IN RE SAV-MART, INC.

FIFRA Appeal No. 94-3

FINAL DECISION

Decided March 8, 1995

Syllabus

U.S. EPA Region IX appeals an Initial Decision of the Presiding Officer assessing a $5,000 penalty against Sav-Mart, Inc. Sav-Mart admitted liability for four violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, and the Region had sought a penalty of $20,000. On appeal, the Region asserts that the Presiding Officer erred in three respects.

First, the Region contends that the Presiding Officer underestimated the potential harm of the violations, and consequently misapplied the FIFRA penalty policy by reducing the penalty from $20,000 to $14,000. Second, the Region argues that the Presiding Officer "failed to remain within the intent" of FIFRA, the FIFRA penalty policy and applicable regulations in further reducing the penalty to $5,000. Finally, the Region asserts that the Presiding Officer "violated Consolidated Rule 22.27 by recommending a single penalty" for the four violations.

Held: The penalty assessment of the Presiding Officer is upheld. While the Presiding Officer did underestimate the potential harm of the violations, the Region has not shown that the penalty was insupportable under the FIFRA Penalty Policy and EPA regulations in light of the totality of the circumstances. More particularly, the Region provided no reason to question the Presiding Officer's determination that a $5,000 penalty should serve as an adequate deterrent in cases such as this. In addition, establishing a final penalty amount by lowering the total calculated penalty as necessary to achieve the proper deterrent effect of the total penalty does not contravene 40 C.F.R. § 22.27.

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

Opinion of the Board by Judge Reich:

In an Initial Decision issued on June 30, 1994, the Presiding Officer assessed a penalty of $5,000 against Respondent, Sav-Mart, Inc. Sav-Mart has admitted committing certain violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* Because the penalty assessed is only 25% of the penalty sought in the complaint, U.S. EPA Region IX appealed. For the reasons discussed below, the Initial Decision is upheld.

I. *BACKGROUND*

The facts of this case are largely uncontroverted. Sav-Mart owns and operates a supermarket in Buckeye, Arizona, with a branch supermarket in Gila Bend, Arizona. The violations arose out of the actions of Mr. Larry Eng, the company's founder, an immigrant from China who apparently has a limited command of English. Mr. Eng is semi-retired and operates the two stores with his children. As described in the Initial Decision, Mr. Eng purchased a quantity of Diazinon Spray (an EPA-registered pesticide) to kill insects around his house and the Buckeye store. After using part of what he had purchased, Mr. Eng decided to repackage and sell some of the remaining Diazinon Spray. He diluted the product with water in a ratio of about 4 ounces of Diazinon Spray to 1 gallon of water and then transferred some of the resulting mixture into ten used one-gallon laundry detergent bottles. He placed on each bottle a photocopy of the printed label for Diazinon Spray[1] as well as a handwritten statement that said "Premixed, Ready to Use, Guaranteed to Kill Bugs." Those bottles were then offered for sale at the Buckeye store. Initial Decision at 2, 4.

On September 18, 1991, the Buckeye store was inspected by representatives of the Arizona Department of Agriculture, acting on an anonymous tip. Pesticide Incident Investigation Report of December 9, 1991 (PIIR), at 1. When they observed the repackaged Diazinon Spray, they purchased two bottles. *Id.* The case was then referred to Region IX, which issued a complaint charging four violations of FIFRA and seeking a total civil penalty of $20,000. Briefly stated, the violations were for sale of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA,[2] producing a pesticide in an unregistered establishment in contravention of Sections 12(a)(2)(L) and 7(a), using a pesticide in a manner inconsistent with its labeling in violation of Section 12(a)(2)(G), and selling an "adulterated" pesticide in violation of Section 12(a)(1)(E). Initial Decision at 2-4. Sav-Mart admitted liability as to all four violations in the proceedings below, leaving only the penalty assessment issue to be contested.[3]

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[1] The printed Diazinon Spray label that Mr. Eng pasted on the detergent bottles states that the product is 48.72% Diazinon, and that it should be diluted with water in a ratio of at least 3 gallons of water to 4 ounces of Diazinon Spray. Initial Decision at 3. *Id.*

[2] Diazinon Spray is registered but the diluted product as sold by Sav-Mart is not.

