IN RE CHEMPACE CORPORATION

FIFRA Appeal Nos. 99-2 & 99-3

FINAL DECISION

Decided May 18, 2000

Syllabus

This matter concerns appeals from the Initial Decision of Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") arising out of an administrative enforcement action by the U.S. Environmental Protection Agency Region V (the "Region") against Chempace Corporation ("Chempace") for 99 alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. §§ 136-136y. Prior to 1989, Chempace maintained registrations for several pesticides under FIFRA. In particular, Chempace held registrations for the pesticides, Trigger, Uni-Rooter, GLY, Uni-Quat 14, Complete, and Eradicate. In January 1989, Chempace let its registrations for Trigger and Uni-Rooter lapse. On October 10, 1989, the Region issued a cancellation order that canceled the registration for these two pesticides and prohibited Chempace from selling or distributing existing supplies after March 1, 1990. The Region issued a similar cancellation order regarding Chempace's production of the pesticide, GLY, on December 18, 1990. On March 13, 1992, the Region canceled Chempace's pesticide producing establishment number, 10155-OH-1, as part of a Consent Order resolving a prior administrative enforcement proceeding.

On May 4 and May 9, 1994, inspectors employed by the Ohio Department of Agriculture conducted inspections of Chempace's Toledo, Ohio facility. The inspections resulted in the Region's enforcement action which charged Chempace with: 55 violations of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), for the distribution and sale of the unregistered pesticides Trigger, Uni-Rooter, and GLY; 43 violations of FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(e), for the distribution and sale of the misbranded pesticides Uni-Quat 14, Complete, and Eradicate; and one violation of FIFRA section 7(a), 7 U.S.C. § 136e(a), for producing pesticides at an unregistered facility between March 14, 1992, and the time of the inspections in May 1994. On March 24, 1999, the Presiding Officer issued an Initial Decision finding that Chempace had violated FIFRA as alleged, and imposed a civil penalty of $92,123.

Both the Region and Chempace appeal from the Presiding Officer's Initial Decision. The Region asserts that the Presiding Officer committed error in concluding that Chempace met its burden of production regarding its inability to pay the Region's proposed penalty of $200,000. The Region argues that the Presiding Officer's conclusion contravenes the Board's precedent in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994). Chempace appeals the Initial Decision in six respects: 1) the Presiding Officer erred in basing a determination of the number of violations on discrete sales or distributions of pesticides; 2) the Presiding Officer erred by placing the evidentiary burden on Chempace to prove what amount of penalty it could pay; 3) the Presiding Officer erred in utilizing a four percent of

gross revenue guideline to assess the penalty; 4) the Presiding Officer erred in ruling that Chempace's most recent financial data should be used to calculate the penalty imposed; 5) the Presiding Officer erred by overestimating Chempace's culpability; and 6) the Presiding Officer erred by failing to consider other gravity adjustments as required by the Enforcement Response Policy for FIFRA (July 2, 1990) ("ERP").

Held: The Presiding Officer did not err in finding Chempace liable for 98 violations of FIFRA section 12(a)(1)(A) and (E). Under sections 12(a)(1)(A) and (E) , the "unit of violation" is the sale or distribution. Each such sale or distribution of a pesticide to any person constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty. In this case, the Region alleged 55 separate sales or distributions of unregistered pesticides, as well as 43 separate sales or distributions of misbranded pesticides, and Chempace did not raise any genuine issues of material fact to refute that such sales or distributions occurred.

Relative to the Region's appeal, the Presiding Officer did not abuse his discretion in denying the Region's motion for additional discovery within the context of determining the appropriate penalty. Considerable deference is afforded a Presiding Officer's discovery ruling, particularly where the issue involved is the amount of the penalty — an issue for which the Presiding Officer has broad discretion. Although the Presiding Officer did not explicitly recite the factors under 40 C.F.R. § 22.19(f)(1) in denying the Region's request for other discovery, this shortcoming does not constitute an abuse of discretion by the Presiding Officer in denying additional discovery in the context of this case.

The record demonstrates no clear error in the Presiding Officer's conclusion that Chempace carried its burden of production in refuting the Region's *prima facie* showing of the ability to pay the full proposed $200,000 penalty. In the absence of a vigorous cross-examination by the Region of Chempace's expert witness showing the alleged deficiencies in that witness' analysis and the lack of support for the witness' conclusions, the Presiding Officer did not veer from the Board's instructions in *New Waterbury*, or fail to properly evaluate the preponderance of the evidence.

However, while Chempace successfully refuted the assertion that it could pay the full $200,000 proposed penalty, it did not convince the Presiding Officer that it could not pay *any* penalty. At that point, the Presiding Officer did not impermissibly place a burden on Chempace as Chempace asserts, but rather appropriately exercised his authority under the Consolidated Rules of Practice to consider the record, the statutory penalty criteria, and the applicable penalty policy, to determine an appropriate penalty.

The Presiding Officer did not commit clear error in applying the statutory ability-to-pay factor. The Presiding Officer properly considered the four percent of average gross income guideline from the ERP in crafting an appropriate penalty and properly used Chempace's most recent financial data in making that calculation.

The Presiding Officer did not commit error in relying on evidence of a prior violation and evidence that Chempace officers failed to train or instruct their employees to support the gravity adjustment scores proposed by the Region in its penalty calculation. Nor did the Presiding Officer commit error in declining to deviate from the ERP on the bases Chempace asserts. Thus, the Presiding Officer's imposition of a $92,123 penalty is affirmed in its entirety.

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

Opinion of the Board by Judge Reich:

This matter concerns appeals from the Initial Decision of Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") arising out of an administrative enforcement action by the U.S. Environmental Protection Agency Region V (the "Region") against Chempace Corporation ("Chempace") for 99 alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. §§ 136-136y. On March 24, 1999, the Presiding Officer issued an Initial Decision[1] finding that Chempace had violated FIFRA as alleged, and imposed a civil penalty of $92,123. Both the Region and Chempace appeal from the Presiding Officer's Initial Decision.

The Region asserts that the Presiding Officer committed error in concluding that Chempace met its burden of production regarding its inability to pay the Region's proposed penalty of $200,000. The Region argues that the Presiding Officer's conclusion contravenes the Board's precedent in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994). The Region seeks the imposition of the full $200,000 penalty proposed in its complaint.[2]

Chempace appeals the Initial Decision in six respects: 1) the Presiding Officer erred in basing a determination of the number of violations on discrete sales or distributions of pesticides; 2) the Presiding Officer erred by placing the evidentiary burden on Chempace to prove what amount of penalty it could pay, once the Region had failed to carry its burden with respect to Chempace's ability to pay the full penalty proposed in the complaint; 3) the Presiding Officer erred in utilizing a four percent of gross revenue guideline to assess the penalty because he lacked sufficient evidence to do so; 4) the Presiding Officer erred in ruling that Chempace's most recent financial data should be used to calculate the penalty imposed; 5) the Presiding Officer erred by overestimating Chempace's culpability; and 6) the Presiding Officer erred by failing to consider other gravity adjustments as required by the Enforcement Response Policy for FIFRA (July 2, 1990)

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[1] The Initial Decision incorporates the Presiding Officer's findings of liability in an October 15, 1997, partial accelerated decision entitled, "Order Granting Partial Accelerated Decision and Allowing Amended Answer" ("PAD"). *See* Initial Decision at 13. Chempace's appeal with respect to liability is also an appeal from the PAD. For ease of reference, we characterize all appeals here as appeals from the Initial Decision.

[2] The Region had calculated a proposed penalty of $495,000 (99 violations at $5,000 per violation), but reduced it to $200,000 based on its assessment of Chempace's ability to pay a penalty. *See* Initial Decision at 14; PAD at 11.

("ERP"). For the reasons discussed below, we affirm the Presiding Officer's Initial Decision and the penalty imposed.

