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ENVIR. APPEALS BOARD

BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, DC

In the Matter of)
)
FRM Chem, Inc.,)
a.k.a. Industrial Specialties)
)
Respondent)

Docket No. FIFRA-07-2004-0041

MOTION FOR CLARIFICATION OF RECORD ON APPEAL

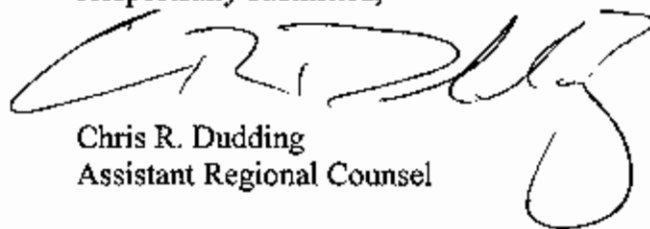
Pursuant to Sections 22.30(e) and 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.30(c) and 22.16(a), the United States Environmental Protection Agency ("EPA"), hereby files this Motion for Clarification of Record On Appeal. Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a), requires that each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer. Section 22.26 of the Rules of Practice, 40 C.F.R. § 22.26, requires that all post-hearing submissions shall be served on all parties. Section

22.8 of the Rules of Practice, 40 C.F.R. § 22.8, prohibits *ex parte* communication between, *inter alia*, a party and the Presiding Officer in a proceeding.

Pursuant to the instructions by the Presiding Officer at the hearing in this matter, EPA filed a post-hearing brief with the Regional Hearing Clerk on October 13, 2004 and sent a copy by first class mail to both the Presiding Officer and the Respondent, FRM Chem, Inc. ("Respondent"), on that same date. Tr. at 116. At the hearing, the Presiding Officer also instructed Respondent to submit its response to EPA's brief within two weeks of EPA's submission of its post-hearing brief. EPA did not receive a response to its brief from Respondent, nor was such a response filed with the Regional Hearing Clerk. However, in the Initial Decision in this matter, the Presiding Officer alludes to Respondent's "Summary and Response," and notes that "EPA did not submit a Reply Brief" to that document. See Initial Decision at 2, n.4; 9-10.

Since the document referred to by the Presiding Officer Respondent's "Summary and Response" to EPA's post-hearing brief appears to have been neither filed with the Regional Hearing Clerk nor served on EPA, EPA requests that the Board clarify that the document is not part of the official record in the above-captioned matter. If the Board determines that the document referred to as the "Summary and Response" to EPA's post-hearing brief is in fact part of the record in this matter, EPA respectfully requests that it be provided with a copy of the document, and an opportunity to respond to this document, as necessary, in its Appeal Brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris R. Dudding". The signature is stylized and cursive, with a large loop at the end.

Chris R. Dudding
Assistant Regional Counsel

Complainant-Appellant

By: _____

OF COUNSEL:

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Office of Enforcement and Compliance Assurance