[3] "Respondent hereby acknowledges that it is liable as charged in the Complaint and Notice of Opportunity for Hearing." Stipulation of the Parties Regarding Liability, signed by Sav-Mart's counsel on February 8, 1993. While Sav-Mart has admitted liability, it has consistently argued that the violations should be treated as a single violation for penalty purposes. Respondent's Appeal Brief at 1.

In determining an appropriate penalty amount for the violations, the Presiding Officer initially considered EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act dated July 2, 1990 (ERP), which includes the FIFRA penalty policy. He first determined that Sav-Mart's unlawful sale of Diazinon Spray should be considered as involving four independent violations for purposes of calculating a civil penalty because they involved differing elements of proof. Initial Decision at 5-7.[4] He then determined a penalty amount for each violation from the appropriate civil penalty matrix in the ERP. In this analysis, he considered the "gravity level" of each violation and the size of the business to arrive at a figure of $5,000 for each violation. Initial Decision at 7-8. Then, consistent with the ERP, he considered whether any of the "gravity adjustment criteria" listed in Appendix B of the ERP should result in any change to the penalty amounts determined from the matrix.

While he found that the Region had correctly applied three of the five criteria,[5] he disagreed with the Region's proposed values for the remaining two criteria: harm to human health and environmental harm. He reduced the numerical value assigned to each of these criteria from 3 to 1, finding that the circumstances more closely fit the criterion for a 1 ("minor potential or actual harm . . . neither widespread nor substantial") than a 3 (either "potential serious or widespread harm" or "harm is unknown"). *Id.* at 8.[6] The effect of changing the numerical values for the violations was to reduce each penalty by 30%, lowering the total to $14,000. The Presiding Officer then considered and rejected Sav-Mart's argument that its financial condition justified a further penalty reduction. *Id.* at 9-10.

Having proceeded through this step-by-step application of the ERP, the Presiding Officer then concluded as follows:

> A reasonable application of EPA's Enforcement Response Policy thus produces a civil penalty of $14,000. But this figure seems high. It is 60 percent of the statutory maximum—$5,000 for each of the four violations, or

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[4] The ERP provides that "[a] violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different." ERP at 25; *see also In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, at 12-13 (EAB, Dec. 6, 1994) (determining certain violations to be independent because they involved different elements of proof).

[5] These were the criteria relative to pesticide toxicity, the violator's compliance history, and culpability. *See* ERP Appendix B and Initial Decision at 8.

[6] The basis for this conclusion is discussed at Section II.A. *infra.*

> $20,000—yet the severity of Respondent's violations is strikingly modest.

Initial Decision at 10 (footnote omitted). The Presiding Officer enumerated a number of mitigating factors in this regard, including the absence of actual harm ("the only bottles sold were the two bought by the Arizona State Official"), the "small" potential for harm, Mr. Eng's "innocent intentions,"[7] and Sav-Mart's record of no prior violations. The Presiding Officer also considered the fact that there was only one set of actions, even though it constituted four separate violations. By aggregating the individual dollar amounts for each of the four violations, the total penalty "exaggerates the magnitude of what he did." *Id.*

Therefore, after a consideration of all these factors, the Presiding Officer concluded that "a reduction of the civil penalty to 25% of the maximum, or $5,000 for all four violations together, seems appropriate" and assessed a penalty in the amount. *Id.* at 11-12. It is from this assessment that the Region has appealed.

The Region raises three issues on appeal. First, the Region asserts that Presiding Officer misapplied the ERP in reducing the penalty from $20,000 to $14,000. Second, the Region raises the issue of whether the Presiding Officer "failed to remain within the intent" of FIFRA, the ERP and applicable regulations in further reducing the penalty to $5,000. Finally, the Region contends that the Presiding Officer "violated Consolidated Rule 22.27 by recommending a single penalty" for the four violations.[8] Region's Appeal Brief at 2. Sav-Mart states in its response to the appeal that it is willing to accept the $5,000 penalty assessed by the Presiding Officer but that it objects to any increase in the assessed penalty.