I. *BACKGROUND*

A. *Factual Background*

Chempace is currently a producer and distributor of maintenance chemicals such as cleaners, degreasers, and deodorizers. Initially, Chempace sold and distributed regulated pesticides and herbicides. However, that portion of the business declined as Chempace increased its sales of maintenance chemical and portable toilet deodorizers. Chempace operates from a facility it owns in Toledo, Ohio, consisting of a warehouse and offices.

Chempace's current President, Ralph Wooddell, began working for Chempace in 1969 as an office clerk. Mr. Wooddell became President of Chempace in 1979 after holding several positions in the company. Robert Shall is Chempace's Chairman of the Board. Mr. Shall created Chempace in its current form when he merged another chemical company with Chempace in 1983. At that time, Mr. Shall owned 45% of the company, his partner Jack Y. Stone owned 45%, and Mr. Wooddell owned 10% of Chempace. In 1987, Chempace and Mr. Stone executed an agreement whereby Chempace bought out Mr. Stone for his share of stock, a covenant not to compete, a consulting contract, and a retirement benefit (total value of $180,000). Mr. Shall currently owns 81.8% of the company and Mr. Wooddell owns 18.2%.

Mr. Wooddell is the chief supervisor of day-to-day business activities. He also has spent time on the road selling products for the company. Mr. Shall, on the other hand, has been less involved in Chempace's day-to-day business. Rather, Mr. Shall oversees strategic planning, and spends much of his time outside of the facility focusing on maintaining and expanding the company's customer base. Mr. Shall is responsible for Chempace's transformation from a company that primarily sold janitorial supplies, as well as pesticides and herbicides, to commercial and government customers in the 1980s, to a company that sells portable toilet deodorizers throughout the world and supplies maintenance chemicals to Ford Motor Company and federal government facilities in the region. In April 1998, Chempace employed 13 persons, including three telemarketers, three salesmen (including Mr. Shall), four warehousemen, two office workers, and Mr. Wooddell.

Chempace's pesticides production, sales and distribution activity is the core of the violations of FIFRA that the Presiding Officer found Chempace had committed. Prior to 1989, Chempace maintained registrations for several pesticides under FIFRA. In particular, Chempace held registrations for the pesticides, Trig-

ger, Uni-Rooter, GLY, Uni-Quat 14, Complete, and Eradicate. In January 1989, Chempace let its registrations for Trigger and Uni-Rooter lapse. On October 10, 1989, the Region issued a cancellation order that canceled the registration for these two pesticides and prohibited Chempace from selling or distributing existing supplies after March 1, 1990. The Region issued a similar cancellation order regarding Chempace's production of the pesticide, GLY, on December 18, 1990. On March 13, 1992, the Region canceled Chempace's pesticide producing establishment number, 10155-OH-1, as part of a Consent Order resolving a prior administrative enforcement proceeding in 1991.[3]

On May 4 and May 9, 1994, inspectors employed by the Ohio Department of Agriculture[4] conducted inspections of Chempace's Toledo, Ohio facility. The inspections resulted in the Region's enforcement action in this case.

B. *Procedural Background*

The Region's Complaint, filed against Chempace on September 26, 1996, sought a civil penalty of $200,000. The Complaint alleged 55 violations of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), for the distribution and sale of the unregistered pesticides Trigger, Uni-Rooter, and GLY.[5] The Complaint also alleged 43 violations of FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(e), for the distribution and sale of the misbranded pesticides Uni-Quat 14, Complete, and

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[3] On September 30, 1991, the Region charged Chempace with a violation of section 7(c)(1) of FIFRA, 7 U.S.C. § 136(e)(c)(1), for failing to file an annual pesticide production report for the 1990 calendar year. *See* Respondent's Appeal Brief ("Chempace Br.") at 6. Chempace and the Region settled the matter in a Consent Order whereby Chempace's producer establishment number was canceled, and Chempace paid a civil penalty of $500. *Id.* at 7.

[4] The U.S. Environmental Protection Agency has authority under FIFRA section 23(a)(1), 7 U.S.C. § 136u(a)(1), to enter into cooperative agreements with states for FIFRA enforcement purposes. The Region has entered into such an agreement with the Ohio Department of Agriculture ("ODA") duly authorizing qualified ODA personnel to conduct inspections under FIFRA, pursuant to, and for the purposes set forth at, sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

[5] Counts I-XXVI of the Complaint involve the sales or distributions of Trigger; Counts XXVII-XXIX involve the sales or distributions of Uni-Rooter; and Counts XXX-LV involve the sales or distributions of GLY.

FIFRA section 12(a)(1)(A) makes it unlawful to distribute or sell:

> any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.

7 U.S.C 136j(a)(1)(A).

In relation to the sales or distributions of Trigger and Uni-Rooter, the Region also charged Chempace with violating a cancellation order under FIFRA section 12(a)(2)(K), 7 U.S.C. § 136j(a)(2)(K).

Eradicate.[6] The Complaint alleged one violation of FIFRA section 7(a), 7 U.S.C. § 136e(a), for producing the pesticides Trigger, Uni-Rooter, GLY, Uni-Quat 14, Complete, and Eradicate at an unregistered facility between March 14, 1992, and the time of the inspections in May 1994.[7]

By letter dated October 8, 1996, Chempace sought to informally settle the complaint with the Region. Chempace filed an Answer to the Complaint on October 18, 1996, pleading "no contest" to most of the material allegations.[8] On December 13, 1996, Acting Chief Administrative Law Judge, Spencer T. Nissen, ordered the initiation of alternative dispute resolution ("ADR") upon the consent of the parties. On April 22, 1997, at the Region's request, the ADR process was terminated by order of Judge Nissen, and the Presiding Officer was designated to preside over these proceedings.

The Presiding Officer issued a prehearing order on May 6, 1997, ordering among other things that Respondent "furnish supporting documentation such as financial statements or tax returns" if it intended to claim inability to pay the proposed penalty. Prehearing Order, at 1 (ALJ, May 6, 1997). On June 6, 1997, the Region moved for Partial Accelerated Decision on liability for the 99 counts in the complaint. On July 23, 1997, Chempace sought to amend its answer and moved to oppose the Region's request for partial accelerated decision. Chempace's proposed Amended Answer either denied, or denied knowledge of, the material allegations in the Complaint, and raised several affirmative defenses. It also challenged the propriety of the penalty calculation. The Region opposed the motion to amend on August 5, 1997. Memorandum in Opposition to [Chempace's] Motion for Leave to Amend Answer (Aug. 5, 1997). The parties

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[6] Counts LVI-LXX of the Complaint involve the sales or distributions of the misbranded pesticide Uni-Quat 14; Counts LXXI-XC involve the sales or distributions of the misbranded pesticide Complete; and Counts XCI-XCVIII involve the sales or distributions of the misbranded pesticide Eradicate.

FIFRA section 12(a)(1)(E) makes it unlawful to distribute or sell "any pesticide that is adulterated or misbranded." 7 U.S.C. § 136j(a)(1)(E). A pesticide is misbranded if, among other things:

> its label does not bear the registration number assigned under section 136e of this title to each establishment in which it was produced * * *.

7 U.S.C. § 136(q)(1)(D).

[7] FIFRA section 7(a) provides in pertinent part:

> No person shall produce any pesticide subject to this subchapter * * * in any State unless the establishment in which it is produced is registered with the Administrator.

7 U.S.C. § 136e(a).

[8] Chempace's Answer was incorrectly dated *November* 17, 1996, although the Regional Hearing Clerk's date stamp indicates receipt on October 18, 1996, and Chempace's cover letter and certificate of service were dated October 17, 1996.

filed their prehearing exchanges on July 18, 1997 (Region's filing) and August 5, 1997 (Chempace's filing).

