

RECEIVED  
U.S. E.P.A.

2007 JUN -8 PM 1:03

ENVIR. APPEALS BOARD

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

---

FIFRA Appeal No. 07-(02)

---

In The Matter Of:

Rizing Sun, L.L.C.  
Peoria, Arizona

Docket No. FIFRA-9-2004-0024 (Region IX)

---

Appeal from the Initial Decision of the  
Presiding Officer, Administrative Law Judge  
Spencer T. Nissen, Dated May 8, 2007

---

APPELLANT'S BRIEF IN SUPPORT OF  
NOTICE OF APPEAL

## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF ISSUE PRESENTED	1
III.	STANDARD APPLICABLE TO THE BOARD'S REVIEW OF INITIAL DECISIONS	2
IV.	BACKGROUND	4
	A. Facts	4
	B. Procedural History	4
V.	ARGUMENT	6
	A. FIFRA Provides for Assessment of Separate Civil Penalties for Violations of FIFRA Section 12(a)(1)(A) and 12(a)(1)(E) Arising From a Single Distribution or Sale of a Same Pesticide.	6
VI.	CONCLUSION	15

TABLE OF AUTHORITIES

I. STATUTES

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") § 12(a)(1), 7 U.S.C. § 136j(a)(1).	7
FIFRA § 2(h), (u), 7 U.S.C. § 136(h), (u).	9
FIFRA § 14(a)(1), 7 U.S.C. § 1361(a)(1).	12
Insecticide Act, Pub. L. No. 61-152, 36 Stat. 331 (1910).	12

II. CASE LAW

A. JUDICIAL

<u>Blockburger v. U.S.</u> , 284 U.S. 299 (1932).	11
<u>Missouri v. Hunter</u> , 459 U.S. 359 (1983).	11
<u>Lovgren v. Byrne</u> , 787 F.2d 857 (3 <sup>rd</sup> Cir. 1986).	11

B. ADMINISTRATIVE

<u>In re Aquarium Products, Inc.</u> , Docket No. I.F. & R. I11-439-C, 1995 EPA ALJ LEXIS 87 (ALJ June 30, 1995).	13
<u>In re Avril, Inc.</u> , Docket No. I.F. & R. III-441-C (ALJ March 24, 1997).	13
<u>In re Cavenham Forest Indus., Inc.</u> , 5 E.A.D. 722 (EAB 1995).	3
<u>In re FRM Chem, Inc., a/k/a Industrial Specialties</u> , FIFRA Appeal No. 05-01, 2006 EPA App. LEXIS 28 (EAB June 13, 2006).	13
<u>In re Hall Signs</u> , EPCRA Appeal No. 97-6 (EAB 1998).	2
<u>In re Martin Electronics, Inc.</u> , 2 E.A.D. 381, 385 (CJO 1987).	3
<u>In re Rek Chem Manufacturing Corp.</u> , Docket No. I.F. & R. VI-437C, 1993 WL 256445, EPA (ALJ May 10, 1993).	13
<u>In re Rhee Bros., Inc.</u> , 13 E.A.D. _ (May 17, 2007).	2
<u>In re Simpson Paper Co.</u> , 4 E.A.D. 766 (EAB 1993).	3

1 I. INTRODUCTION

2 The Associate Director for Agriculture of the Communities and  
3 Ecosystems Division, U.S. Environmental Protection Agency, Region  
4 IX (the "Appellant"), files this brief in support of its Notice of  
5 Appeal filed concurrently pursuant to section 22.30(a) of the  
6 Consolidated Rules of Practice Governing the Administrative  
7 Assessment of Civil Penalties and the Revocation/Termination or  
8 Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R.  
9 § 22.30(a). Appellant is seeking review of the Initial Decision  
10 issued by Administrative Law Judge Spencer T. Nissen (the "ALJ"),  
11 dated May 8, 2007, in In the Matter of Rizing Sun, L.L.C., Docket  
12 No. FIFRA-9-2004-0024. Appellant respectfully requests that the  
13 Environmental Appeals Board ("EAB" or the "Board") vacate, in a  
14 published order, a single portion of the ALJ's Initial Decision.

