(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Green Thumb Nursery, Inc. Canton, Ohio	)	FIFRA Appeal No. 95-4a
I.F. & R. Docket No. V-014-94	)	

[Decided March 6, 1997]

FINAL ORDER

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

GREEN THUMB NURSERY, INC.

FIFRA Appeal No. 95-4a

FINAL ORDER

Decided March 6, 1997

Syllabus

The Respondent, Green Thumb Nursery, Inc. of Canton, Ohio, appeals from the Initial Decision of the Presiding Officer assessing a civil penalty of $3,000.00 for the sale or distribution of an unregistered pesticide product, a solution of sodium hypochlorite, in violation of sections 3(a), 12(a)(1)(A), and 12(a)(2)(S) of FIFRA; 7 U.S.C. §§ 136a(a), 136j(a)(1)(A), and 136j(a)(2)(S). Green Thumb asserts that the Presiding Officer erred in not providing an oral evidentiary hearing, in finding liability, and in imposing a penalty instead of issuing a warning.

The Respondent contends that FIFRA section 14(a)(3), 7 U.S.C. § 136*l*(a)(3), requires an oral evidentiary hearing before imposition of a penalty. Respondent also asserts that it met FIFRA's pesticide product registration requirements because it had registered its pesticide formulation facility and had provided information about its pesticide product therein. Finally, Respondent asserts that a warning, not a civil penalty, should have been imposed because Green Thumb is a small company which does not assign anyone to meeting FIFRA requirements, and that meeting FIFRA requirements would be an unreasonable burden.

Held: The penalty assessment of the Presiding Officer is upheld. A person seeking a hearing under FIFRA's penalty provisions must request such a hearing in a timely manner, pursuant to 40 C.F.R. §§ 22.15(b)(3) and (c), and must raise real disputes of material fact. In this case, Green Thumb did neither. As to Green Thumb's liability for a civil penalty, FIFRA is an action forcing environmental statute. A person must register its pesticide products under FIFRA, and cannot satisfy this requirement by expecting EPA to investigate related documents containing different information. Failure to assign staff to meet FIFRA requirements, or asserting that meeting such requirements is too difficult, provide no defense to imposition of liability in this case.

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

Opinion of the Board by Judge McCallum:

The Respondent, Green Thumb Nursery, Inc. of Canton, Ohio ("Green Thumb"), appeals from the Initial Decision of Administrative Law Judge Frank W. Vanderheyden ("Presiding Officer") assessing a civil penalty of $3,000.00 for violation of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136 *et seq*. Respondent is a retail establishment which sells chemicals, under its own brand name, used for swimming pools, lawns, and gardens. Among the chemicals sold is a product labeled as a 12% solution of sodium hypochlorite, chiefly used as a pool sanitizing agent. Green Thumb is charged by EPA, Region V, the Complainant, with the sale or distribution of an unregistered pesticide product, to wit, the 12% solution of sodium hypochlorite. The Respondent raises the following issues:

> 1. Was it error for the assigned ALJ to determine all issues in this case against Respondent without holding any hearings?
>
> 2. Was it error for the assigned ALJ to rely upon [allegedly] improper and untimely affidavit/decla-ration submissions by Complainant?
>
> 3. Was it error for the assigned ALJ to determine that Respondent violated Section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1)(A)?

> 4. Was it error for the assigned ALJ to determine that Respondent should pay a civil penalty in the amount of $3,000.00 rather than be issued a warning?

Respondent's Appeal at 1.

With respect to these allegations, for the reasons set forth below, we conclude that: 1. no oral hearing was required in this matter; 2. the Presiding Officer did not rely upon improper documents; 3. the Respondent violated section 12(a)(1)(A) of FIFRA; and, 4. a civil penalty of $3,000.00, rather than a warning, was appropriate. We will discuss Respondent's appeal in the following order: right to a hearing; whether Green Thumb sold or distributed an unregistered pesticide product; and whether a penalty or a warning is appropriate. First, however, we start with a brief description of the regulatory and factual background.

I. *BACKGROUND*

A. *Statutory and Regulatory Background, The Federal Insecticide, Fungicide, and Rodenticide Act*

FIFRA is a federal statute regulating the sale and distribution of pesticides. A pesticide is defined in section 2(u) of FIFRA[1] as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest * * *."[2] To distribute or sell are defined in FIFRA

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[1] 7 U.S.C. § 136(u).

[2] "Pest" is broadly defined to mean "(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism * * * (continued...)

section 2(gg)[3] as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver."

1. *Section 3 of FIFRA*

The initial regulatory tool in FIFRA is section 3(a), 7 U.S.C. § 136(a), which prohibits distribution or sale of unregistered pesticide products. "Except as provided by this subchapter, no person * * * may distribute or sell * * * any pesticide that is not registered under this subchapter." FIFRA section 3(c) establishes the procedure for registering pesticide products, requiring the filing of a statement containing a substantial amount of information about the pesticide product being registered and its intended uses.

2. *Section 7 of FIFRA*

In addition to requiring the registration of pesticide products themselves, FIFRA also requires that persons who produce pesticides, or the active ingredients in pesticides, must register the establishments that they operate. FIFRA section 7(a), 7 U.S.C. § 136e(a). FIFRA section 7(c) requires that the producer operating an establishment registered under this section provide information about the types and amounts of pesticides and active ingredients being

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[2](...continued)
which the Administrator declares to be a pest * * *." FIFRA section 2(t), 7 U.S.C. § 136(t).

[3]7 U.S.C. § 136(gg).

produced.[4] This is related information to that required to be provided under section 3(c), but it is not the same information.

3. *Section 12(a) of FIFRA*

Section 12(a) of FIFRA makes unlawful a number of actions relating to the sale or distribution of pesticides, including the sale or distribution of pesticides which are not registered under FIFRA section 3(a).[5] In addition, section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136(a)(2)(S), makes unlawful any action which violates any regulation issued pursuant to FIFRA section 3(a). This would include violation of 40 C.F.R. § 152.15, which implements FIFRA section 3(a) and prohibits the distribution or sale of unregistered pesticide products (with certain exceptions not here relevant).[6]

4. *Section 14(a) of FIFRA*

FIFRA section 14(a), 7 U.S.C. § 136*l*(a), provides for civil penalties for violation of FIFRA. In particular, section 14(a)(1) provides for a civil penalty, not to exceed $5,000 for

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[4]FIFRA section 2(w), 7 U.S.C. § 136(w), defines "producer" as "the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide." Section 2(w) defines "produce" as "to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide."