In an order dated October 15, 1997, the Presiding Officer ruled on Chempace's motions and the Region's request for partial accelerated decision as to liability. The Presiding Officer granted Chempace's motion to amend its answer. Order Granting Partial Accelerated Decision and Allowing an Amended Answer, at 2-3 (ALJ, Oct. 15, 1997). The Presiding Officer also found Chempace liable for the 99 violations of FIFRA alleged in the complaint. *Id.* at 12. The Presiding Officer also specifically identified Chempace's ability to pay the proposed civil penalty as the primary issue to be addressed at the evidentiary hearing. *Id.*

On October 22, 1997, Chempace sought reconsideration of the Presiding Officer's liability determination with respect to counts XXX — LV (sales or distribution of the pesticide GLY). The Region filed a motion opposing reconsideration on November 5, 1997. The Presiding Officer denied reconsideration on November 17, 1997.

On December 10, 1997, the Region moved to compel Chempace's completion of its prehearing exchange and sought further discovery from Chempace. *See* Motion to Compel Completion of Prehearing Exchange and for Further Discovery[9] (Dec. 10, 1997) ("Other Discovery Motion"). In particular, the Region sought general and specific financial information about Chempace to permit its expert witness, Ms. Charlotte M. Resseguie, C.P.A., to fully review Chempace's ability to pay a civil penalty.[10] Chempace filed its opposition to the Region's Other Dis-

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[9] The Region's motion for "Further Discovery" was based on 40 C.F.R. § 22.19(f), which provides for "other discovery" after the prehearing exchange required by 40 C.F.R. § 22.19(b). The rules governing these proceedings were amended on July 23, 1999. *See* 64 Fed. Reg. 40,138 (July 23, 1999). Any references to these rules in this opinion are to the pre-amendment rules, unless otherwise specified.

[10] Ms. Resseguie stated:

> In order to conduct a thorough analysis of CHEMPACE's ability to pay a civil penalty for the violations committed in this case, I must analyze true and correct information concerning, at a minimum, the following financial factors:
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> a. Current and anticipated cash flow generated by CHEMPACE over a given period of time;
> b. The profits accrued by CHEMPACE over a given period of time and CHEMPACE's current net worth;
> c. The net sales or income generated by CHEMPACE over a given period of time;
> d. The value of cash and other liquid assets held by CHEMPACE;
> e. CHEMPACE's ability to obtain new loans;
> f. Any unnecessary assets that could be liquidated;
> g. Any extraordinary or unnecessary expenses that could be reduced or eliminated.

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covery Motion on December 29, 1997. On January 12, 1998, the Presiding Officer issued an order on a number of motions, including the Region's Other Discovery Motion, ruling that the Region's request to compel completion of the prehearing exchange was "largely moot or insubstantial" since Chempace stated it would supply missing documents and would stipulate to the accuracy of its financial records. Order on Discovery, at 1 (ALJ, Jan. 12, 1998). With respect to the request for further discovery of Chempace's detailed financial information, the Presiding Officer set a deadline of January 27, 1998, for Chempace to respond, and only provided "guidelines" for such discovery, but did not rule on that portion of the Region's motion. *Id.* First, he stated an expectation that the parties would cooperate in the discovery process. Second, he questioned the need for the Region to "pursue this type of detailed analysis of [Chempace's] finances * * *. The risk of failing to disclose or present evidence that would support [Chempace's] claim of inability to pay falls primarily on [Chempace]." *Id*. at 2 (relying on the Board's decision in *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994)). Finally, the Presiding Officer noted that the ERP provided "another method for estimating a respondent's ability to pay — calculating four percent of a company's (and affiliated corporate entities') gross sales." *Id.* The Presiding Officer then suggested that this latter guideline be used as a "starting point for settlement negotiations." *Id.*

On February 11, 1998, Chempace filed a Motion for Accelerated Decision seeking to reduce the number of counts in the complaint from 99 to 7, arguing that the relevant statutory provisions were not intended to penalize each individual sale or distribution of an unregistered or misbranded pesticide. The Presiding Officer denied Chempace's motion on February 19, 1998, finding that the motion was untimely. *See* Order Denying Motion for Accelerated Decision, Denying Postponement of Hearing and Granting an Extension for Supplemental Prehearing Exchange (ALJ, Feb. 19, 1998). Two weeks later, on February 26, 1998, Chempace filed its supplemental response to the Region's Other Discovery Motion. Chempace requested that the Presiding Officer deny the Region's discovery request, arguing that this Board's decision in *New Waterbury* "provided very clear guidelines regarding the scope of discovery," and that the Region wanted to conduct "the 'trial of the century'" with its analysis of Chempace's financial status. Chempace's Supplemental Response to Complainant's Motion for Further Discovery, at 1-2 (Feb. 26, 1998).

On February 27, 1998, the Presiding Officer issued an order entitled, "Order Denying Motions," that ruled on a number of prehearing motions filed by the parties. With respect to the Region's Other Discovery Motion, the Presiding Officer

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(continued)
Affidavit of Charlotte A. Resseguie, C.P.A., at 3 (Dec. 8, 1997).

denied the Region's request for further discovery. *See* Order Denying Motions at 2. The Presiding Officer reasoned:

> [Chempace] has already produced five years' tax returns and financial statements. [The Region's] latest prehearing exchange includes an analysis of [Chempace's] ability to pay by [the Region's] financial expert. If the additional undisclosed documents are shown at the hearing to be relevant to the penalty assessment, adverse inferences could be drawn against the [Chempace's] position.

Id.

The Presiding Officer then held an evidentiary hearing on April 7 and 8, 1998. Each party presented three witnesses. The Region presented Mr. Matthew Hofelich, Ms. Dea Zimmerman, and Ms. Charlotte Resseguie. Chempace presented Mr. Robert Shall, Mr. Ralph Wooddell, and Mr. Richard Bernstein. The record of the hearing consists of a stenographic transcript of 571 pages, and 29 exhibits received into evidence. The Presiding Officer then issued his Initial Decision, ruling that Chempace had violated FIFRA as alleged in the Region's complaint, and imposing a civil penalty of $92,193. The Region and Chempace now appeal the Initial Decision.

II. *DISCUSSION*

We now turn to the issues presented on appeal. For efficiency, we address the issue of the number of violations first. Since, as explained below, we affirm the Presiding Officer's decision regarding the number of violations, we then turn to the penalty calculation issues raised by the Region and Chempace.

A. *The Number of Violations Assessed Under FIFRA Section 12(a)(1)(A) and (E)*

Chempace argues on appeal that the "Presiding Officer erred in determining [that] the number of counts the Agency can charge for violations of FIFRA §§ 12(a)(1)(A) and (E) is a matter of Agency discretion." Chempace Br. at 13. Rather, Chempace asserts, "the number of counts which may be charged under these provisions is a matter of statutory interpretation." *Id.* The Region argues that Chempace is barred from raising this issue now because Chempace failed to put on any evidence or cross-examine the Region's witness regarding the Agency's

discretion to charge Chempace with 99 counts.[11] Region's Reply Brief ("Region's Reply") at 8-9. In the alternative, the Region argues that there is no error where the ERP "permits charging a respondent with a separate violation of FIFRA for each separate act of sale or distribution of an unregistered or misbranded pesticide." In such cases, the Presiding Officer must consider the ERP, and the Board has upheld the use of the ERP for "independently assessable charges in a FIFRA context." *Id.* at 10.

