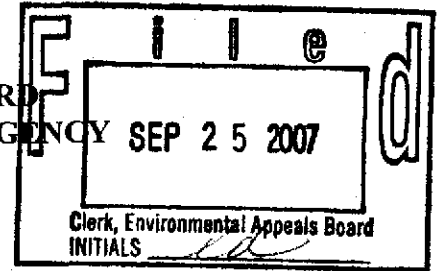


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: _____)
)
Rizing Sun, L.L.C.)
)
Docket No. FIFRA 9-2004-0024)
_____)

FIFRA Appeal No. 07-02

**ORDER AFFIRMING INITIAL DECISION IN PART
AND VACATING IN PART**

On June 8, 2007, the U.S. Environmental Protection Agency, Region 9 (“Region”) filed an appeal from an Initial Decision by Administrative Law Judge Spencer T. Nissen (“ALJ”) dated May 8, 2007. In the proceeding giving rise to the appeal, the Region alleged that Rizing Sun, L.L.C. (“Rizing Sun”) violated sections 12(a)(1)(A) and 12(a)(1)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA” or the “Act”), 7 U.S.C. §§ 136j(a)(1)(A), (E). The violations arose from thirty-one separate distribution or sale transactions of a pesticide that was both misbranded and unregistered. The Region’s administrative complaint proposed a penalty for thirty-one violations of FIFRA section 12(a)(1)(A) (distribution or sale of an unregistered pesticide) and a separate penalty for thirty-one violations of section 12(a)(1)(E) (distribution or sale of a misbranded pesticide). The ALJ found that Rizing Sun violated both FIFRA sections 12(a)(1)(A) and 12(a)(1)(E) in the thirty-one transactions. However, based on his interpretation of the statute and the applicable penalty guidelines, the ALJ determined that FIFRA did not permit the Region to assess a

penalty for a section 12(a)(1)(A) violation and a separate penalty for a section 12(a)(1)(E) violation involving the same distribution or sale. Consequently, the ALJ found that the appropriate base penalty for the violations was \$107,100, half of the penalty the Region proposed in a prehearing exchange. Rizing Sun asserted an inability to pay the Region's proposed penalty, and the ALJ found that while Rizing Sun could not afford to pay a \$200,000 penalty, a \$10,000 penalty was appropriate and a penalty of that amount was assessed.

On appeal, the Region raises a singular issue, "whether EPA can assess separate civil penalties for violations of FIFRA section[s] 12(a)(1)(A) and 12(a)(1)(E) arising from the distribution or sale of the same pesticide in the same transaction." Appellant's Brief in Support of Notice of Appeal ("Region's Br.") at 1. The Region asks the Environmental Appeals Board ("Board") to vacate the conclusion of law, Conclusion III.7, that discusses the assessment of separate penalties for violations of sections 12(a)(1)(A) and 12(a)(1)(E). The Region does not seek to disturb the amount of the penalty assessed as it was based on Rizing Sun's inability to pay, rather than the number of offenses, and thus was unaffected by the ALJ's allegedly erroneous legal conclusion. Rizing Sun did not file a response to the appeal.

For the reasons set forth below, we vacate Conclusion III.7 and Part IV.B of the Initial Decision, which reject the assessment of a penalty for the distribution or sale of an unregistered pesticide and a separate penalty for the distribution or sale of the same pesticide that is also misbranded. Because we have substantial doubts about the ALJ's

legal conclusion and because this issue is ultimately irrelevant to the disposition of this case, we believe it is preferable to leave the issue for a future case where there is full briefing in a true adversarial context. The penalty assessed in the Initial Decision, which is not in dispute, is affirmed.

I. BACKGROUND

A. Statutory and Regulatory Background

FIFRA creates a national registration system for the purpose of regulating the manufacture, sale, distribution and use of pesticides in the United States. Pursuant to FIFRA sections 3 and 12, no pesticide may be lawfully sold or distributed prior to registration with the EPA. FIFRA §§ 3(a), 12(a)(1)(A), 7 U.S.C. §§ 136a(a), 136j(a)(1)(A). It is also unlawful to sell or distribute a misbranded pesticide.¹ FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E); *see also* FIFRA § 2(q), 7 U.S.C. § 136(q) (defining “misbranded”). A “pesticide” includes “any substance or mixture of substances

¹ Section 12(a) provides in relevant part:

- (1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State 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;
* * * [; or]
 - (E) any pesticide which is adulterated or misbranded[.]

