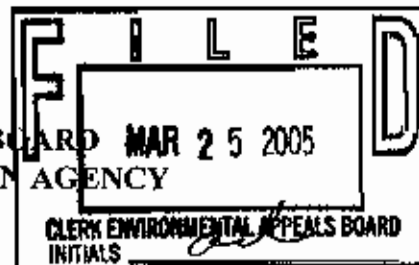


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



\_\_\_\_\_  
In re: \_\_\_\_\_ )  
FRM Chem, Inc., \_\_\_\_\_ )  
a/k/a Industrial Specialties \_\_\_\_\_ )  
Docket No. FIFRA-07-2004-0041 \_\_\_\_\_ )  
\_\_\_\_\_ )

FIFRA Appeal No. 05-01

**ORDER REGARDING MOTION FOR CLARIFICATION OF RECORD**

United States Environmental Protection Agency, Region 7 (the "Region") timely filed a Notice of Appeal on March 18, 2005, from the Initial Decision issued on February 16, 2005 (the "Initial Decision"), in the above-referenced matter. The Initial Decision was issued by Administrative Law Judge William B. Moran (the "ALJ") assessing a civil administrative penalty against FRM Chem, Inc. ("FRM"). The Region also filed a motion requesting that the Board "clarify" that a particular document the ALJ referred to in the Initial Decision is not "part of the official record" in this proceeding.

In its motion for clarification, the Region correctly notes that 40 C.F.R. § 22.5(a) requires that all documents filed in a proceeding must be served on all parties and that 40 C.F.R. § 22.26 requires that documents submitted after the hearing must be served on all parties. The Region also correctly notes that 40 C.F.R. § 22.8 prohibits ex parte communication between the ALJ and

any party in the proceeding. The Region states that, in the present case, the Region filed its post-hearing brief on October 13, 2004, and sent a copy to FRM by first class mail on the same date. The Region states that it did not receive from FRM a response to the Region's brief and that FRM did not file a response with the Regional Hearing Clerk. However, the ALJ's Initial Decision states that FRM submitted a "two-page 'Summary and Response'" and that "EPA did not submit a Reply Brief." Initial Decision at 2 n.4. The Region requests that the Board either clarify that FRM's Summary and Response is not part of the official record of this matter, or that the Region be provided with a copy of the document and an opportunity to respond to it as necessary.

The Board has reviewed the Regional Hearing Clerk's file containing the official record of all documents properly filed in this case. The Regional Hearing Clerk's file of the official record does not contain a document submitted by FRM that fits the description of a "Summary and Response" to the Region's post-hearing brief as described in the Initial Decision.

The regulations governing this proceeding provide that all documents sent directly to the ALJ, like the "Summary and Response" referenced in the ALJ's Initial Decision, must be served on all parties and that the other parties shall be given an opportunity to submit a reply. 40 C.F.R. § 22.8. Specifically, the regulations state as follows:

*Any ex parte memorandum or other communication addressed to the \* \* \* Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall*

be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

*Id.* Accordingly, we conclude that the Region was entitled to receive a copy of the Summary and Response and to have an opportunity to file a reply to that document if the Region concluded that a reply was necessary.

We reject the Region's request that we "clarify" that FRM's "Summary and Response" is not part of the official record of this proceeding. Such a determination would be inappropriate under the present circumstances where the Initial Decision refers to it and, thus, the ALJ, at least to some extent, considered it when issuing the Initial Decision. Clearly, the document should have been made part of the official record and the Region should have been afforded the opportunity to file a reply. We do not decide at this time whether the ALJ's consideration of the "Summary and Response" warrants a remand of this matter to the ALJ to consider the Region's response, or whether the ALJ's failure to afford the Region an opportunity to respond to the "Summary and Response" was merely harmless error under the circumstances of this case.


For the foregoing reasons, we hereby direct FRM, on or before Friday, April 8, 2005, to serve a copy of the "Summary and Response" on the Region and to file a copy with the Clerk of the Environmental Appeals Board along with a certificate of service. Within fifteen (15) days after FRM serves the "Summary and Response" on the Region, the Region shall file with the Clerk of the Board its response, if any, to FRM's "Summary and Response" along with a statement regarding whether or not the Region requests that this matter be remanded to the ALJ to consider the Region's response and to consider making any adjustments in the Initial Decision.

FRM may request an opportunity to submit a reply to the Region's filing, and the Region may also request that briefing on the merits of its appeal be suspended while the Board considers any request for remand based on this issue, if one is made.

So ordered.

Dated: 3/25/05

ENVIRONMENTAL APPEALS BOARD

By:   
Edward E. Reich  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Regarding Motion for Clarification of Record in the matter of FRM Chem, Inc., FIFRA Appeal No. 05-1, were sent to the following persons in the manner indicated:

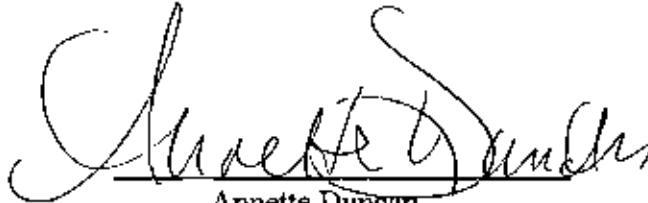
By First Class, U.S. Mail:

Raymond E. Kastendieck  
FRM Chem, Inc.,  
P.O. Box 207  
50 Hiline Dr.  
Washington, MO 63090

By Pouch Mail:

Chris R. Dudding  
Office of Regional Counsel  
U.S. EPA, Region 7  
901 N. Fifth Street  
Kansas City, Kansas 66101

Dated: MAR 25 2005



Annette Duncan  
Secretary