We generally agree with Chempace that the issue of "whether alleged acts or omissions give rise to a single or, alternatively, multiple violations of a single statutory provision is a question of statutory construction." *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 771 (EAB 1998) (citing *In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 344-46 and n.6 (EAB 1996)).[12] As in *McLaughlin*, Chempace has framed the issue in terms of defining the "unit of violation" under section 12(a)(1)(A) and (E). In *McLaughlin*, we found that the respondent had committed one violation of FIFRA section 12(a)(2)(Q), which makes it unlawful for any person to "falsify all or part of any information relating to the testing of a pesticide" by falsely stating compliance with the Environmental Protection Agency Pesticides Program's Good Laboratory Practice's Standard (40 C.F.R. part 160). We reasoned that the complaint against McLaughlin stated only one violation of FIFRA section 12(a)(2)(Q) because it was based on a singular false compliance statement, even though a study conducted by McLaughlin of the pesticide at issue allegedly failed to conform with 40 C.F.R. part 160 in four respects. *See McLaughlin* at 346. Thus, we found that the "unit of violation" under section 12(a)(2)(Q) in that case could be "no smaller than a false compliance statement containing a single-sentence assertion that a particular study was conducted in accordance with * * * standards of [40 C.F.R.] part 160." *Id.* Accordingly, we determined the "unit of violation" to be based on the act of submitting a false statement, not based on the number of reasons for the statement being false.

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[11] Although it is not clear from the Region's Reply Brief whether the Region is arguing that Chempace's appeal on this issue is untimely or waived, we need not decide this since the Consolidated Rules of Practice ("CROP"), as amended, 64 Fed. Reg. 40,138, 40,176 (July 23, 1999) (to be codified at 40 C.F.R. part 22), provide "any party may appeal any adverse order or ruling of the Presiding Officer * * *." *Id.* at 40,186. Because Chempace raised this issue in a motion for accelerated decision and the Presiding Officer ruled against Chempace, *see* Order Denying Motion for Accelerated Decision (ALJ, Feb. 19, 1998), it is appropriate, under the CROP, as amended, 40 C.F.R. § 22.30, for Chempace to raise this issue here. The fact that Chempace did not put on evidence to challenge the Region's exercise of discretion in charging 99 counts did not waive its underlying legal argument as to the proper statutory interpretation.

[12] Chempace admits that the "legislative history of FIFRA * * * sheds no light on how Congress intended to define a single 'offense.'" Chempace Br. at 14. Yet, Chempace would presume that Congressional failure to explicitly define the unit of violation under the relevant FIFRA sections implies its disfavor with defining individual violations as the Region and the Presiding Officer have done here, i.e., each sale or distribution of the unregistered or misbranded pesticide is a violation of FIFRA section 12(a)(1)(A) or (E). *Id.* We see no basis, and Chempace has cited none, for this presumption.

In this case, the Presiding Officer denied Chempace's request for reconsideration of this issue in the Order Denying Motion for Accelerated Decision. The Presiding Officer reasoned that:

> an additional factor in the decision to deny the motion was its unlikelihood of success. On its face, the charge of distributing or selling an unregistered pesticide is different in character in terms of the statutory "unit of violation" than the violations under consideration in the cases of *In re Associated Products, Inc.* and *In re McLaughlin Gormley King Co.* FIFRA § 12(a)(1)(A) renders it unlawful "to distribute or sell to any person — any pesticide that is not registered." A straightforward interpretation indicates that the unit of violation is the act of distribution or sale. * * * The cases cited by [Chempace] concern completely different FIFRA violations, in which the relevant violations were construed to constitute single violations. They do not lend support to [Chempace's] position on the unit of violation for violations of § 12(a)(1)(A).

Order Denying Motion for Accelerated Decision, at 2.

We agree with the Presiding Officer's analysis. The plain language of FIFRA section 12(a)(1)(A) and (E) provides as follows:

> [I]t shall be unlawful for any person * * * to distribute or sell to *any person* -
>
> (A) *any* pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.
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> * * * * * * *
>
> (E) *any* pesticide which is adulterated or misbranded.

7 U.S.C § 136j(a)(1)(A), (E) (emphasis added).

The prohibited act is the sale or distribution of an unregistered, adulterated, or misbranded pesticide. Thus, under section 12(a)(1)(A) and (E), the "unit of violation" is the sale or distribution. Each such sale or distribution of a pesticide to any person[13] constitutes a distinct unit of violation, and thus is grounds for the

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[13] A "person" is defined under FIFRA as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s).

assessment of a separate penalty. While Chempace argues that the FIFRA provisions in question "merely state a general prohibition against the sale and distribution of unregistered or misbranded pesticides," Chempace Br. at 22, the prohibitions are expressed in plain language making it unlawful to sell or distribute *any* unregistered or *any* misbranded pesticides to *any* person. 7 U.S.C. § 136j(a)(1)(A), (E).[14]

This construction of the statutory language is also supported by the ERP which provides that "[T]he Agency considers violations that occur for each shipment of a product * * *, or each sale of a product * * * to be independent offenses of FIFRA." ERP at 25. While we have stated that the ERP "is a non-binding agency policy whose application is open to attack in any particular case," *see McLaughlin* at 350, Chempace has not pointed to anything in the language, legislative history, or context of section 12(a)(1)(A) and (E) that supports its position that the unit of violation in this case should be less than the number of individual sales or distributions made in 1992 and 1993 of its unregistered and misbranded pesticides as outlined in the Region's Complaint.

Chempace's suggested reading of these FIFRA sections as treating a course of conduct involving multiple sales or distributions as a single violation not only fails to follow the plain language of the statute, but also undermines the deterrent purpose that civil penalties are intended to effectuate. For example, Chempace's interpretation results in charging a seller or distributor of unregistered pesticides with only one count of violating FIFRA section 12(a)(1)(A) with a resultant current maximum penalty of $5,500,[15] regardless of whether that person sold or distributed all or part of his stock, and whether those sales or distributions were made to one or hundreds of customers. Thus, the potential liability for civil penalties would no longer provide an incentive to a seller or distributor of unregistered pesticides to refrain from continuing that unlawful activity after the first illegal sale or distribution.[16]

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[14] We find Chempace's reliance on *In re Microban Prod. Co.*, No. FIFRA-98-H-01 (ALJ, Feb. 18, 1999) inapposite since the presiding officer's decision in that case involves FIFRA section 12(a)(1)(B), and as Chempace readily admits, *see* Chempace Br. at 17, the presiding officer in that case clearly distinguished sections 12(a)(1)(A) and (E) in his opinion. *In re Microban* is currently before the Board on appeal, and our statement here does not express any opinion as to the merits of that case.

[15] The Debt Collection Improvement Act of 1996 directs the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. *See* 31 U.S.C. § 3701. Inflation adjusted penalty amounts have been published at 40 C.F.R. § 19.1 *et seq.*, and apply to violations occurring after January 30, 1997.

[16] Chempace cites the way violations were charged in other cases (which included single-count complaints where multiple sales or distributions of misbranded or unregistered pesticides occurred over a period of time) as an indication of an inconsistent "application of a standard for § 12(a)(1)(A)
Continued

In this case, based on invoices discovered during the inspection of Chempace by Ohio Department of Agriculture inspectors, the Region alleged 55 separate sales or distributions of the unregistered pesticides Trigger, Uni-rooter, and GLY, as well as, 43 separate sales or distributions of the misbranded pesticides Uni-Quat 14, Complete, and Eradicate in 1992 and 1993. Chempace's Amended Answer did not raise any genuine issues of fact to refute that such sales or distributions occurred. *See* Order Granting Partial Accelerated Decision and Allowing an Amended Complaint (ALJ, Oct. 17, 1997). Accordingly, we find that the Presiding Officer did not err in finding Chempace liable for 98 violations of FIFRA section 12(a)(1)(A) and (E).

B. *The Appropriateness of the Penalty Imposed*

The Presiding Officer is afforded significant discretion under the regulations governing this matter "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he or she] set[s] forth in the initial decision the specific reasons for the increase or decrease." *See* 40 C.F.R. § 22.27(b). The Presiding Officer also "must consider" appropriate penalty guidelines, but is not bound by them. *Id.*; *see In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). The duty to consider appropriate penalty guidelines "carries with it no obligation to adhere to the penalty policy in a particular instance. Nor does it suggest that a presiding officer errs in the slightest respect if he or she decides not to deviate from the penalty policy." *DIC Americas*, at 190.