FIFRA § 12(a)(1)(A)-(F), 7 U.S.C. § 136j(a)(1)(A)-(F).

intended for preventing, destroying, repelling, or mitigating any pest.” FIFRA § 2(u), 7 U.S.C. § 136(u). “Pests” include “any insect, rodent, nematode, fungus [or] weed * * *.” FIFRA § 2(t), 7 U.S.C. § 136(t). It is undisputed that Rizing Sun distributed or sold pesticides in thirty-one separate transactions. It is also undisputed that the pesticides at issue were not registered and were misbranded.²

The sale or distribution of an unregistered pesticide exposes the seller or distributor to the potential assessment of a civil penalty of up to \$5,500 for each offense occurring between January 30, 1997, and March 15, 2004, and \$6,500 for each offense occurring on March 15, 2004, and thereafter.³ FIFRA § 14(a)(1), 7 U.S.C. § 136l(a)(1); 40 C.F.R. § 19.4 & tbl.1. The same civil penalty assessment scheme applies to the sale or distribution of a misbranded pesticide. FIFRA § 14(a)(1), 7 U.S.C. § 136l(a)(1); 40 C.F.R. § 19.4 & tbl.1. When determining the amount of a civil penalty assessed under FIFRA, “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 the business, and the gravity of the violation” must be considered. FIFRA § 14(a)(4), 7 U.S.C. § 136l(a)(4). The “effect

² Rizing Sun did not appeal any of the ALJ’s liability findings in this case.

³ The statutory maximum civil penalty for the unlawful sale or distribution of a pesticide described in section 12(a)(1)(A) through (E) as specified in the Act is \$5,000 for each offense. FIFRA § 14(a)(1), 7 U.S.C. § 136l(a)(1). This maximum penalty has been increased twice in accordance with EPA regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. § 2461 note), *amended* by Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321 (codified at 31 U.S.C. § 3710 note). *See* 40 C.F.R. pt. 19; 69 Fed. Reg. 7124 (Feb. 13, 2004). These statutes direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation.

on the person's ability to continue in the business" is known as the "ability to pay." Additionally, "any civil penalty guidelines issued under the Act" must be taken into account.⁴ 40 C.F.R. § 22.27(b). The *Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act* ("ERP") is the civil penalty guideline applicable to FIFRA penalties. See Office of Compliance Monitoring and Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act* ("FIFRA") (July 2, 1990).

B. *Factual and Procedural Background*

The following findings of fact, which the ALJ made as the basis for his Initial Decision, are not contested on appeal. Rizing Sun is a Nevada corporation operated by Allen H. Smith of Peoria, Arizona. Initial Decision ("Init. Dec.") at 6. The Region's complaint alleges that in 2003 and 2004, Rizing Sun engaged in thirty-one sale or distribution transactions of the pet flea and pest control product known as "Frontline." *Id.* at 13-14. According to the Region, for each transaction, Rizing Sun sold and distributed pesticides that were both unregistered and misbranded, in violation of FIFRA, *id.* at 13, and the proposed penalty thus reflected sixty-two alleged FIFRA violations. *Id.* at 27. The Region proposed a penalty of \$214,200. *Id.* at 15, 27.

⁴ Our discussion of the legal framework for penalty assessment is limited since the penalty amount is not at issue in this case.

Following an administrative hearing, the ALJ concluded that Rizing Sun violated FIFRA by engaging in an unlawful act enumerated in FIFRA section 12: selling and distributing unregistered (§ 12(a)(1)(A)) and misbranded (§ 12(a)(1)(E)) pesticides. *Id.* at 18, 23. The ALJ then determined that the appropriate base penalty for the violations was half the amount the Region proposed because the Region may not assess separate penalties for violations of sections 12(a)(1)(A) and 12(a)(1)(E). *Id.* at 27. The ALJ reasoned that the “unit of violation”⁵ determining the number of violations of FIFRA section 12(a)(1) for which the Region could assess separate penalties against Rizing Sun was the distribution or sale of a pesticide that falls under at least one of the categories described in sections 12(a)(1)(A) through (E). *Id.* at 23. According to the ALJ, a distribution or sale may be unlawful for more than one reason; however, the multiple reasons for unlawfulness do not increase the number of distributions or sales that are the bases for assessing a penalty. *Id.* at 24. Therefore, the Region could only assess penalties for thirty-one violations because there were only thirty-one transactions, and the proper base penalty prior to considering Rizing Sun’s ability to pay was \$107,100. *Id.* at 27.

The evidence adduced during the administrative hearing supported the conclusion that Rizing Sun lacked the ability to pay a penalty of \$200,000 or more. *Id.* at 27. The

⁵ We observed in *In re McLaughlin Gormley King Co.* that “Congress has authority to treat a single act of proscribed conduct as more than one violation of a statute. * * * Courts have typically framed the issue in the criminal context as determining the ‘unit of prosecution’ under the statute.” *In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 344 (citations omitted). The “unit of violation” is the corollary in the civil enforcement context. *See id.*

Region presented a prima facie case that Rizing Sun could afford a \$10,000 penalty, which Rizing Sun did not rebut. *Id.* at 27. The ALJ found \$10,000 to be an appropriate penalty and assessed it against Rizing Sun. *Id.* at 27.