[5]FIFRA section 12(a)(1)(A); 7 U.S.C. § 136j(a)(1)(A).

[6]40 C.F.R. § 152.15 also provides that "[a] pesticide is any substance (or mixture of substances) intended for a pesticidal purpose * * *." Section 152.15 continues on to state that, "[a] substance is considered to be intended for a pesticidal purpose * * * if * * * [t]he person who distributes or sells the substance claims, states, or implies * * * that the substance * * * can or should be used as a pesticide * * *."

each offense, for violations of FIFRA sections 3(a), 12(a)(1)(A), or 12(a)(2)(S). Section 14(a)(3)[7] provides that: "No civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing on such charge in the county, parish, or incorporated city of the residence of the person charged." Section 14(a)(4) allows the Administrator to issue a warning instead of a penalty if "the violation occurred despite the exercise of due care or did not cause harm to health or the environment."

B. *Factual Background*

The relevant facts are undisputed. The Respondent has been a retail seller of its 12% solution of sodium hypochlorite since 1988, having sold thousands of gallons of pesticide product under its own label to the public nearly every year since 1988. Initial Decision at 4. Around June of 1988, Respondent registered itself, under the Green Thumb name, with the United States Environmental Protection Agency ("EPA") as a pesticide producing establishment, pursuant to section 7 of FIFRA, 7 U.S.C. § 136e. Initial Decision at 5. For several years the Respondent's annual reports to EPA, required by FIFRA section 7, included a reference to a purported EPA Product Registration Number for sodium hypochlorite, 1744-2. However, this product registration number, 1744-2 (issued pursuant to section 3 of FIFRA, 7 U.S.C. § 136a), belongs to the product sold by the Respondent's supplier, Jones Chemicals, Inc., and not to the product sold by the Respondent under its own label.[8] Initial Decision at 5.

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[7] 7 U.S.C. § 136*l*(a)(3).

[8] The record is silent as to how the pesticide product sold under Green Thumb's label differs from the product delivered to Green Thumb by its supplier. At a minimum, the pesticide product was repackaged

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The Respondent admits that, in 1992, a supplier representative informed the Respondent, Green Thumb, that it needed to obtain an EPA Product Registration Number for the sodium hypochlorite product that it was selling. The Respondent asserts that the supplier representative said that the supplier would make the necessary application and that, in February of 1993, forms arrived from EPA, which Respondent filled out and returned, with the result that the Respondent's sodium hypochlorite product has been registered with EPA since April of 1993. Initial Decision at 5-6; Respondent's Appeal at 5, 7. The Respondent was inspected by the Complainant in January of 1993, prior to the registration. Initial Decision at 4. It was thereupon discovered that, for several years, Green Thumb had been selling its sodium hypochlorite solution, concededly a pesticide product, without its pesticidal solution having been registered by the Respondent with EPA. Initial Decision at 4-5.

On May 2, 1994, a Complaint was filed against Respondent for selling or distributing an unregistered pesticide product, sodium hypochlorite (12% solution).[9] An

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[8](...continued)
with new labeling. It may also have been reformulated. It is this repackaging and/or reformulation of pesticide product that brings Green Thumb under the provisions of FIFRA here at issue. If Green Thumb merely resold, in the original containers, a registered pesticide product which had been manufactured, labeled, and shipped to it by its supplier, the provisions here at issue would not apply to Green Thumb. *See* note 4, *supra*.

[9]The Complaint alleged, among other things, that: 1. the inspection had found sodium hypochlorite, 12% solution, packaged, labeled, and held for shipment or sale at Green Thumb's facility, which means that the material was being "distributed and sold" within the meaning of section 2(gg) of FIFRA, 7 U.S.C. § 136(gg); 2. the label on the packaging says "[f]or treatment of water in swimming pools," implying (continued...)

answer was filed by Respondent on May 31, 1994. Respondent's Appeal at 2. The Answer consisted of a general denial, even denying the Complaint's notification of a right to a hearing. No demand for a hearing was made in the Answer. Such a demand is required by 40 C.F.R. §§ 22.15(b)(3) and (c). On September 1, 1994, in "its prehearing exchange submissions upon Complaint," Respondent requested a hearing, attaching an affidavit, outlining some proposed testimony, and providing a list of exhibits. Respondent's Appeal at 2. On November 4, 1994, the Complainant filed a motion for accelerated decision on liability, pursuant to 40 C.F.R. § 22.20(a). The only substantive issue disputed by Respondent in responding to the motion for accelerated decision was Complainant's allegation that Green Thumb's pesticide product was not registered under FIFRA section 3(a).[10] In support of its

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[9](...continued)
algicidal and germicidal procedures, and "thus pesticidal purposes;" and 3. Green Thumb's product is not registered under FIFRA section 3(a), thereby violating sections 3(a), 12(a)(1)(A), and 12(a)(2)(S) of FIFRA, as well as the implementing regulation, 40 C.F.R. § 152.15. The Complaint also alerted the Respondent to its right to a hearing under FIFRA section 14(a)(3) (7 U.S.C. § 136*l*(a)(3)), 5 U.S.C. § 551 *et seq.*, and 40 C.F.R. Part 22.

[10]In its motion for accelerated decision, Complainant asserted that the requirements for liability were met in that sections 3(a) and 12(a)(1) of FIFRA only require proof that: 1. Green Thumb is a person; 2. sodium hypochlorite, 12% solution, is a pesticide product; 3. Green Thumb sold or distributed the pesticide product; and 4. the product was not registered under FIFRA section 3(a). Complainant's Accelerated Decision Mem. at 3-5. Respondent has never challenged this legal analysis of what is required to demonstrate liability. Accordingly, the record does not reveal what specific actions Green Thumb took as a seller or distributor of the sodium hypochlorite which it handled under its own label. Because no such issues were raised by Respondent on appeal, we do not inquire into the issue of liability beyond the questions posed by the parties, addressing solely whether Green Thumb failed to
(continued...)

assertion that the pesticide product was not registered, Complainant had submitted the affidavit of EPA employee R. Terence Bonace, to the effect that all FIFRA pesticide registrations are in a computer data base which he had searched, and that he had found no Green Thumb registration for sodium hypochlorite as of the date of the inspection of Green Thumb's establishment. Respondent challenged the use of a computer search as opposed to a paper document search, while not alleging that there was a paper document to be found. Respondent's Opposition To Accelerated Decision at 2. Green Thumb also opposed the claim that the product was not registered by attaching various documents which, it asserted, demonstrated registration. Additionally, Respondent asserted "de jure" or "de facto" registration, claiming that all pertinent information on its pesticide product was available, and that the pesticide product itself was registered with EPA (referring perhaps to other persons who might be selling the same or similar products). *Id*. at 2-3. Respondent argued that this should have sufficed as Green Thumb has nobody on staff to do product registration work, and relies upon its suppliers for this function. *Id*.

