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August 31, 2007

Via Courier

Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, NW
Suite 600
Washington, DC 60000

Re: In the Matter of Rizing Sun, L.L.C.
FIFRA Appeal No. 07-(02)
Docket No. FIFRA-9-2004-0024 (Region IX)

Dear Sir or Madam:

Enclosed please find the original and five copies of the Brief of *Amici Curiae* CropLife America, Responsible Industry for a Sound Environment (RISE®), and American Chemistry Council Biocides Panel in the above-captioned matter.

Sincerely,

Michael T. Novak

MTN:njs
Enclosures

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

IN THE MATTER OF RIZING SUN, L.L.C.

FIFRA APPEAL NO. 07-(02)

DOCKET NO. FIFRA-9-2004-0024 (REGION IX)

APPEAL FROM THE INITIAL DECISION OF MAY 8, 2007

BRIEF OF AMICI CURIAE

CROPLIFE AMERICA,
RESPONSIBLE INDUSTRY FOR A SOUND ENVIRONMENT (RISE),
AND
AMERICAN CHEMISTRY COUNCIL BIOCIDES PANEL

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I. SUMMARY OF THE CASE

In this appeal, the U.S. Environmental Protection Agency ("Appellant" or "EPA") seeks review of the Initial Decision in The Matter of Rizing Sun, L.L.C., Docket No. FIFRA-9-2004-0024 (May 8, 2007). The Administrative Law Judge ("ALJ") agreed with the Agency's charge that Rizing Sun had committed thirty-one violations of selling an unregistered pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or the "Act"), section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). The ALJ also accepted the Agency's view that the same underlying transactions also constituted thirty-one sales of a misbranded pesticide in violation of FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). However, the ALJ held that the unregistered sales and misbranding violations are dependent violations,[1] and thus a penalty could be imposed for only one of the two charges for any given distribution or sale of a pesticide. Based upon Respondent's inability to pay a higher penalty, Appellant sought, and the ALJ agreed to impose, a penalty of $10,000.

Having secured a penalty in the amount sought at hearing, Appellant seeks in this appeal only to challenge the ALJ's statements that penalties cannot be assessed for both unregistered sales and misbranding charges for the same underlying transaction. Respondent Rizing Sun has not challenged the penalty assessment and did not file a response to Appellant's Brief in Support of Notice of Appeal.

Because the penalty assessment is not at issue, no controversy remains between Appellant and Rizing Sun. *Amici*[2] urge the Board to dismiss this appeal based on its precedent of refusing to review statements of the law in ALJ penalty decisions where, as here, neither party has appealed the amount of the penalty. A determination of whether FIFRA allows EPA to assess penalties for violations of

[1] The FIFRA Enforcement Response Policy ("ERP") (July 2, 1990) states "A civil penalty shall be assessed for each independent violation of the Act." ERP at 25.

[2] *Amici Curiae* CropLife America, Responsible Industry for a Sound Environment (RISE), and the American Chemistry Council Biocides Panel requested permission to file a late brief. By an Order dated August 15, 2007, the Board granted the request of *amici curiae* and ordered the brief to be filed on or before August 31, 2007.

sections 12(a)(1)(A) and 12(a)(1)(E) arising from the same transaction is a complex and important legal issue that should be addressed only by the Board with full and balanced briefing on both sides of the issue by adverse parties with a vested interest in the outcome.

II. INTERESTS OF *AMICI CURIAE*

CropLife America is the national, not-for-profit trade association for the plant science industry. The association's members develop, produce, sell, and distribute virtually all the crop protection pesticides (such as herbicides and insecticides) and biotechnology products used by American farmers. For more than five decades, CropLife America has been the industry's leading voice on enactment, amendment, and implementation of FIFRA. The association frequently files *amicus curiae* briefs in appeals which involve significant issues arising under FIFRA.

RISE® (Responsible Industry for a Sound Environment) is an affiliate of CropLife. RISE® represents 188 producers and suppliers of specialty pesticide and fertilizer products. RISE® was established in 1991 and serves as a resource on pesticides and fertilizers providing current and accurate information on issues and research affecting this specialty industry. RISE® member companies manufacture more than 90% of domestically produced specialty fertilizer for turf and gardens.