On many occasions, the Board has affirmed the proposition that penalty policies serve to facilitate the application of statutory penalty criteria, and that presiding officers and the Board may utilize applicable penalty policies in determining civil penalty amounts. *See, e.g., DIC Americas*, at 189 (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994)); *In re Pacific Ref. Co.*, 5 E.A.D. 607, 613 (EAB 1994) (also citing *Great Lakes*).

This Board generally will not substitute its judgment for that of a presiding officer when the penalty assessed falls within the range of penalties provided in the penalty guidelines, absent a showing that the presiding officer committed an abuse of discretion or a clear error in assessing the penalty. *See Pacific Ref.*, at 613 (EPCRA § 313 penalty policy); *see also In re Employers Ins. of Wausau and Group Eight Tech., Inc.*, 6 E.A.D. 735, 757 (EAB 1997) (reviewing application of Polychlorinated Biphenyls ("PCB") penalty policy); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120 (EAB 1994) (involving PCB penalty policy). We now turn to

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(continued)
and § 12(a)(1)(E) violations." Chempace Br. at 18-21. We see no inconsistency here. The fact that the Agency has the authority to charge separate violations does not eliminate its enforcement discretion to choose not to do so. As Chempace notes, the issue of what constitutes the appropriate "unit of violation" was not raised in any of those cases. *Id.*

the issues raised on appeal regarding the Presiding Officer's penalty determination in this case.

1. *Ability to Pay*

Both parties take issue with the Presiding Officer's implementation of the ability-to-pay factor of the penalty calculation.[17] The Region charges that the Presiding Officer erred by concluding that Chempace met its burden of production regarding its inability to pay the Region's proposed penalty of $200,000, in contravention of this Board's precedent in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994).[18] Region's Appeal Brief at 2, 16-27 ("Region's Br."). Chempace, however, argues that the Presiding Officer erred by imposing the burden on it to "put forth evidence on an amount of civil penalty it could pay after the Presiding Officer concluded that [the Region] had failed to carry its burden * * * ." Chempace Br. at 23.

The Board held, in *New Waterbury*, that the Region bears the burden of proof on establishing the appropriateness of a penalty after considering all of the statutory factors.[19] More particularly as to the ability-to-pay factor, we stated:

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced.

Id. at 542-43.

New Waterbury also instructs that:

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[17] FIFRA provides that penalty calculations take into account "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. § 136*l*(a)(4); *see* ERP at 23-25 (setting forth methods for determining ability-to-pay).

[18] We note that *New Waterbury* involved violations of section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e), and the assessment of a civil penalty under the "Guidelines for the the Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy" ("PCB Policy"), 45 Fed. Reg. 59,770 (Sept. 10, 1980). The ERP used in this case and the PCB Policy similarly construe the statutory factors of ability-to-pay and ability to continue in business as a single factor that must be considered in assessing a penalty. *See* ERP at 23; PCB Policy at 59,770.

[19] The complainant's burden "focuses on the overall *appropriateness* of the proposed penalty in light of all the statutory factors, rather than any particular quantum of proof for individual statutory factors." *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 773 (EAB 1998).

> Once the respondent has presented specific evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions.

Id. at 543. Accordingly, the Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty.[20] The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the Complainant must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

We now turn to the Region's contention that the Presiding Officer erred in finding that Chempace carried its burden of production with respect to its inability to pay a $200,000 penalty in this case. First, the Region argues that the Presiding Officer could not have properly concluded that Chempace carried its burden of production because Chempace did not provide the specific documentary information[21] that the Region's expert, Ms. Resseguie, said she needed to conduct a com-

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[20] As we observed in *New Waterbury*, since the complainant's ability to obtain financial information about a respondent is limited at the outset of the case, a respondent's ability to pay is presumed until respondent puts it in issue. *New Waterbury* at 541. Moreover, once a respondent has raised the issue, it must provide sufficient information to enable the complainant to assess ability to pay. Failure to do so results in a waiver of respondent's objection to a penalty based on inability to pay. *Id.* at 542. As discussed below, in this case the Presiding Officer determined that Chempace had provided sufficient information to enable the Region to make an ability-to-pay determination.

[21] The Region sought, among other things:

1) General Financial Information — trial balances for fiscal year 1997 ; charts of accounts for fiscal year 1997; general ledgers for the month ending June 30, 1996, and the six-month period ending June 30, 1997; corporate tax returns of a Chempace subsidiary, Chemical Dust Control, Inc.

2) Assets Information — cumulative depreciation schedules; purchase contracts, invoices, or other purchase documentation; loan documents for assets purchased since July 1992; sales agreements and bills of sale since 1992;

3) Investment Information — loan, sales, or other contracts between Chempace and its subsidiary between 1996 and 1997; cost and fair market value of corporate assets;

4) Liability Information — loan documents; settlement sheets; closing statements; and

5) Stockholder Loans — notes between Chempace and stockholders from 1992; corporate minutes; and profit-sharing plans.

See Region's Br. at 20; Other Discovery Motion at 7-10.

plete ability-to-pay analysis. *See* Region's Br. at 20-23; *supra* note 10. The Region also suggests that the Presiding Officer's failure to require disclosure of the specific financial information requested prevented the Region from "refut[ing] or evaluat[ing]" conclusions in his Initial Decision. *Id.* at 23. We disagree.

The Board generally reviews the Presiding Officer's determination *de novo*. *See* CROP, as amended (to be codified at 40 C.F.R. § 22.30(f)) (conferring authority on the Board to "adopt, modify, or set aside" the findings and conclusions of the presiding officer); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D 522, 530 (EAB 1998). When a Presiding Officer has "the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference * * *." *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994) (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355 (EAB 1994)); *see also, In re Ocean State Asbestos Removal, Inc.* 7 E.A.D. 522, 530 (EAB 1998).

The Presiding Officer concluded that the preponderance of the evidence, in the form of Mr. Bernstein's testimony, Chempace's corporate tax returns, and Chempace's financial statements showed that Chempace was unable to pay the proposed $200,000 civil penalty without liquidating assets necessary to continue operating, and that Chempace was unable to obtain loans to pay the proposed penalty. While it may have been useful for the Region to review the specific detailed financial information it sought in this case, we are not convinced that the Presiding Officer abused his discretion in denying such additional discovery.

The CROP provides for "other discovery," after the prehearing exchange required by 40 C.F.R. § 22.19(b), only upon the Presiding Officer's determination:

> (*i*) That such discovery will not in any way unreasonably delay the proceeding;
> (*ii*) That the information to be obtained is not otherwise obtainable; and
> (*iii*) That such information has significant probative value.

40 C.F.R. § 22.19(f). Making this determination involves the exercise of considerable discretion since it requires a subjective judgment on the need for, and value of, the additional discovery and the possible delay and disruption it might entail. This determination is most suitably made by the Presiding Officer. The Presiding Officer's determination is appropriately entitled to considerable deference. This is consistent with federal court precedent that the appropriate standard of review for discovery orders is the abuse of discretion standard. *See FDIC v. Ogden Corp.*, 202 F.3d 454, 460 (1st Cir. 2000) ("Trial judges enjoy broad discretion in the handling of interstitial matters, such as the management of pretrial discovery."); *Dorf & Stanton Comm., Inc. v. Molson Breweries*, 100 F.3d 919, 922 (Fed. Cir. 1996)

(standard of review regarding discovery is an abuse of discretion standard); *Rae v. Union* Bank, 725 F.2d 478, 481 (9th Cir. 1984); *but see Haines v. Liggett Group, Inc.*, 975 F.2d 81, 92 (3rd Cir. 1992) (proper standard of review for discovery orders is the "clearly erroneous or contrary to law" standard).[22] Affording considerable deference to a Presiding Officer's discovery ruling is particularly appropriate where the issue involved is the amount of the penalty, an issue for which the Presiding Officer has broad discretion.[23]