Complainant countered Green Thumb's defenses by showing that the documents attached to Green Thumb's opposition to accelerated decision were establishment registration forms under section 7(a) of FIFRA, 7 U.S.C. § 136e(a), and not the product registration forms that are required under section 3(a) of FIFRA. Accelerated Decision Reply at 3-4. Complainant also showed that the product registration number that appeared on the forms submitted by Respondent in its opposition was either 1744-2-03678, which registration number was not issued until after the Complainant's inspection of the Respondent, or, that the

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[10](...continued)
register its pesticide product.

product registration number listed was 1744-2, a number issued to Green Thumb's supplier and not to Green Thumb.[11] *Id*. at 4-5.[12] Com-plainant further argued that there is no such thing as "de jure" or "de facto" registration. *Id*. at 5-6. Green Thumb responded, not with contrary evidence, but with a motion to strike Complainant's affidavit as improper new material.

On March 2, 1995, the Presiding Officer issued an accelerated decision on liability, holding that Green Thumb had engaged in the unlawful distribution and sale of an unregistered pesticide product in violation of FIFRA sections 3 and 12(a)(1)(A). The Presiding Officer found that having no one on staff assigned to do product registration work and relying on suppliers for that function was not a defense. Additionally, the Presiding Officer rejected any argument that FIFRA section 7 establishment registration could substitute for FIFRA section 3 product registration. Thereafter, the Presiding Officer went on to consider a penalty.[13] On August 31, 1995, the Presiding Officer decided the penalty phase on documentary submissions. In defense against a penalty, Respondent asserted, in addition to the

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[11]We note that under certain circumstances Green Thumb's supplier could have distributed sodium hypochlorite solution under Green Thumb's name. *See* 40 C.F.R. § 152.132. There is no suggestion that those circumstances apply in this case.

[12]The Complainant also pointed out that the copies of the FIFRA section 7 reports that were submitted by the Respondent as exhibits all have their dates blacked out. *Id*. at 4.

[13]The Presiding Officer's order which granted partial accelerated decision on liability also required the Complainant to show cause why a warning would not be proper against Green Thumb. After considering the responses of the parties, the Presiding Officer, on April 7, 1995, withdrew the order to show cause and ordered a hearing on written submissions to resolve matters relating to imposition of a civil penalty.

defenses that it had raised against liability, that for five years EPA had accepted, without comment, Green Thumb's Product Registration Number information placed on its FIFRA section 7 reports. Green Thumb also asserted that it has always made a good faith effort to comply with all environmental statutes and regulations, and that there is no allegation or evidence that Green Thumb caused any harm to human health or the environment. The Presiding Officer rejected these defenses as a basis for declining to assess any penalty at all, but reduced the penalty from Complainant's proposed penalty of $4,000.00 to a penalty of $3,000.00. Respondent thereupon filed an appeal.

II. *DISCUSSION*

A. *An Appropriate Hearing Process Was Afforded To Green Thumb*

1. *FIFRA and its implementing Regulations Provide For A Hearing*

FIFRA and its implementing regulations specifically provide that respondents such as Green Thumb are entitled to an "opportunity for a hearing." FIFRA section 14(a)(3); 40 C.F.R. §§ 22.14(a)(6) and 22.15(c). The Presiding Officer decided this matter upon a documentary record compiled by the parties, without taking any evidence or argument in oral proceedings. One of the grounds by which Green Thumb challenges the decision of the Presiding Officer is that it was deprived of the right to a hearing under both FIFRA and constitutional due process.[14] Respondent's Appeal at 8.

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[14]By the term "hearing," we assume that Green Thumb means an oral evidentiary proceeding where Respondent is given the opportunity to present and cross-examine witnesses, with counsel for both sides appearing before the Presiding Officer. Respondent's Appeal at 8. As a

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Neither the facts nor the law support these allegations. There is no question but that Green Thumb was afforded an "opportunity for a hearing," including an evidentiary hearing where it would be allowed to present witnesses in support of its case and to cross-examine witnesses against it. Specifically, Green Thumb was advised in the Complaint of its FIFRA-based right to request a hearing and when it should make its request for that hearing.[15] This information

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[14](...continued)
general rule however, a disposition upon motion papers alone is a "hearing." *See In re General Electric Co.*, 4 E.A.D. 615, 627, 632-33, 639 (EAB 1993) (right to a hearing before modification of a RCRA permit; holding that the due process right to a hearing, including the right to oral presentation, is flexible, depending upon the circumstances, and that a hearing on documents alone may be sufficient); *Northwest Food Processors Assn. v. Reilly*, 886 F.2d 1075, 1077-78 (9th Cir. 1989) (right to a public hearing on the cancellation of a pesticide registration was satisfied by the creation of a written record, without oral presentation) (citing *EDF v. Costle*, 631 F.2d 922, 926-32 (D.C. Cir. 1980) (no oral presentation required for a public hearing on restricting use of a pesticide)), *cert. denied*, 497 U.S. 1004 (1990).

[15]The Complaint contains, at page 5, the following paragraphs:

OPPORTUNITY TO REQUEST A HEARING

As provided in Section 14(a)(3) of FIFRA, 7 U.S.C. § 136l(a)(3), and in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., you have the right to request a hearing regarding the proposed Complaint, to contest any material fact contained in the Complaint, and/or to contest the appropriateness of the amount of the proposed penalty. Any hearing that you request will be held and conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 55 et seq., and the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22. A copy of these rules accompanies this Complaint.