The American Chemistry Council ("ACC") is a not-for-profit trade association whose member companies represent approximately 85 percent of the productive capacity for basic industrial chemicals in the United States. Many of ACC's members produce, sell and distribute pesticides. One group of companies participates in ACC's Biocides Panel, which is composed of more than fifty companies engaged in the production, formulation, or use of antimicrobial pesticides subject to registration by EPA under FIFRA.

III. THE PROCEEDINGS IN THIS MATTER

As described in the Initial Decision, Rizing Sun, L.L.C. ("Respondent" or "Appellee"), is a Nevada corporation owned and operated by Mr. Allen H. Smith of Peoria, Arizona. EPA Region IX enforcement staff filed an administrative complaint alleging that, beginning in 2003, Rizing Sun distributed or sold fourteen different types of "Frontline®" brand of domestic pet flea and tick products in thirty-one separate transactions, all of which were alleged not to be "registered" and to be "misbranded" within the meaning of FIFRA.

On September 28, 2004, Appellant filed an administrative complaint against Respondent, alleging thirty-one counts of distribution or sale of unregistered pesticides in violation of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and thirty-one counts of distribution or sale of misbranded pesticides in violation of FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). Appellant initially sought a $214,200 penalty for those violations. In pre-hearing exchanges, Appellant subsequently reduced its request to $214,000 and then, recognizing the asserted inability of Rizing Sun to pay any greater amount, further reduced its demand to $10,000.

On February 1, 2006, in response to a motion for accelerated decision as to liability, the ALJ found Respondent liable for the misbranding counts. However, the ALJ held that the non-registration and misbranding violations are dependent violations, and thus a penalty could be imposed for only one of the two charges in any given act of distribution or sale of a pesticide. The ALJ also held that a hearing was necessary to determine whether the products were registered.

The hearing was held on February 7, 2006, and the ALJ issued the Initial Decision on May 8, 2007. The ALJ found that Respondent was liable for the thirty-one violations of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A) in addition to the thirty-one violations of FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). The ALJ determined that under the FIFRA Enforcement

Response Policy, the appropriate penalty would be $107,100. However, due to an alleged inability to pay a penalty of that magnitude, Appellant reduced its penalty demand to $10,000. The ALJ found that Respondent was able to pay a civil penalty of $10,000 and so ordered.

IV. STATEMENT OF THE ISSUE PRESENTED BY THE APPEAL

Appellant's brief presents one issue for resolution by the Board on appeal:

> Whether EPA can assess separate civil penalties for violations of FIFRA sections 12(a)(1)(A) and 12(a)(1)(E) arising from the distribution or sale of the same pesticide in the same transaction.

Appellant contends that the ALJ committed a clear error of law in determining that Appellant cannot assess separate penalties for violations of sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA arising from the distribution or sale of the same pesticide in the same transaction. Having agreed that Rizing Sun was unable to pay a penalty of more than $10,000, Appellant does not seek to have the Board remand this matter for imposition of a different penalty amount or assess an alternative penalty amount pursuant to its *de novo* authority under 40 C.F.R. § 22.30(f). Thus, no controversy remains between Appellant and Rizing Sun.

V. THE BOARD SHOULD DISMISS THIS APPEAL

The Board acts in the stead of the Administrator[3] and thus possesses the full scope of discretion possessed by the Administrator by law. See 40 CFR § 1.25(e). As a result, although any party may appeal any *adverse* ruling,[4] the Board has complete discretion to dismiss any appeal. The circumstances of this proceeding strongly support its dismissal. This appeal has multiple characteristics that should lead the Board to exercise its discretion and dismiss the appeal.

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[3] Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5,320 –5,321 (February 13, 1992).

[4] 40 CFR § 22.30(a).

A. The Initial Decision Is Not Adverse to the Appellant

Under the Rules of Practice, any party may appeal an *adverse* order. See 40 C.F.R. § 22.30(a). Appeals of orders that are not adverse to the party appealing are not authorized, and therefore this appeal should be dismissed.

There is no longer any adversity between the parties in this matter. The ALJ found that Respondent had committed all the violations alleged by Appellant, and Respondent did not appeal those findings. The penalty is not at issue since the ALJ imposed the penalty sought by Appellant, and Respondent did not appeal the penalty imposed. The only issue Appellant has raised 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 Appellant.

The Initial Decision is not adverse to Appellant's ability to assert charges. Appellant has not even represented that its ability to lodge the same pair of charges in any future matter having the same facts has been impaired. Appellant acknowledges the lack of adversity when stating in its brief that the Initial Decision is not binding. See App. Brief, p. 3. In effect, Appellant's only grievance is that future ALJ's might be persuaded to follow this Initial Decision.