The Region filed this appeal on June 8, 2007, and, as noted above, raises a singular issue, “whether EPA can assess separate civil penalties for violations of FIFRA section 12(a)(1)(A) and 12(a)(1)(E) arising from the distribution or sale of the same pesticide in the same transaction.” Region’s Br. at 1. The Region asks the Board to vacate the Conclusion that discusses the assessment of separate penalties for violations of sections 12(a)(1)(A) and 12(a)(1)(E). The Region does not seek to disturb the penalty assessed as it was based on Rizing Sun’s inability to pay. Rizing Sun, which was *pro se* in the proceeding before the ALJ, did not oppose the Region’s appeal. With the Board’s permission, CropLife America, Responsible Industry for a Sound Environment, and the American Chemistry Council Biocides Panel (collectively, the “*Amici*”) filed a brief as *amici curiae* on August 31, 2007. Brief of *Amici Curiae* (“*Amici Curiae* Br.”).

II. DISCUSSION

As noted above, the Region does not seek an adjustment to the penalty; rather, the Region requests the Board vacate certain portions of the Initial Decision that discuss whether the Region may assess two separate penalties for simultaneous violations of FIFRA sections 12(a)(1)(A) and 12(a)(1)(E) when the violations arise from the sale or distribution of one pesticide in a single transaction. The Region essentially disagrees

with the ALJ's determination that EPA may assess only one penalty for each sale or distribution of a pesticide that may simultaneously constitute more than one of the enumerated unlawful acts in section 12(a)(1). That is, even if a single transaction may constitute two or more unlawful acts as defined in section 12(a)(1), according to the Initial Decision, only one penalty may be assessed. The Region's concern is that the ALJ's allegedly erroneous legal conclusion could be relied upon as precedent in some future case. Rizing Sun did not respond to the Region's appeal.

The *Amici* notably do not argue the merits of the appeal. Instead, the *Amici* state that only orders adverse to an appellant may be appealed to the Board and assert that, because the penalty calculation in the Initial Decision was not adverse to the Region, this appeal does not arise from a decision adverse to the appellant. *See Amici Curiae* Br. at 5. Specifically, the *Amici* frame the Region's appeal as one that "relates to the penalty calculation, and given that the penalty is not at issue, the penalty calculation in the Initial Decision cannot be said to be adverse to the [Region]." *Id.*

When confronted with cases where neither party has appealed the amount of the penalty, we have previously expressed our inclination not "to be drawn into disputes concerning the language or analysis contained in an ALJ's penalty assessment." *In re Rhee Bros., Inc.*, FIFRA Appeal No. 06-02, slip. op. at 12 (EAB May 17, 2007), 13 E.A.D. _____. The administrative adjudicatory process becomes less adversarial when parties do not possess a financial stake in an appeal's outcome, resulting in little incentive to fully research and present arguments regarding the issues appealed. *In re*

Burlington N. R.R., 5 E.A.D. 106, 108-09 (EAB 1994). The concern we expressed in *Rhee Bros.* about the potential lack of “full and balanced briefing of the issues” is illustrated in this case by Rizing Sun’s decision not to file a response to the Region’s appeal. *Rhee Bros.*, slip. op. at 12, 13 E.A.D. at _____. Rizing Sun’s demonstrated disinterest in litigating the merits of this appeal reinforces our concern regarding the lack of adversaries in this case. Where there is no appeal of a penalty, we are concerned about rendering a decision on the merits when true adversaries do not exist, and, absent a compelling justification, will generally decline to do so.

In this case, based on our own analysis of the issue, we have substantial doubts about the ALJ’s legal conclusion. For the reasons just discussed, we are not prepared, in the absence of full adversarial briefing, to find, as the Region urges, that the ALJ’s conclusion is erroneous. However, we do believe the preferable course would be to strike the disputed language, which is irrelevant to the ultimate disposition of the case, and leave the issue for a future case where the issue is presented in a truly adversarial context.

III. CONCLUSION

Based on the foregoing, Conclusion III.7 and Part IV.B of the Initial Decision are vacated. The penalty amount assessed in the Initial Decision (\$10,000) is affirmed. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of

service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:


U.S. EPA, Region 9
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

A transmittal letter identifying the case name and the EPA docket number, plus the Respondent's name and address must accompany the check. 40 C.F.R. § 22.31(c).

So ordered.⁶

ENVIRONMENTAL APPEALS BOARD

Dated: 9/25/07

By: 
Edward E. Reich
Environmental Appeals Judge

⁶ The three-judge panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Decision and Order in the matter of *Rizing Sun, L.L.C.*, FIFRA Appeal No. 07-02, were sent to the following persons in the manner indicated:

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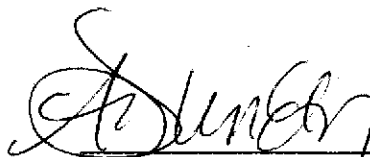
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Date: SEP 25 2007



Annette Duncan
Secretary