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was included in the Complaint pursuant to 40 C.F.R. § 22.14(a)(6), which requires each complaint to include the following information: "Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty." In response to the Complaint, Green Thumb filed a timely Answer but did not include a request for a hearing. Instead, Green Thumb "denied" the portion of the Complaint informing it of its right to a hearing.[16] Based on these facts alone,[17] the Presiding Officer correctly found that there was "no specific request by respondent for a hearing as required by 40 C.F.R. § 22.15(c)."[18]

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[15](...continued)

If you wish to avoid being found in default, you must file a written Answer to this Complaint and Notice of Opportunity for a Hearing with the Regional Hearing Clerk * * * within twenty (20) days of service of this Complaint. * * * The Answer must also state: * * * Whether you request a hearing.

[16]The regulations direct a respondent to "clearly and directly admit, deny or explain each of the factual allegations contained in the complaint * * *. 40 C.F.R. § 22.15(b). The factual allegations of the Complaint filed against Green Thumb appear in numbered paragraphs, under the headings "General Allegations" and "Specific Violation." The information regarding hearing rights, in contrast, appears in unnumbered paragraphs near the end of the Complaint, under the all capital letter, bold-typed, underlined, heading, "Opportunity To Request A Hearing." For the text of the latter, see note 15, *supra*.

[17]Additionally, Green Thumb had argued, at page 2 of its reply papers on whether a warning was the appropriate penalty, that "[a] hearing in a case of this nature would be a colossal waste of the parties resources." Green Thumb later asserted that it had never agreed to waive an oral hearing if there was going to be a penalty, but only if there was going to be a warning. Respondent's Appeal at 4. See also note 19, *infra*, and accompanying text.

[18]Decision of April 7, 1995, at 2.

The Supreme Court has said that the use of the word "opportunity" in connection with a statutory provision for a hearing, means that the agency may key such hearings to timely requests for a hearing. *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 214 (1980) (request for public hearing on issuance of an NPDES permit). We hold that the statutory language, giving an opportunity for a hearing, means that no absolute right to a hearing was provided in FIFRA, and that Green Thumb's failure to make a timely request for a hearing constitutes a waiver of the opportunity for a hearing for both the liability and penalty phases of the proceedings. *See National Coal Operators' Assn. v. Kleppe*, 423 U.S. 388, 397-400 (1976) (failure to make a timely request for a hearing on an administrative civil penalty under the Federal Coal Mine Health and Safety Act of 1969, which Act contains a similar "opportunity" for a hearing provision, waives right to an evidentiary hearing and formal findings of fact).

The Presiding Officer did not specifically rule upon the question of whether Respondent's actions or inactions had waived a hearing. Instead, the Presiding Officer noted that the Respondent had failed to request a hearing in its answer, as required by 40 C.F.R. § 22.15, and then proceeded to consider whether Respondent had an additional constitutional right to an oral evidentiary hearing.[19] Green Thumb claims that by deciding not to hold

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[19]As noted above, at Point I.B, while the Answer, a general denial, clearly failed to make the required timely demand for a hearing, Respondent, in "its prehearing exchange submissions upon Complaint" belatedly requested a hearing. Respondent's Appeal at 2. This was possible because, after Respondent had filed its Answer, the Presiding Officer issued a lengthy form order governing future proceedings. Included was a paragraph on prehearing exchanges. Even if the Presiding Officer, whose docket, we can safely say is bountiful if not overcrowded, did not delete the reference to "prehearing exchange

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an oral evidentiary hearing the Presiding Officer deprived it of due process. We disagree. Green Thumb, as explained above, was clearly afforded this opportunity by the Agency.[20] By providing Green Thumb with the opportunity for a hearing, the Agency afforded Green Thumb all the due process to which Green Thumb is entitled under law. While it is clear that the government may only impose a sanction on someone in accordance with due process, that requirement is fulfilled by providing a citizen with a right to a hearing or, more specifically, with a meaningful opportunity for a hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976).[21] The Agency also clearly afforded Green Thumb due process as a matter of fact, by advising and informing Green Thumb in the Complaint of when and how to request a hearing. Furthermore, all of these procedures are buttressed by the regulations' reserving to the Presiding Officer the discretion to hold a hearing notwithstanding a respondent's failure to request a hearing (discussed next at Point II.A.2).

2. *The Presiding Officer's Discretion To Hold A Hearing*

Notwithstanding Green Thumb's failure to make a timely request for a hearing, the Presiding Officer retained

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[19](...continued)
submissions" in this form order, the inclusion of this paragraph did not undo the effects of Respondent's failure to make a timely demand for a hearing.

[20]In the case of FIFRA, a right to a hearing is conferred by statute and regulation to those who properly request it, and thus due process by that reason alone has been afforded Green Thumb as a matter of law.

[21]For a full discussion of the constitutional right to a hearing, and of *Mathews v. Eldridge, see In re General Electric Co.*, 4 E.A.D. at 627, 632-33, 639. *General Electric* supports the Presiding Officer's conclusion that a documentary hearing would be sufficient here.

discretion to hold a hearing in his informed discretion, as provided by 40 C.F.R. § 22.15(c).[22] Upon due consideration, the Presiding Officer declined to hold an evidentiary hearing with live testimony, but decided instead to resolve the matter based upon a documentary record to be developed by the parties. Decision of April 7, 1995, at 2. Given that the regulation, 40 C.F.R. § 22.15(c), confers discretion on presiding officers to hold or not hold a hearing under the circumstances presented here, it is appropriate for us to review his exercise of discretion.

3. *Any Demand For A Hearing Must Raise Material Issues Of Fact*

FIFRA section 14(a)(3) clearly provides for the "opportunity for a hearing" before imposition of a civil penalty. Such language notwithstanding, a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue. The Supreme Court, in *Costle v. Pacific Legal Foundation*, 445 U.S. at 214 n.12, noted with approval the decision in *Independent Bankers Assn. v. Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975), to the effect that "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests." Indeed, the general federal rule is that a hearing need not be held in every case and in every circumstance. *See County of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984) (in order to seek review of

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[22]That regulation provides, in relevant part:

> *Request for Hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of the respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

administrative procedures, a person must allege material facts demonstrating prejudice from the alleged errors during those procedures) (citing *Vermont Yankee Nuclear Power Co. v. NRDC*, 435 U.S. 519, 558 (1978)), *cert. denied*, 469 U.S. 1189 (1985). Even the constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute. *See Codd v. Velger*, 429 U.S. 624, 627 (1977) (in order to obtain review of derogatory information placed into a government personnel file, the injured person must allege that the material is untrue).