The Board is not held to the strict case or controversy standard that governs jurisdiction in the Federal courts. Nonetheless, the Board should, consistent with its oversight duties, interpret the adversity requirements of the Rules of Practice in a manner consistent with the case or controversy requirement imposed on federal courts. Under the case or controversy requirements, there must be "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937). In the case of the federal courts, this standard is a constitutional requirement to ensure that the courts decide only true controversies

involving adverse parties and concrete facts. While not constrained in the manner of the federal courts, nonetheless the Board should be extremely cautious in entertaining appeals where there is no relief to be granted. The concern that one ALJ's logic might be deemed persuasive to another ALJ is not justification for the Board's entertaining this appeal.

This is not a matter of first impression. The Board has previously expressed its strong disinclination to review an ALJ's penalty assessment if neither party has appealed the amount of the penalty. See In re Burlington Northern Railroad Co., 5 E.A.D. 106, 108-109 (EAB 1994); In re Rhee Bros., Inc., FIFRA Appeal No. 06-02, slip op. at 12 (EAB, May 17, 2007). A decision issued under these conditions would be tantamount to issuing an advisory opinion, which the Board's charter does not authorize. See In the Matter of Bio-Tek Industries, Inc., FIFRA-92-H-06 1993 WL 326406 (ALJ August 5, 1993) (function of the EAB is to decide Appeals as the Administrator's delegatee); see also In re Cavenham Forest Indus., Inc., 5 E.A.D. 722, 731 n.15 (EAB 1995) (noting that if the Board had properly been requested to provide an advisory opinion, it would have declined to do so); In re Simpson Paper Co., 4 E.A.D. 766, 771 n.10 (EAB 1993) (providing advisory opinion with respect to a hypothetical permit is inconsistent with EPA's permit review authority).

In Rhee Bros., Inc., the Board expressed "strong misgivings" against being drawn into disputes over the language or analysis contained in ALJ penalty decisions where, as here, neither party has appealed the amount of the penalty. See also In re Burlington Northern Railroad Co., 5 E.A.D. 106, 108-109. The Board was concerned that if parties had no financial stake in the outcome of an appeal, they would have limited incentive to research and fully address the questions at issue. Id. See also Burlington Northern at 110. In the Board's view, "it would be more appropriate to decide this issue when it is presented in a truly *adversarial* context." Id. (Emphasis added.)

B. This Matter Has Not Been Fully Litigated By Parties With An Interest in the Outcome

This matter has not been fully briefed and litigated. The Respondent was represented below *pro se* by its non-lawyer owner, who, while proffering certain creative arguments, did not demonstrate a full understanding of FIFRA and the legal issues at stake. Having no further vested interest in the outcome, the Respondent did not file a brief in response to the appeal. This set of facts strongly suggests that the Board should dismiss this case rather than use it as a vehicle to decide the issue of first impression raised in the appeal under circumstances where there is no party that could seek judicial review of a Board decision.

The deficiencies giving rise to the Board's prudential concerns are pronounced and compelling in the instant matter. Unlike Rhee Bros., Inc., where both parties filed briefs with the Board on the issues raised on appeal, Appellant is the sole remaining party in interest in this matter. Respondent, which had been proceeding *pro se*, has neither appealed the penalty amount nor filed a brief responding to EPA's appeal. Accordingly, this appeal will not receive thorough briefing as would a contested case.

Appellant relies on the Board's decision In Re Hall Signs, Inc., to argue that the Board should nevertheless consider this appeal because it involves a single narrow issue that can be dealt with "in short order" without reference to the specific facts of this case and little to no parsing of the initial decisions. App. Br. at 3, citing In re Hall Signs, EPCRA Appeal No. 97-6, slip op. at 8 (EAB 1998). Appellant's reliance on Hall Signs is misplaced. First, as both parties to Hall Signs filed briefs and participated in the appeal, there was adversarial tension and balance that is not present in this matter. See Hall Signs at 7 and n. 2. In addition, by comparing the "numerous alleged deficiencies" in Rhee Bros., Inc. to the single question raised in Hall Signs or the instant case, Appellant improperly equates the number of issues requiring resolution to the ease with which the Board could dismiss a matter in

short order. This appeal involves a complex legal issue that deserves full briefing, not a narrow issue that can be dealt with "in short order."