II. *DISCUSSION*

As explained below, we agree with the Region that the Presiding Officer erred when he reduced the penalty from $20,000 to $14,000 based on the gravity-adjustment criteria. Nevertheless, we conclude that he acted within his discretion in ultimately reducing the penalty to $5,000, and that he assessed an appropriate penalty under the circumstances of the case. Accordingly, we affirm the penalty assessment.

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[7] The Presiding Officer noted while Mr. Eng's ignorance of the law was no excuse, "the context of his violations suggests that a lesser civil penalty is needed to achieve deterrence—the purpose of civil penalties—than would be true if his actions and Respondent's past record indicated a more cavalier attitude toward compliance." Initial Decision at 11.

[8] The Consolidated Rules of Practice at 40 C.F.R. Part 22 establish procedures for assessment of administrative civil penalties under a number of statutes, including FIFRA.

A. *Gravity-Adjustment Criteria for Harm to Human Health and the Environment*

The first issue is whether the Presiding Officer erred in reducing the penalty from $20,000 to $14,000 based on the gravity-adjustment criteria for harm to human health and the environment. In making this determination, the Presiding Officer concluded that "the most probable result" of the violations, "would be that any use of the pesticide would prove less effective than anticipated." Initial Decision at 9. Whether this is true, however, depends on how a purchaser would react to the conflicting labels on the laundry detergent bottles.

Diazinon Spray, before dilution, contains 48.72% of diazinon as the active ingredient. If a purchaser were to dilute it before use in accordance with the directions on the registered label, the resulting concentration of active ingredient would be 0.49%.[9] In this case, however, Sav-Mart had already diluted the mixture to a concentration of 1.62% active ingredient before bottling it for resale to retail customers. The Presiding Officer, in addressing the harm criteria, stated that a purchaser from Sav-Mart would most likely follow the directions on the photocopied label and further dilute the solution, resulting in a spray weaker than the recommended concentration.[10] Thus, the spray might be less effective but this would not present a risk to human health or the environment.

However, as the Region points out, there is another possibility, which is at least as plausible. A purchaser from Sav-Mart might instead note the handwritten label, which stated "Premixed, Ready to Use . . .," and assume that no further dilution was required. If so, the spray would be used at a concentration of 1.62% rather than 0.49%, three times the maximum level permissible. Region's Appeal Brief at 3-4 and 10-11. Initial Decision at 3-4. The Region has stated, and Sav-Mart has not disputed, that there are no data available (at least none in the administrative record) on the toxic effects of using the spray as sold by Sav-Mart without further dilution, *i.e.*, at three times the maximum permitted concentration. *Id.* at 12. Under those circumstances, a finding that the harm was "unknown," corresponding to a value of 3, was most appropriate. We thus find that the Presiding Officer erred in

[9] As previously noted, the label requires dilution in a ratio of 4 oz. of Diazinon Spray to at least 3 gallons of water.

[10] The resulting mixture would contain 0.01% active ingredient.

reducing the gravity level from 3 to 1, and in reducing the penalty from $20,000 to $14,000 based on the gravity-adjustment criteria.[11]

B. *Failure to Consider the ERP As Required By 40 C.F.R. § 22.27(b)*

The Region also appeals the decision of the Presiding Officer to deviate from the $14,000 penalty he calculated from the ERP by reducing it to $5,000. The Region contends that this reduction contravened the requirement that a presiding officer "meaningfully" consider the ERP in assessing a penalty.[12] We disagree.

The regulation at issue, 40 C.F.R. § 22.27(b), provides in pertinent part:

> (b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, *and must consider any civil penalty guidelines issued under the Act.* If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. (Emphasis added.)