The Presiding Officer held that there were no genuine material facts at issue that required an oral evidentiary hearing, and that a hearing on a documentary record would therefore be sufficient, citing to *Mathews v. Eldridge*, 424 U.S. at 334-45. Hearing Decision at 2-3. This principle that one must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing is at the heart of all procedures for summary disposition, whether as to summary judgment in a judicial context, or as to administrative proceedings. Accordingly, review by this Board is governed by an administrative summary judgment standard, requiring the timely presentation of a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P.[23] *See In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct Sewer Authority v. EPA*, 35 F.3d 300 (1st Cir. 1994). In *Mayaguez*, we referred in particular to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985), which states that "[o]nly disputes over facts that might affect the outcome of

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[23]Our regulations expressly provide that an accelerated decision on all or part of the proceedings may be rendered, without an oral hearing, on the documentary evidence, "if no genuine issue of material fact exists." 40 C.F.R. § 22.20(a).

the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Not only must a party opposing summary judgment raise an issue of material fact, but that party must demonstrate that this dispute is "genuine" by referencing probative evidence in the record, or by producing such evidence. *See In re Dos Republicas Resources Co., Inc.*, NPDES Appeal No. 96-1, slip op. at 27 (EAB, Dec. 2, 1996), 6 E.A.D. __; *In re City of Fort Worth*, NPDES Appeal No. 95-8, slip op. at 17-18 and n.17 (EAB, April 5, 1996), 6 E.A.D. ____; *Mayaguez*, 4 E.A.D. at 782; *Hicks v. Southern Md. Health Systems Agency*, 737 F.2d 399, 402-03 n.4 (4th Cir. 1984).[24]

Green Thumb did not put into issue, before the Presiding Officer, a single genuine issue of material fact, *i.e.*, a factual dispute whose resolution would change the result here in Green Thumb's favor, either as to the issue of liability for a civil penalty, or as to the amount of such a penalty (discussed *infra*, at Point II.C). On appeal, Green Thumb still does not allege what evidence it would have produced at an oral hearing, on any issue, that it could not otherwise have produced, or how that evidence could have changed the result here, on any issue, to one more in its favor. Green Thumb implicitly admits that it did not register its sodium hypochlorite solution under the procedures required in FIFRA section 3. Green Thumb also admits that

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[24]Summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up. *See In re Dos Republicas Resources Co., Inc.; United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381 (2d Cir. 1982) (quoting *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980): "[T]he mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party."); *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981).

it assigned no employee to the task of seeing to it that FIFRA requirements are met. Green Thumb admits that it knew that there was a FIFRA section 3(a) registration requirement for its sodium hypochlorite solution before Green Thumb's facility was inspected and was found to be selling an unregistered pesticide product.

Based on the foregoing, we conclude that the Respondent was not entitled to an oral evidentiary hearing, because it did not timely request such a hearing, and because it did not raise any genuine issue of material fact which would have been the subject of testimony at such a hearing.[25] *Costle v. Pacific Legal Foundation*; *National Coal Operators' Assn. v. Kleppe*; *Codd v. Velger*; *County of Del Norte v. United States*. The Presiding Officer's election not to hold an oral evidentiary hearing was neither erroneous nor unreasonable. We discuss below the merits of the Presiding Officer's decision as to liability and as to the imposition of a civil penalty.

B. *Green Thumb Failed To Register Its Pesticide Product*

On the issue of liability, or Green Thumb's failure to register its pesticide product before selling or distributing that product, the Respondent challenged only the allegation that its pesticide product was not registered under section

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[25]FIFRA section 14(a)(3) provides that, before a penalty may be assessed, there be the opportunity for a hearing "in the county, parish, or incorporated city of the residence of the person charged." This suggests that something more than a hearing on a documentary record may be intended. EPA's General Counsel has issued an opinion to the effect that FIFRA section 14(a)(3) requires an APA (5 U.S.C. § 556) hearing before a civil penalty may be assessed, and that the presumption is that the hearing must be on the record. EPA General Counsel's Opinion, February 12, 1973. However, that opinion does not address the issue of whether a hearing must be held when the central facts are undisputed.

3(a) of FIFRA. Most of that challenge was directed toward procedure or rulings on evidence.

1. *Procedural Issues on Liability*

The regulations governing civil penalty proceedings are to be found at 40 C.F.R. Part 22. *See* 40 C.F.R. § 22.01(a)(1). The Presiding Officer is required by 40 C.F.R. § 22.04(c) to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." Additionally, "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value * * *." 40 C.F.R. § 22.22.

The Complainant based its initial case on liability upon a showing that it had searched EPA's computerized data base and had not found any registration of sodium hypochlorite, 12% solution, by or on behalf of Green Thumb. In its defense, Respondent produced registration documents which Green Thumb had filed under FIFRA section 7.[26] The

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[26]Respondent did object that the Complainant had relied upon a search of a computer data base to determine that the pesticide product was unregistered, rather than a search of paper files. This objection is frivolous in light of Respondent's implicit admission that it did not register its pesticide product under FIFRA section 3(a), and the undisputed fact that the section 3(a) pesticide product registration number that the Respondent did use in its section 7 papers belongs to another person. The objection is also clearly at odds with the Federal Rules of Evidence, Rules 803(6)-(8) and (10), which expressly allow proof of failure to act by means of searches of data bases where such actions would normally be recorded if they had been taken. We have previously said that the Federal Rules of Evidence are more restrictive than our administrative rules. However, while not bound by such rules, we have said that we would accept evidence admissible under Rules 803(8) and (10), and that the absence of documentary evidence in federal records is satisfactory proof of the nonoccurrence of any unrecorded event. *See In*

(continued...)