Within the context of determining the appropriate penalty, we see no abuse of discretion by the Presiding Officer in denying the Region's motion for additional discovery. The Presiding Officer specifically ruled that Chempace had "already produced five years' tax returns and financial statements. * * * If the additional undisclosed documents are shown at the hearing to be relevant to the penalty assessment, adverse inferences could be drawn against [Chempace's] position." Order Denying Motions at 2 (ALJ, Feb. 27, 1998). While the Presiding Officer did not explicitly recite the factors under 40 C.F.R. § 22.19(f)(1) in denying the Region's request, this shortcoming does not demonstrate an abuse of discretion by the Presiding Officer in issuing his Order Denying Motions. *See FDIC v. Ogden Corp.*, 202 F.3d 454, 460 (declining to abandon abuse of discretion standard where discovery order was granted by endorsement and without elaboration). Rather, it appears from our reading of the reasons given by the Presiding Officer for denying the Other Discovery Motion that he had concluded, given the Region's limited initial burden of proof under *New Waterbury* and the evidence already provided during the pre-hearing exchange, that such further discovery would not necessarily have "significant probative value."[24] 40 C.F.R. § 22.19(f)(1)(*iii*). Under these circumstances, we see no abuse of discretion on the part of the Presiding Officer in denying the additional discovery sought by the Region to buttress its penalty calculation.

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[22] The Board is not bound by the Federal Rules of Civil Procedure and related practice; however, those rules and related practice can nonetheless be used to inform our analysis of relevant issues. *See In re Zaclon*, Inc., 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997).

[23] *See In re Employers Ins. of Wausau and Group Eight Tech., Inc.*, 6 E.A.D. 735, 758 (EAB 1997) (penalty assessments are ultimately constrained only by statutory penalty criteria, caps limiting the size of the penalty, the regulatory requirement to provide "specific reasons" for the penalty assessed (40 C.F.R. § 22.27(b)), and the Administrative Procedure Act requirement that sanctions be rationally related to the offense committed) (citing *DIC Americas*, at 189 and *Pacific Ref. Co.*, at 613 ("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.")).

[24] The Presiding Officer's January 12, 1998, Order on Discovery, while not ruling on the Region's request to compel further discovery, stated "it may well not be necessary for the Region to pursue this type of detailed analysis of Respondent's finances in order to meet its burden of proof [under *New Waterbury*]." Order on Discovery at 2 (ALJ, Jan. 12, 1998).

We also decline to find error in the Presiding Officer's application of *New Waterbury* in this case. Our opinion in *New Waterbury* specifically contemplated that once respondent had introduced rebuttal evidence, a complainant could carry its ultimate burden of persuasion either by introducing "additional evidence," or by discrediting the respondent's evidence through cross-examination. *New Waterbury*, 5 E.A.D. at 543. Here, after Chempace introduced Mr. Bernstein's testimony based only on the pre-hearing exchange evidence, the Region failed to exercise its opportunity to vigorously cross-examine Mr. Bernstein on the ability-to-pay issue; his reliance on unaudited financial statements; and his failure to provide or bring to the hearing his detailed notes supporting his conclusions. It did not ask about any other documents it believed would be relevant. Such cross-examination, while not affirmatively establishing how large a penalty Chempace could pay, may have successfully shown that Chempace could not carry its burden to show with specific evidence that it could not pay the penalty sought. Our review of the hearing transcripts indicates that the Region attempted to undermine Mr. Bernstein's credibility by questioning him about his personal relationships with Mr. Wooddell and Mr. Shall, *see* Hearing Transcript ("Hearing Tr."), at 528-29, and his status as a member of the Board of Directors.[25] The remainder of the Region's cross-examination focused primarily on the detailed information contained in Chempace's 1995-96 financial statement. In our opinion, the testimony provided during the Region's cross-examination simply clarified the content of the document, but did not elicit any inconsistencies with Mr. Bernstein's opinion that Chempace was unable to pay the proposed penalty. *See* Hearing Tr. at 533-56. Nor did the cross-examination demonstrate the Region's need for the additional discovery it sought. In the absence of vigorous cross-examination by the Region of Chempace's expert witness showing the alleged deficiencies in that witness' analysis and the lack of support for the witness' conclusions, we cannot see how the Presiding Officer veered from our instructions in *New Waterbury*, or failed to properly evaluate the preponderance of the evidence.[26] Accordingly, we see no clear error in the record

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[25] In that regard, the Region inquired about a disclaimer included in Chempace's 1995-96 comparative financial statement indicating that Mr. Bernstein, as author of the statement, was "not independent in [his] relationship with Chempace Corporation." Hearing Tr. at 533. Mr. Bernstein explained that the disclaimer was included because he is an officer of the corporation. *Id.*

[26] We note that some of the additional information sought by the Region was for the purpose of showing that at least some of the $200,000 proposed penalty could be obtained from a related entity, Chemical Dust Control, Inc., a wholly-owned subsidiary of Chempace. In so doing, the Region, at hearing and on appeal, attempts to equate Chempace's corporate structure with New Waterbury's complex corporate structure and financial status. The comparison is unwarranted. In *New Waterbury*, we applied the four percent guideline of the PCB Policy to assess a $24,000 penalty. We then examined New Waterbury's corporate structure to determine if further reductions in the penalty assessed were warranted. Upon finding New Waterbury to be in operation largely due to the financial support received from Winston Management, a company solely-owned by Mr. Trevor Roberts, who was the largest partner of New Waterbury, we declined to reduce the penalty further. *New Waterbury*, 5 E.A.D. at 548.

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before us in the Presiding Officer's conclusion that Chempace carried its burden of production in refuting the Region's *prima facie* showing of ability to pay a $200,000 penalty.

Chempace argues that the Presiding Officer erred by imposing the burden on it to "put forth evidence on an amount of civil penalty it could pay after the Presiding Officer concluded that [the Region] had failed to carry its burden * * *." Chempace's Br. at 23. The Presiding Officer's Initial Decision does state that "Chempace did not offer evidence on a proposed specific alternate smaller penalty amount that it could pay." Initial Decision at 22.[27] This characterization of the record by the Presiding Officer, put in context, does not amount to placing a burden on Chempace to demonstrate an appropriate penalty. The Initial Decision, also states that "[i]n the absence of any more specific evidence on the amount [Chempace] could pay, it is appropriate to rely on the ERP's guideline of 4% of average gross income." *Id.*

We believe Chempace is misreading both the record and *New Waterbury*. As we stated in *New Waterbury*, the respondent must show an inability to pay "*any* penalty" to fully meet its burden of production in response to the complainant's *prima facie* case. *See New Waterbury*, 5 E.A.D. at 543, *quoted supra* section II.B.1 (emphasis added). While Chempace successfully refuted the assertion that it could pay the full $200,000 penalty, it obviously did not convince the Presiding Officer that it could not pay *any* penalty. *See* Initial Decision at 22. Thus, rather than placing a burden on Chempace, the Presiding Officer was merely exercising his authority under the CROP to consider the record, the statutory penalty criteria, and the applicable penalty policy, *see* 40 C.F.R. § 22.27(b), to determine an appropriate penalty. We see no error as Chempace claims and decline to disturb the Presiding Officer's penalty determination on this basis.

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Here, Chempace Dust Control, Inc. was incorporated in 1996 (several years after the alleged violations). It had sales activity representing only 5-6 percent of Chempace's sales, and experienced a $20,966 loss of gross profits in the 1995 tax year. *See* Hearing Ex. 6, at 1. This is hardly indicative of "a complex arrangement of interrelated small companies," *see New Waterbury*, at 547, that the Presiding Officer need have allowed the Region to examine in determining Chempace's ability to pay. Even if it were, as stated in *New Waterbury*, the inquiry should be utilized in considering whether to "make further reductions from the amount recommended by the four percent formula." *Id.* Here, the Presiding Officer did not reduce the penalty amount below the four percent level. Based on this evidence, we can see no error in the Presiding Officer's decision to deny additional discovery concerning Chempace Dust Control, Inc.

