

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

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In re:)
)
Microban Products Co.) FIFRA Appeal No. 99-1
)
Docket No. 98-H-01)
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ORDER DENYING MOTION FOR INTERLOCUTORY REVIEW

On March 22, 1999, the U.S. Environmental Protection Agency ("EPA") filed a motion for interlocutory appeal with the Environmental Appeals Board from the February 18, 1999 ruling of Administrative Law Judge William B. Moran ("Presiding Officer") in the above-referenced matter. Microban Products Company ("Microban") filed its opposition to EPA's motion for interlocutory appeal on March 29, 1999. On March 31, 1999, EPA moved for leave to file a reply to Microban's opposition. On April 6, 1999, Microban then filed a motion opposing EPA's motion for leave to file a reply. The Board denied EPA's motion to file a reply by order dated April 12, 1999.

In his ruling, the Presiding Officer rejected EPA's assertion that Microban had committed 32 violations of section

12(a)(1)(B) the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1)(B), based on 32 sales or distributions of the registered pesticide, Microban Additive "B." See Order Determining Number of Violations and Ruling on Respondent's Motion for Accelerated Decision as to Penalty at 9-10 (Feb. 18, 1999). The Presiding Officer concluded that Microban had committed five violations based on five documents containing unapproved claims regarding the effectiveness of Microban Additive "B." *Id.*

In this instance, EPA seeks interlocutory review of the following issue: Whether "individual sales and shipments of a pesticide cannot trigger independent violations under Section 12(a)(1)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) unless the unapproved claims *physically* accompany the pesticides during each sale and shipment." See Complainant's Motion for Interlocutory Appeal at 1 (March 22, 1999). Pursuant to 40 C.F.R. § 22.29(c), where a Presiding Officer denies certification, interlocutory appeal will be granted only where the Board determines "in exceptional circumstances, that to delay review would be contrary to the public interest." EPA has asserted that the Board should take review now, but EPA has failed to convince us that such

exceptional circumstances exist. EPA's motion for interlocutory appeal is therefore denied.¹

So ordered.

Dated: 5/10/99

ENVIRONMENTAL APPEALS

BOARD

By: _____ /s/
Kathie A. Stein
Environmental Appeals Judge

¹The Board notes that this order does not, nor should it be construed to, rule on the merits of the Presiding Officer's decision to limit Microban's liability to five (5), rather than thirty-two (32), violations of FIFRA section 12(a)(1)(B).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order in the matter of Microban Products Co., FIFRA Appeal No. 99-1, were sent to the following persons in the manner indicated:

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Dated: 5/10/99

_____/s/
Annette Duncan
Secretary