Presiding Officer permitted the Complainant to file responsive documents showing that this submission was misleading, and explaining the difference between FIFRA sections 3 and 7. This was entirely proper under any evidentiary rules, and is certainly permitted by 40 C.F.R. Part 22. The material produced by Complainant was in response to issues raised by Respondent, and did not represent new argument by Complainant. Moreover, Respondent could have moved to reply to Complainant's material, but did not. Even now, Respondent does not deny the accuracy of Complainant's evidentiary materials and analysis. The Presiding Officer made no error in receiving probative and useful responsive documentary evidence to rebut Respondent's opposition to an accelerated decision, and also in using those materials in the civil penalty phase of the proceedings. *See In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. at 369-70 (Region may rely upon reports and other documents in preference to a respondent's testimony). *See also In re Central Paint and Body Shop, Inc.*, 2 E.A.D. 309, 310 (CJO 1987) ("The presiding officer has broad authority to control the hearing * * *.") (citing 40 C.F.R. § 22.04(c) and also, at 311, quoting 40 C.F.R. § 22.22(a): "The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly prejudicial, or otherwise unreliable or of little probative value [admitting hearsay evidence].").

2. *Respondent's Registration Efforts*

The Respondent, despite the fact that it does not dispute that it did not proceed through the formal steps required by FIFRA section 3(a) in order to register its pesticide product, insists that it should not be found to have

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[26](...continued)
re Great Lakes Division of National Steel Corp., 5 E.A.D. 355, 369-70 and n.34 (EAB 1994).

violated section 12(a)(1)(A) of FIFRA. In support of this conclusion, Respondent makes several assertions which we treat seriatim:

1. Green Thumb is a small company "and has no one on staff who is experienced and knowledgeable about USEPA statutes and regulations that may be pertinent to its business. * * * Traditionally, Respondent has relied upon its suppliers, who are usually larger and more sophisticated companies, to keep Respondent informed about any legal requirements that may apply to Respondent's operations." Respondent's Appeal at 5. In 1992, a supplier representative informed Green Thumb that Green Thumb needed to obtain an EPA Product Registration Number for the sodium hypochlorite product that Green Thumb was selling. The representative said that the supplier would make the application. *Id*.

First of all, these assertions do not demonstrate any attempt to comply with FIFRA section 3(a), which requires a detailed registration of Green Thumb's pesticide product. Green Thumb plainly did not do what the statute required. That should end the matter. However, we would point out that not only do Respondent's assertions fail to address FIFRA's requirements, but also that they are quite troubling. The Respondent seems unaware that its statements are not at all exculpatory. Federal law often imposes liability upon corporations or corporate officers for nonfeasance in public health and welfare situations. Respondent's statutory duty to register its pesticide product was mandatory and could not be avoided by purporting to delegate it to another person. The failure to assign any employee to that responsibility, and the reliance upon another company's salesman to perform the work, provide no defense. The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result. The environmental statutes have long been

construed as imposing strict liability for failure to meet their requirements. *See The President Coolidge*, 101 F.2d 638, 638-40 (9th Cir. 1939), decided under the 1899 Rivers and Harbors Act. The Court held that the Act was prohibitory, and did not mean to utilize a due care standard.[27] The environmental statutes since that time, including FIFRA, consistently have been construed as imposing strict liability for failure to meet their requirements. *See In re Kay Dee Veterinary*, 2 E.A.D. 646, 649 (CJO 1988) (strict liability under FIFRA). *See also In re Chem-Nuclear Systems, Inc.*, CERCLA § 106(b) Petition No. 94-11, slip op. at 14 (EAB Apr. 29, 1996) (strict liability under CERCLA), 6 E.A.D. __; *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994) (strict liability under Clean Air Act asbestos regulations); *In re Strandley*, 3 E.A.D. 718, 722 (CJO 1991) (strict liability under TSCA); *In re Humko Products*, 2 E.A.D. 697, 703 (CJO 1988) (strict liability under RCRA).[28] Respondent's failure to take control

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[27]*See also United States v. Standard Oil Co.*, 384 U.S. 224, 225-26, 229-30 (1966) (Aviation gasoline was accidentally discharged into a stream. Defendant was charged for unpermitted discharge of refuse under the 1899 Act, but argued that the gasoline was not refuse, being valuable material not intentionally lost. The argument was rejected upon the ground that the statute at issue had a remedial intent which barred such a cramped and narrow interpretation). Respondent's attempt to interpose technical excuses for its failure to meet the clear requirements of FIFRA section 3(a) is at variance with well established principles for interpretation of environmental laws.

[28]There are also numerous court decisions finding strict liability under the environmental statutes. *Babbitt v. Sweet Home Ch. Of Commun. For Great Or.*, 515 U.S. __, 115 S. Ct. 2407, 2420 (1995) (CERCLA) (O'Connor, J., concurring) (citing *New York v. Shore Realty Co.*, 759 F.2d 1032, 1044 and n.12 (2d Cir. 1985) (CERCLA and the Clean Water Act)); *In re Glacier Bay*, 71 F.3d 1447, 1455 (9th Cir. 1995) (Clean Water Act discharges); *GNB Battery Tech., Inc. v. Gould, Inc.*, 65 F.3d 615, 618 (7th Cir. 1995) (RCRA); *United States v. Brace*, 41 F.3d 117, 122 (3d Cir. 1994) (Clean Water Act permits); *Town of Munster v.*

(continued...)

of its responsibilities under FIFRA is evidence of culpability, not innocence.[29]

Respondent's claim that FIFRA and its enabling regulations are simply too difficult[30] is not a defense. *See United States v. Erickson*, 75 F.3d 470, 481 (9th Cir. 1996) (Defendants asserted that they did not understand Medicare's complicated billing requirements. They must therefore have had reason to believe that their practices were illegal, and simply failed to investigate and determine proper techniques). Additionally, Respondent admits that when it was told by its supplier that Green Thumb needed to register its pesticide product with EPA, instead of taking charge of this responsibility, Green Thumb left it to its supplier to procure the necessary papers for Green Thumb. Initial Decision at 5-6; Respondent's Appeal at 5, 7. Similar failure to take action so as to ensure compliance with environmental requirements has supported civil penalties

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[28](...continued)
Sherwin-Williams Co., 27 F.3d 1268, 1272 (7th Cir. 1994) (CERCLA and Clean Water Act).

[29]To put it another way, under federal law mandatory duties to achieve certain results may not be avoided by failure to retain control over the situation. *See Italia Society Per Azioni Di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 317 n.3 (1964); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 211-12 (1963) (duty to maintain seaworthiness remains, even if control of ship is released to others); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247-50 (6th Cir. 1989) (Action for willful failure to investigate condition of prisoner in the County's care. Delegation of this duty to contractors was no defense.), *cert. denied*, 495 U.S. 932 (1990); *Smith v. United States*, 497 F.2d 500, 514 (5th Cir. 1974) (non-delegable duty to meet regulations); *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 607 (5th Cir. 1966) (non-delegable duty to maintain accurate records).