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[11] As an alternative basis for arguing that the violations should be considered to have a value of "3," the Region asserts there is evidence to support a finding of "potential * * * widespread harm to human health." *See* ERP at B-1. It claims that "a reasonable interpretation of the facts indicates that dozens of families have used a potentially unsafe pesticide and may have suffered harm." Region's Appeal Brief at 15. The Region cites the finding in the PIIR that three gallons of Diazinon Spray had been removed from the packing case (and thus presumably had been used). The Region calculates that at the dilution rate used by Mr. Eng, this would have yielded over 100 gallons of diluted spray, which must have been sold to numerous persons for home use. *Id.* at 12-13.

The problem with the Region's reasoning is that it is totally unsupported and constitutes the merest speculation. First, it ignores Mr. Eng's statement that the Diazinon Spray was originally purchased for use, and only a portion of the excess was repackaged for resale. Second, as Sav-Mart notes in its appellate brief, the Region has itself stated that the sale to the State inspector "is the only sale of repackaged pesticide that has been evidenced in this proceeding." Respondent's Appeal Brief at 2, quoting from Complainant's Response to Respondent's Opening Brief at 2. We reject the Region's assertion of alleged facts not in evidence. In any event, the argument is moot in light of our determination that the violation warrants a value of "3" on other grounds.

[12] While the Region lists as an "issue presented for review" whether the Presiding Officer "failed to remain within the intent" of FIFRA, the ERP and Part 22, the issue as argued focuses on the alleged misapplication of 40 C.F.R. § 22.27(b).

It has been repeatedly stated "while penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed." *In re James C. Lin and Lin Cubing, Inc., supra*, at 5; *In re Pacific Refining Company*, EPCRA Appeal No. 94-1, at 8 (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).

The Region argues that § 22.27(b) requires "meaningful" consideration of the ERP, and that the Presiding Officer "strayed so far from the ERP," that it amounted to not considering the ERP within the meaning of § 22.27(b). Region's Appeal Brief at 17. In support of this contention, the Region argues, first, that the Presiding Officer underestimated the potential harm of these violations; and second, that a $5,000 penalty will be inadequate to deter future violations.

With regard to the Region's first argument, as we stated earlier, we agree with the Region that the Presiding Officer's conclusion that the probable worst consequence of the repackaging would be that the pesticide as ultimately used would be weaker than it should be is questionable, and that it is at least as likely that the spray as used would have been stronger than it should be.[13] *Id.* at 15. However, in light of *all* of the factors on which the Presiding Officer relied, we do not believe that the Presiding Officer's erroneous assessment of the potential harm from these violations warrants the conclusion that he did not provide "meaningful" consideration of the Agency's penalty guidelines, as the regulations require. *See, e.g., In re Johnson Pacific, Inc.*, FIFRA Appeal No. 93-4 (EAB, Feb. 2, 1995) (upholding the Presiding Officer's penalty assessment despite the fact that the Presiding Officer had underestimated the potential harm from the violations).

Second, the Region questions whether the penalty would constitute a sufficient deterrent, both as to Sav-Mart and as to others. Clearly, a primary purpose of civil penalties is deterrence.[14] *See In re Ray*

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[13] We also agree with the Region that the failure to register either the establishment or the pesticide under FIFRA deprives the Agency of necessary information and therefore weakens the statutory scheme. *See Thornton v. Fondren Green Apartments*, 788 F. Supp. 928, 932 (S.D. Tex. 1992) ("The purpose of FIFRA is to regulate the registration and labeling of pesticide products such that purchasers are provided with assurances of effectiveness and safety when the product is used in accordance with its label.") A finding of no harm from such violations would impermissibly reward businesses which fail to register their products by depriving EPA of information which could be used in an enforcement action.

[14] As stated in the Policy on Civil Penalties, EPA General Enforcement Policy No. GM-21, at 1 (Feb. 16, 1984), other purposes for penalty assessment are fair and equitable treatment of the regulated community and swift resolution of environmental problems, neither of which would seem to apply here.