[27] Our review of the record indicates that this is an accurate characterization of the record. Chempace, throughout the proceedings below, claimed an inability to pay the proposed $200,000 penalty, but nothing in the record suggests any particular penalty amount that Chempace indicated it could pay.

2. *Application of the Four Percent of Average Gross Annual Income Guideline*

Chempace argues that the Presiding Officer erred in applying a four percent of average gross annual income guideline to calculate the civil penalty once the Region failed to carry its burden of persuasion on the ability of Chempace to pay the entire proposed penalty. We are unswayed by Chempace's argument. As we noted earlier, the Presiding Officer is afforded significant discretion under the CROP to "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he or she] set[s] forth in the initial decision the specific reasons for the increase or decrease." *See* 40 C.F.R. § 22.27(b). The Presiding Officer also "must consider" appropriate penalty guidelines, but is not bound by them. *Id.*; *see DIC Americas*, at 189.

Here, the Presiding Officer found, based on a preponderance of the evidence, that the Region's proposed penalty was not appropriate. Accordingly, the Presiding Officer looked to the ERP for an alternative method to determine a penalty that would also account for Chempace's limited ability to pay. The ERP provides three methods for taking into account a respondent's ability to pay. *See* ERP at 23.[28] Based on the evidence before him, the Presiding Officer concluded that while Chempace could not pay the penalty as proposed, "it is appropriate to rely on the ERP's guideline of 4% of average gross income." Initial Decision at 22. This ERP guideline provides for averaging the most current and preceding three years' gross income and multiplying that average by four percent. Accordingly, the Presiding Officer utilized the financial data current at the time of the prehearing exchange (1994-96 financial statements), supplemented by a Dun & Bradstreet report of gross sales through June 30, 1997. *See* Initial Decision at 23.

We see no error in the Presiding Officer's application of the statutory ability-to-pay factor, his utilization of the FIFRA ERP four percent of average gross income guideline, and his rationale for applying it in this case. In fact, the Presiding Officer made it clear early in this proceeding that the four percent guideline could be utilized to determine the appropriate penalty in this case. *See* Order on Discovery at 2 (ALJ, Jan. 12, 1998). In that order, the Presiding Officer stated:

> I note that the FIFRA Enforcement Response Policy also provides another method for estimating a respondent's ability to pay — calculating four percent of a company's (and affiliated corporate entities') gross sales. I suggest the parties use this guideline as a starting point for settlement negotiations.

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[28] The ERP outlines the three methods as: 1) a detailed tax, accounting, and financial analysis; 2) a guideline of four percent of average gross annual income; or 3) ABEL (a computer model). *See* ERP at 23.

Id. Chempace was on notice of other potential methods to calculate ability to pay and was aware that showing it could not pay the penalty as proposed in the complaint was not the same thing as showing an inability to pay *any* penalty. It knew that the four percent guideline could be used in such circumstances and it had an opportunity to present evidence to demonstrate why such method was inappropriate. Here, the Initial Decision suggests that Chempace presented its best case to refute the appropriateness of the Region's proposed penalty based on the ability-to-pay factor, but in the absence of evidence that no penalty is appropriate, the Presiding Officer is authorized to consider the ERP's four percent guideline, and to craft an appropriate penalty. Thus, we decline to disturb the penalty calculation.[29]

3. *Chempace's Compliance History and Culpability*

Chempace argues that the Presiding Officer erred in determining Chempace's culpability. Chempace Br. at 29-33. Chempace first alleges that the Presiding Officer erred by concluding a prior violation was "the primary factor behind [Chempace's] culpability." *Id.* at 30. Second, Chempace argues that the evidence does not support the Presiding Officer's conclusion that Chempace "failed to train or instruct employees to ensure that cancelled [sic] pesticides would no longer be produced in the warehouse." *Id.* at 31.

Chempace's first argument is based on a claim that its only prior FIFRA violation, a reporting violation under FIFRA section 7(c)(1), 7 U.S.C. § 136e(c)(1), should have been resolved by the Region with only a notice of warning rather than a civil complaint.[30] If it had been resolved with only a notice of warning, Chempace argues, this infraction would not have been considered a prior violation under the ERP, and thus would not have increased the gravity component of the penalty for the current violations.

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[29] Chempace also suggests error in the Presiding Officer's use of its most recent financial information to calculate the four percent of average gross income. Chempace appears to argue that the delay in reaching the hearing in this case results in an unfair and inequitable application of the penalty calculation since its earnings for 1992 and 1993 were significantly less than in 1998 when the hearing occurred. We are unswayed since the record shows that any delay was not solely attributable to the Region. We agree with the Presiding Officer's decision to use 1994-97 data in the record since the ERP provides for use of the "current year and the prior three years." *See* ERP at 23. Here, the Presiding Officer noted that the statute "speaks in terms of the respondent's ability to continue in business," *see* Initial Decision at 23, and correctly concluded that use of the most recent financial data "would protect companies that have a decline in earnings since the violations, as easily as it could increase the potential liability * * *." *Id.* Accordingly we do not disturb the Presiding Officer's penalty calculation.

[30] *See supra* n.3 (describing the Region's 1991 enforcement action and the Consent Order between the parties).

By way of background, the ERP requires consideration of five types of circumstances for purposes of adjusting the base penalty: (1) the toxicity of the pesticide; (2) the harm to human health; (3) the harm to the environment; (4) the respondent's compliance history; and (5) culpability. *See* ERP, app. B. These five circumstances, the last two of which appear to be at issue here, reflect the gravity of the misconduct. For each circumstance, values are assigned for various gravity levels which are then added up for a total gravity adjustment value. The magnitude of the total gravity adjustment value dictates the percentage by which the base penalty should be increased or decreased to reflect the circumstances of the case. *See* ERP, app. C-1, tb. 3. With respect to the compliance history element, the ERP provides that, "[a] notice of warning (NOW) will not be considered a prior violation for the purposes of the gravity adjustments criteria, since no opportunity has been given to contest the notice." ERP, app. B, n.4.

In this case, the Presiding Officer adopted the Region's calculation of the gravity-based penalty, *see* Initial Decision at 14, but stated that his decision "assesse[d] a reduced penalty on the [sic] primarily on the effect of the proposed penalty on Chempace's ability to remain in business." *Id.* at 14-15. Chempace's first argument calls upon the Board to review the Region's decision in the previous enforcement action against Chempace wherein the Region issued a complaint seeking civil monetary penalties. *See supra* note 3. Chempace contends that it should have received a warning rather than a civil penalty assessment in that case. However, absent specific statutory guidance that constrains discretion, such prosecutorial choices are ordinarily matters within the prerogative of the responsible enforcement officials. *See In re Green Thumb Nursery, Inc.* 6 E.A.D. 782, 799-800 (EAB 1997) (FIFRA does not "require the Agency to issue warnings instead of penalties, or to impose penalties of zero. * * * the Administrator * * * retains the discretion to assess a penalty."); *In re Wyoming Refining Company*, 2 E.A.D. 221, 223 (CJO 1986) ("The decision whether to issue a warning or a complaint is a matter within Complainant's enforcement discretion."). Under section 14(a)(4) of FIFRA, the Administrator may — but is not required to — issue a warning in lieu of assessing a penalty whenever there is a finding that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment. In light of the discretion conferred by FIFRA, the decision to assess a penalty or to issue a warning is only subject to review for clear abuse. *See, e.g., In re Arapahoe County Weed Dist.*, 8 E.A.D. 381, 392 (EAB 1999) (no abuse found); *In re Aero-master, Inc.*, 1 E.A.D. 916, 918 (CJO 1984) (no abuse shown). Our disinclination to review the previous case involving Chempace is further bolstered by the fact that the Region's decision was made in a prior enforcement case, the record of which is not directly before us on appeal. Moreover, Chempace's argument is particularly ill-founded since the resolution of the prior enforcement action, which Chempace would have us question, was in the form of a Consent Order signed by Chempace and in which Chempace agreed to pay a penalty. *See* Initial Decision at 6. We see no error in the Presiding Officer's reliance on this evidence of a prior violation to support the gravity adjustment

score proposed by the Region in its penalty calculation.[31]