[30]Respondent's Appeal at 13; Respondent's Opposition to Penalty at 2-4.

under other environmental statutes. *See In re Echevarria*; *In re Strandley*.[31]

Respondent's statements about its operations in general and its actions here in particular are not exculpatory.

2. In May or June of 1988, Green Thumb registered the company's facility (under FIFRA section 7), and included a product registration number, 1744-2. For five years, nobody told Green Thumb "that the EPA Product Registration Number information placed on the form was not complete." The reports were "accepted without comment or request for further information." Respondent's Appeal at 5, 7.

This estoppel-like argument does not have merit. The information required for a FIFRA section 7 registration for a facility is not the same information as is required for a FIFRA section 3(a) registration of a pesticide product. The temporary acceptance of unresponsive documents does not estop the United States. *See Federal Crop Ins. v. Merrill*, 332 U.S. 380, 385 (1947). Neither can the United States be estopped to enforce its laws simply because it has not taken action for several years. *See INS v. Hibi*, 414 U.S. 5, 8-10 (1973).[32]

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[31]*See also United States v. Production Plastics, Inc.*, 742 F. Supp. 956, 960 (W.D. Mich. 1990) ("RCRA is a remedial strict liability statute which is construed liberally."), *aff'd*, 955 F.2d 45 (6th Cir. 1992).

[32]*See also In re Landfill, Inc.*, 3 E.A.D. 461, 468 (CJO 1990) (in a RCRA case involving ground water monitoring, EPA would not have been estopped by incorrect advice from its own personnel, and was certainly not estopped by the advice of others) (citing *Federal Crop Ins. v. Merrill*, and *Schweiker v. Hanson*, 450 U.S. 785, 793 (1981)).

Green Thumb would have failed to meet its FIFRA section 3, pesticide product registration obligation even if, for the sake of discussion, its FIFRA section 7 establishment registration papers had actually contained the same information as was required for a section 3 pesticide product registration (which it did not). Green Thumb did not file the required section 3 registration documents. FIFRA requires such registration, and it is common for registrants to have filed both section 3 and section 7 registration documents. Indeed, there are producers who have product registrations under FIFRA section 3 who also have multiple facilities, each requiring a separate establishment registration under FIFRA section 7. It is unreasonable to expect EPA to be required to perform a search of its considerable files so as to assemble the information required for a section 3 pesticide product registration for private parties who fail to file section 3 documentation. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 835-36 (9th Cir. 1986) (where complex information is needed to support a permit, it is not to be expected that the permitting agency will independently locate this information). If a statute or regulation requires the filing of specific information in a specific form, that requirement is not satisfied by filing something significantly different. *See Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198, 203-206 (9th Cir. 1989) (where official mining records did not contain required documentary filings, miner could not rely upon its filings of other documents to substitute for the required documents).[33] Respondent is entitled to no benefit

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[33]*See also In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 521-22 (EAB 1993) (The settlement of a prosecution for TSCA section 13 violations (failure to certify that imported chemicals met TSCA requirements) did not also resolve TSCA section 8 violations (failure to report on chemical manufacture), although both violations involve providing information about chemicals. The two sections have different purposes).

because its FIFRA section 7 filings, and its lack of FIFRA section 3(a) filings, went unchallenged for several years.

The Presiding Officer's decision that Green Thumb had sold or distributed an unregistered pesticide product, based upon the documentary record before him, was neither erroneous nor unreasonable.

C. *Whether to Impose a Penalty or a Warning*

1. *Procedural Issues*

On the subject of a penalty, the only evidence that Respondent objected to was the affidavit of calculation of a penalty. This affidavit did nothing more than identify EPA's penalty policy document, and show how a penalty was derived from it.[34] The affiant did not testify to any factual matter that has been put at issue by the Respondent, and therefore the affidavit was properly received into evidence. Indeed, Respondent used the structure of the affidavit and the civil penalty policy in its argument for no penalty. The Presiding Officer properly allowed the affidavit into evidence.

2. *The Merits of Whether to Impose a Penalty*

FIFRA section 14(a)(4) provides that: "Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator *may* issue a warning in lieu of assessing a penalty." (emphasis added). On its face, FIFRA does not require the Agency to issue warnings instead of penalties, or to impose penalties of zero. The Agency is vested with discretion, which is manifest from

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[34]Such testimony is commonplace. *See In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. at 358 n.8 and 359 n.13.

FIFRA's use of the word "may," in delineating the Administrator's authority to issue a warning in lieu of assessing a penalty. *See In re Kay Dee Veterinary*, 2 E.A.D. at 649 n.7. *See also Marx v. Centran Corp.*, 747 F.2d 1536, 1546 (6th Cir. 1984) (similar provisions of the banking laws, allowing remission of a civil penalty, held to be discretionary), *cert. denied*, 471 U.S. 1125 (1985).[35] In other words, even if the Administrator were to find that either of the requisite conditions for issuing a warning existed, the Administrator nevertheless retains the discretion to assess a penalty.

Green Thumb asserts that it has always made a good faith effort to comply with all environmental statutes and regulations, implying that its offense is insignificant in light of its prior record. Respondent's Appeal at 7. However, Green Thumb has failed to take charge of its FIFRA responsibilities. Failure to properly register a pesticide product is not harmless or insignificant. Over fifty years ago a similar failure (involving labeling) was considered to be injurious under the Food and Drugs Act of 1906:

> Congress extended the range of its control over illicit and noxious articles * * *. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.