Birnbaum Scrap Yard, TSCA Appeal No. 92-5, at 7 (EAB, Mar. 7, 1994) (citing *In re Briggs & Stratton Corp.*, TSCA Appeal No. 81-1 (JO, Feb. 4, 1981)); *In re South Coast Chemical, Inc.*, FIFRA Appeal No. 84-4, at 5 n.5 (CJO, Mar. 11, 1986). The Presiding Officer specifically found that the $5,000 penalty he was assessing "should be enough to inspire Respondent to attend more carefully to its compliance in the future, and enough to deter any carelessness on the part of other similarly situated parties." Initial Decision at 11-12. The Presiding Officer stated that he was influenced by "Mr. Eng's innocent intentions and Respondent's record of no prior violations." *Id.* at 10.

In evaluating the Region's challenge to the Presiding Officer's determination, we are compelled to reiterate our view that:

> 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 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.

In re Johnson Pacific, Inc., *supra*, at 8-9. With this in mind, we decline to second-guess the Presiding Officer's ultimate determination, even though, as noted, the Region's argument about the potential harm of the violations has some merit. We agree with the Presiding Officer that Mr. Eng acted without any appreciation of the legal constraints. Moreover, Mr. Eng has stated that now that he is aware of the law, he will never take such actions again. Statement of Larry Eng dated September 18, 1991, attached to the PIIR. While this does not excuse the violations, these factors are relevant in deciding what penalty may be necessary to have a sufficient deterrent effect. We have no reason to question the Presiding Officer's determination that the payment of a $5,000 penalty (not to mention having been the subject of this enforcement action) should serve as a sufficient deterrent in cases such as this.

C. *Failure to Assess A Penalty For Each Violation*

Finally, the Region objects to the Initial Decision on the grounds that "Consolidated Rule 22.27(b) is reasonably interpreted as requiring

the Presiding Officer to recommend some penalty whenever a violation is found." Region's Appeal Brief at 17. Because the Presiding Officer assessed a $5,000 penalty for all four violations together, the Region asserts that 40 C.F.R. § 22.27(b) has been violated. We find no merit to this contention.

In this case, the Presiding Officer carefully evaluated each violation, determining a penalty for such violation under the ERP, and then considered the penalty as a whole. Finding it excessive, he instead assessed a penalty of "25 percent of the maximum, or $5,000 for all four violations together." Initial Decision at 11.[15]

While it might have been preferable to specifically apportion the penalty as to each individual violation, the Region has not persuaded us that a Presiding Officer must do so in all instances. The Region premises its argument largely based on the fact that § 22.27(b) speaks in the singular but any force this argument might have is lost by virtue of 40 C.F.R. § 22.02 which indicates that "[a]s used in these rules of practice, words in the singular also include the plural * * *." Further, while the penalty policies clearly envision an initial analysis to be done separately for each violation, certain adjustments sanctioned by EPA's penalty policies are most logically made to the total calculated penalty. For example, the adjustment for inability to pay is explicitly required to be made to the *total* civil penalty after the penalty amounts for all the violations are aggregated.[16] An adjustment based on the need to achieve deterrence without being unduly punitive should also logically be applied to the total calculated penalty. If the adjustment to a total penalty based on inability to pay does no violence to § 22.27(b), then we fail to see how the Presiding Officer's adjustment to a total penalty to achieve the proper measure of deterrence is somehow proscribed.

In sum, we are unpersuaded by the Region's contention that the Presiding Officer's assessment violated § 22.27(b), and reject this basis for the appeal.

III. *CONCLUSION*

For all the reasons discussed above, the Region's appeal is rejected and the Initial Decision is upheld. Consistent with that Initial Decision, and pursuant to FIFRA, section 14(a)(1), 7 U.S.C. § 136*l*(a)(1), a civil penalty of $5,000 is hereby assessed against Respondent, Sav-

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[15] We note that if this sentence were interpreted as 25 percent of the maximum *for each violation* for a total of $5,000 for all four violations, the Region's concern would be mooted.

[16] *See*, for example, ERP at 23.

Mart, Inc. Respondent shall pay the full amount of the civil penalty within sixty (60) days of the date of service of this Decision. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

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

So ordered.