Second, with respect to the culpability factor, we are not persuaded that the Presiding Officer committed error in finding knowing and willful conduct based on Chempace's failure to train or instruct employees appropriately. Chempace argues that the Presiding Officer erred by failing to appropriately consider other evidence that "Mr Shall and Mr. Wooddell were spending most of their time on the road," *see* Chempace Br. at 31, that Chempace "employed a succession of warehouse men, due to the company's financial straits and inability to pay competitive wages," *see id.* at 32, and that "Mr. Wooddell also specifically indicated he was not aware of the unlawful sales." *Id.* We disagree with Chempace's contentions. We have specifically rejected the "contention that * * * employee turnover and * * * strained financial condition shows that the Presiding Officer committed clear error or an abuse of discretion" in not reducing a penalty. *In re Steeltech, Ltd.*, 8 E.A.D. 577, 592 (EAB 1999) (noting further that "compliance with applicable environmental and safety regulations are basic requirements of operating a business in this country."). Furthermore, our reading of the Initial Decision leads us to conclude that the Presiding Officer appropriately focused on the evidence that Chempace's officers failed to "train or instruct their employees to ensure that canceled pesticide products would no longer be produced in the warehouse. " Initial Decision at 16. The Presiding Officer described what he called a "'see-no-evil, hear-no-evil' type of scenario," occurring a mere five months after Chempace signed the earlier Consent Order, and three months after cancellation of Chempace's establishment number. *Id.* He went on to state that:

> [i]f Mr. Shall and Mr. Wooddell did not actually know of the sales of canceled and misbranded pesticides, they certainly should have known. Regardless of their knowledge, their failure to take any action to prevent these violations constitutes an omission that amounts to wilfulness, rather than mere negligence.

Id. While Chempace may not agree with his conclusion, this recitation of inaction by Chempace officers demonstrates that the Presiding Officer did consider evidence that Chempace officers were not present, and that they had no knowledge of the violations. We conclude that the Presiding Officer's finding on culpability does not represent clear error or an abuse of discretion.

Finally, even if Chempace's assertions were correct, we fail to understand how this would constitute reversible error or an abuse of discretion in assessing the penalty in this case. The Presiding Officer reasoned, "even if the prior viola-

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[31] *See also, In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 552 (EAB 1998) (consideration of prior unadjudicated notices of violation or consent orders is appropriate in the penalty assessment analysis).

tion is not considered in the ERP calculation, it only results in a 10 % reduction of the [base] penalty. This is superseded by the reduction assessed by this decision based on the effect on [sic] the Respondent's ability to continue in business." Initial Decision at 19. We agree with the Presiding Officer's assessment that any argument about Chempace's compliance history or culpability is overtaken (in Chempace's favor) by the Presiding Officer's ability-to-pay analysis. Accordingly, we see no error as alleged by Chempace in the Presiding Officer's analysis of Chempace's culpability.

4. *Failure to Consider Other Gravity Adjustments*

Lastly, Chempace argues that the Presiding Officer failed to consider a number of mitigating factors and circumstances which the ERP does not take into account. In particular, Chempace asserts error in the Presiding Officer's failure to distinguish between sales of "insubstantial amounts, e.g., on the order of 1 gallon, and those sales of more substantial amounts, e.g., 55 gallons," Chempace Br. at 34. Chempace also asserts as error the Presiding Officer's failure to "distinguish between pesticides that were previously registered and those that were never registered." *Id.* Accordingly, Chempace argues that deviation from the ERP, or reduction in the gravity levels associated with the violations is appropriate.[32]

As we have stated previously, the Presiding Officer "must consider" appropriate penalty guidelines, but is not bound by them. *Id.*; *see DIC Americas*, at 189. The duty to consider appropriate penalty guidelines "carries with it no obligation to adhere to the penalty policy in a particular instance. Nor does it suggest that a presiding officer errs in the slightest respect if he or she decides not to deviate from the penalty policy." *DIC Americas*, at 190. Here, the Presiding Officer considered Chempace's argument that the large number of sales involving small amount of pesticides "results in an exaggerated penalty amount." Initial Decision at 17. Yet, the Presiding Officer concluded that "[a]lthough many of the individual sales were small, the harm to the EPA's pesticides regulatory program is considerable when a company sells and produces multiple unregistered and misbranded pesticides for over a year." *Id.* at 18. We have held that harm to the integrity of a regulatory program is appropriate to consider in assessing an appropriate penalty. *See In re Predex Corp.*, 7 E.A.D. 591, 601 (EAB 1998) (citing *Green Thumb Nursery*, 6 E.A.D. 782 (EAB 1997)). Given the number of sales, and the number of unregistered and misbranded pesticides at issue, the pesticides regulatory program, lacking data on these transactions, would be significantly harmed if any environmental or human health problems were to result from Chempace's activities.

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[32] We note that the Presiding Officer had already determined, in his partial accelerated decision, that "the magnitude of the reduction for Respondent's ability to pay virtually supersedes the other penalty factors related to the gravity of the violations." PAD at 11; *supra* Part II.B.3.

Chempace also claims that the Presiding Officer erred by failing to take into account sales of pesticides that were previously registered versus those pesticides that were never registered. Chempace Br. at 34-35. Chempace argues that "pesticides that have been previously registered have passed the rigorous review process in 4[0] C.F.R. § 152 and determined to be safe for humans and the environment; whereas pesticides which have never been registered have not." *Id.* We are unpersuaded by Chempace's argument. As we have outlined earlier, FIFRA section 12(a)(1)(A), makes it unlawful to distribute or sell "any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended * * *." 7 U.S.C 136j(a)(1)(A). Chempace has not shown any meaningful distinction in the statute between sales or distributions of pesticides that have never been registered and those whose registrations have lapsed (and been canceled as a result) — both are unlawful.[33] The pesticides regulatory program is undermined by the sale of any unregistered pesticides, even if, as in this case, the sales involve pesticides which are no longer registered because their registrations had lapsed. We see no reason why the Presiding Officer need make such a distinction for the purpose of calculating his penalty in this case.[34] We are not persuaded that the Presiding Officer committed error by following the ERP and not deviating from the policy as Chempace suggests.[35] We decline to disturb the penalty calculation.

III. *CONCLUSION*

Upon consideration of the issues raised on appeal by Chempace and the Region, we affirm the Presiding Officer's Initial Decision in its entirety. Pursuant to FIFRA section 14(a)(4), 7 U.S.C. § 136*l*(a)(4), a civil penalty of $92,193 is hereby assessed against Chempace. Chempace shall pay the full amount of the civil penalty within thirty (30) days after the filing of this Final Decision. Payment shall be made by forwarding a certified or cashier's check payable to the Treasurer, United States of America, at the following address:

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[33] The ERP, in assigning gravity levels to violations of section 12(a)(1)(A), does not distinguish between pesticides that have never been registered and pesticides that are canceled. *See* ERP at A-1.

[34] We note that the Presiding Officer in evaluating "[t]he true gravity of Chempace's violations," looked to "its extended pattern of engaging in these illegal sales and production activities." Initial Decision at 18.

[35] The Presiding Officer also cited the reduction in the penalty based on ability to pay as a further reason for not departing from the ERP in determining the gravity of the violations. *See* Initial Decision at 19.

EPA — Region V
Sonja R. Brooks
Regional Hearing Clerk
P.O. Box 70753
Chicago, Illinois 60673

So ordered.