United States v. Dotterweich, 320 U.S. 277, 280, 284 (1943). The Court continued by noting that Congress had simply placed the burden of describing the drugs being shipped upon those who had that information, rather than upon the

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[35]We recognize that sometimes only a zero penalty can be justified. *See Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991).

public. In a similar vein, EPA has held that failure to register pesticides under FIFRA section 3(a) is harmful to the FIFRA program and to the public. *In re Sav-Mart, Inc.*, 4 E.A.D. 732, 738 (EAB 1995). Respondent's failure to register its pesticide product under FIFRA section 3(a) was harmful to the FIFRA regulatory program and to the public. *Id.*[36]

In the instant case there was a complete lack of due care by the Respondent. Such conduct can cause significant harm to the national FIFRA pesticide product registration program. The registration program is the foundation for securing the Agency's ability to protect human health and the environment. Without that foundation in place, the Agency cannot efficiently exercise its other powers conferred under the Act. Without having a pesticide product in its registration database, the Agency cannot, for example, prescribe labeling requirements for the product that set forth effective warnings and specific directions for use intended to protect human health and the environment. It also cannot effect a recall of an unregistered product whose name does not appear in the registration database. As we said in *In re Sav-Mart, Inc.*, 4 E.A.D. at 738 n.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

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[36]*See also In re Everwood Treatment Co., Inc.*, RCRA (3008) Appeal No. 95-1 , slip op. 18-21 (EAB Sept. 27, 1996) (violation damaged the RCRA regulatory program, even if damage to the environment was not great), 6 E.A.D. __.

> 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.

In the instant case, the facts and circumstances surrounding the violation weigh heavily in favor of assessing a penalty, even though the harm from the violation consists of a general harm to the FIFRA pesticide registration program rather than to the health of specific individuals or to components of the ecosystem.[37] Accordingly, we conclude that imposition of a penalty was called for, and was correctly applied.

3. *The Size of Penalty to be Imposed*

Respondent has structured its case entirely as a yes or no dispute over whether there should be any penalty at all. It has never discussed what size penalty it should pay, if it is to pay a penalty of any kind. Indeed, Green Thumb has posited its sole substantive issue on the civil penalty in

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[37]Respondent assumes that it has met both of the conditions that would allow for the issuance of a warning rather than the imposition of a penalty, *i.e.* that it exercised due care, and that there has been no injury to health or to the environment. Respondent's Appeal at 12-15. As we have pointed out above, Respondent certainly did not use due care. As to injury to health or the environment, this is more complicated than Respondent admits. As a result of its failure to register its pesticide product, Respondent initially sold mislabelled sodium hypochlorite to the public. Initial Decision at 13-14. All that can be said at the current time is that no individualized and specific injury to health or the environment is known to have resulted from Respondent's failure to register its product.

these words: "Was it error for the assigned ALJ to determine that Respondent should pay a civil penalty in the amount of $3,000.00 rather than be issued a warning?" Respondent's Appeal at 1. This could be read to concede that if any civil penalty is to be imposed instead of a warning, then $3,000.00 is an appropriate penalty. However, Respondent's arguments are probably intended to be broader than that, arguing for a zero penalty as well as for a warning, and thereby attacking the size of the penalty on several grounds.

We turn then to the question of the size of the penalty. Here, FIFRA section 14(a)(4) provides that: "In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." EPA has prepared guidelines for carrying out this language.[38]

Respondent's arguments that a lower penalty than $3,000.00 was called for, *i.e.*, a penalty of zero, are that: 1. The value of the sodium hypochlorite sales was only a few thousand dollars a month, making Respondent a very small company within EPA's penalty guidelines. Respondent's Appeal at 14. However, it was undisputed that Respondent's gross income from all products was about $1.8 million per year. Initial Decision at 8-9. It is a company's total gross income that EPA utilizes in the FIFRA penalty

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[38]Respondent attacks those guidelines as being unlawful regulations. Respondent's Appeal at 15. We have pointed out that the FIFRA civil penalty guidelines are not regulations and are not binding. *See In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 701 (EAB 1995); *In re Custom Chemical & Agricultural Consulting, Inc.*, 2 E.A.D. at 752, 756. *See also In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, slip op. 33-38 (EAB, Feb. 11, 1997) (TSCA penalty guidelines are not regulations), 6 E.A.D. ____.

policy.[39] *Cf. In re Kirlin Enterprises, Inc.*, 2 E.A.D. 290, 291 n.6 (CJO 1986) (even where a company has a formal separate operating division, if that division has no separate legal identity, we look to the entire corporation as the responsible entity as regards size of operation). 2. Sales of sodium hypochlorite county-wide are jeopardized by "this kind of harassing enforcement action by the USEPA." Respondent's Appeal at 14-15. Assuming that this claim fits within EPA's penalty guidelines, or is otherwise relevant under the statute (Respondent has never claimed that its general ability to stay in business is at issue here), there is no evidence to support this claim, only speculation. Moreover, it is clear that sodium hypochlorite is currently registered by Green Thumb and others (including Green Thumb's supplier). It seems unlikely that a product which is registered by several persons, including the Respondent, will fail to find a supplier in the county if there is a demand. 3. Respondent spends most of its efforts alleging, in one way or another, that the gravity of its offense is low, that it is guilty only of a technical violation, and that no one has been harmed. Respondent's Appeal at 13-17. Respondent is wrong. A regulatory program has been harmed by Green Thumb's refusal to meet the requirements of law. The Presiding Officer, in discussing the gravity of Green Thumb's violation, the good faith of its efforts, and its compliance history, credited Respondent with the fact that it has registered its product, and with the fact that Respondent had no prior infractions. That is why a penalty of only

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[39]Guidelines For the Assessment of Civil Penalties Under Section 14(a) of FIFRA (July 2, 1990) (announced at 55 Fed. Reg. 30032 (July 24, 1990), superseding the FIFRA guidelines at 39 Fed. Reg. 27711 (July 31, 1974)).

$3,000.00 was imposed by the Presiding Officer. Initial Decision at 17-18.[40]

We conclude that a civil penalty was appropriate, and that there is no reason to disturb the amount chosen by the Presiding Officer, $3,000.00.[41]

III. *CONCLUSION*

For the reasons discussed above, the Respondent'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. § 136l(a)(1), a civil penalty of $3,000 is hereby assessed against Respondent, Green Thumb Nursery, Inc., of Canton, Ohio. 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:

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[40]In applying the EPA civil penalty guidelines, the Presiding Officer also considered the toxicity of the pesticide product. Initial Decision at 11-12. The Respondent does not challenge that portion of the Initial Decision.

[41]As can be seen from the above discussion, the Respondent raised no factual issues during the penalty phase of these proceedings that involved witness credibility or any other matter that would have been likely to benefit from an oral hearing.

EPA--Region V
Regional Hearing Clerk
United States Environmental Protection Agency
P.O. Box 70753
Chicago, IL 60673

So ordered.