C. There Is No Clear Error Present that Would Justify the Board's Entertaining This Appeal

When previously presented with appeals where the penalty is not at issue, the Board has generally dismissed such appeals unless there is "clear error" present that would justify the Board's intervention. See Burlington Northern at 108-109; Rhee Bros., Inc. at 12. Thus, there is no need for the Board to entertain the appeal.

The Board's determination that it should resolve the Hall Signs appeal involved its perceived need to correct the EPA staff's construction of the Initial Decision. It was not a determination by the Board that the ALJ had committed a clear error in its decision justifying reversal notwithstanding the lack of adversity and a Respondent with financial stake in having the Initial Decision upheld. The Board stated:

> Despite our general reluctance to be drawn into such cases, we think the issue raised by the Region's appeal may be dealt with in short order, and for that reason alone we have decided to address it. Stated succinctly, it is our conclusion that the rationale of the Presiding Officer need not be vacated because, as discussed below, the Region is in error in construing the Initial Decision as establishing a precedent that undermines the validity of the Agency's penalty policy. [Emphasis added.]

Hall Signs at 8. The Board determined in Hall Signs that it could address the Appellant's clearly erroneous construction of the Initial Decision and leave the Decision intact.

Conversely, the position of the ALJ in the Initial Decision at issue here cannot be categorized as "clear error." The interpretation of the offenses section of FIFRA presents a complex legal issue, and the Initial Decision cannot be dispatched summarily. While Appellant argues that the ALJ's interpretation of the conjunctive "or" misconstrues the statutory text of FIFRA, Appellant provides no support for this proposition. Indeed, although several courts have held that the word "or" normally

connotes the disjunctive, still other courts have noted that this rule of construction yields when a disjunctive reading would frustrate a clear statement of legislative intent. Compare U.S. v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980) to U.S. v. O'Driscoll, 761 F.2d 589, 597 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Thus, this issue raises questions of first impression with respect to FIFRA whose resolution will require more than the casual parsing of the initial decision that Appellant suggests. App. Br. at 3.

Also at issue is the appropriate test by which to determine whether two related violations of FIFRA are independent and, thus, can lead to separate penalties as the FIFRA Enforcement Response Policy directs. See ERP at 25. Appellant places emphasis on that portion of the FIFRA ERP which states that violations are independent if they require different facts to establish each violation but ignores that portion of the ERP which precludes finding a violation to be independent if it is the result of any other violation. The ERP thus supports a test based upon whether the second violation inherently follows from the first and thus "results" from the first charge. One could argue that an unregistered product is by law always misbranded, and thus the latter offense always results from the former. The point of the foregoing discussion is not to present an argument on the merits of this appeal but to illustrate the complexity of the issue and *Amici's* view that resolution of this issue is best achieved through a thoroughly briefed case which explores these issues in the depth they deserve.

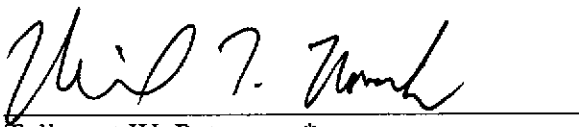
A determination of whether FIFRA allows EPA to assess penalties for violations of sections 12(a)(1)(A) and 12(a)(1)(E) arising from the same transaction should be addressed by the Board with full and balanced briefing on both sides of the issue by adverse parties with a vested interest in the outcome. If this issue is important, it will arise again in a context which provides this level of adversity. It would be imprudent for the Board to utilize this appeal to explore the question presented.

VI. CONCLUSION

This appeal fits the Board's criteria for dismissal and, there being no clear error in the Initial Decision, should be dismissed.

Dated: August 31, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 2007, the original and five copies of the foregoing Amici Brief of CropLife America, Responsible Industry for a Sound Environment (RISE®), and American Chemistry Council Biocides Panel were hand-delivered to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
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I HEREBY FURTHER CERTIFY that a true and correct copy of said document was forwarded, postage pre-paid, via First Class mail, to the following:

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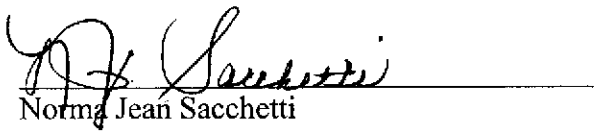

Norma Jean Sacchetti