15 II. STATEMENT OF ISSUE PRESENTED

16 This brief presents one issue for resolution by the Board on  
17 appeal:

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

21 Appellant contends that the ALJ committed a clear error of  
22 law in determining that Appellant cannot assess separate  
23 penalties for violations of section 12(a)(1)(A) of the Federal  
24 Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or the  
25 "Act"), 7 U.S.C. § 136j(a)(1)(A), and section 12(a)(1)(E) of  
26 FIFRA, 7 U.S.C. § 136j(a)(1)(E), arising from the distribution or  
27 sale of the same pesticide in the same transaction, and  
28 respectfully requests that the Board vacate this portion of his

1 Initial Decision. Since the penalty that the ALJ assessed in the  
 2 Initial Decision is based on Respondent's limited ability to pay,  
 3 Appellant does not seek to have the Board remand this matter for  
 4 assessment of a different penalty amount or assess an alternative  
 5 penalty amount pursuant to its *de novo* authority under 40 C.F.R.  
 6 § 22.30(f). The sole focus of this brief is construction of FIFRA  
 7 section 12 and the assessability of separate penalties for  
 8 violations of FIFRA section 12(a)(1)(A) and 12(a)(1)(E) arising  
 9 from a single transaction.

10 III. STANDARD APPLICABLE TO THE BOARD'S REVIEW  
 11 OF INITIAL DECISIONS

12 The Consolidated Rules of Practice provide that the Board,  
 13 when ruling on an appeal,  
 14 shall adopt, modify, or set aside the findings of fact  
 15 and conclusions of law or discretion contained in the  
 decision or order being reviewed. . . .

16 40 C.F.R. § 22.30(f).

17 In Rhee Bros., Inc., 13 E.A.D. \_ (May 17, 2007), slip. op. at  
 18 12, the EAB expressed reluctance, absent a compelling rationale, to  
 19 issue advisory opinions or parse the language of an initial  
 20 decision in matters where the amount of the penalty is not at  
 21 issue. While cognizant of this reluctance, Appellant respectfully  
 22 asserts that review is warranted in this case.<sup>1</sup> In Hall Signs,  
 23 EPCRA Appeal No. 97-6 (EAB Dec. 16, 1998) (unpublished Final Order),  
 24 the Board noted that "[d]espite our general reluctance to be drawn

---

25  
 26 <sup>1</sup>Further, in this matter, the penalty was substantially  
 27 reduced only for the ability to pay factor. See page 5 infra.  
 28 Appellant thinks it proper to take such factors into account  
 while still having the opportunity to request review of legal  
 issues.

1 into such cases [i.e., cases where the amount of the penalty is not  
2 at issue], we think the issue raised by the Region's appeal may be  
3 dealt with in short order, and for that reason alone we have  
4 decided to address it." Slip. op. at 8.

5 Where Rhee focused on numerous alleged deficiencies in the  
6 ALJ's application of EPA's FIFRA Enforcement Response Policy  
7 ("ERP") to the violations at issue, this appeal focuses solely on  
8 a discrete issue of law: whether FIFRA permits EPA to assess  
9 separate penalties for violations of FIFRA section 12(a)(1)(A) and  
10 12(a)(1)(E) arising from the same transaction. Appellant asserts  
11 that this single narrow legal issue "may be dealt with in short  
12 order" without regard to the specific facts of this case, and  
13 requires little or no parsing of the language of the initial  
14 decision. Moreover, although Rhee affirmed that "an ALJ's initial  
15 decision in a particular matter does not establish binding  
16 precedent for future cases," slip. op. at 13, fn. 14, Appellant  
17 urges the Board to review this matter "to assure that the initial  
18 decision does not establish an erroneous precedent." In re Martin  
19 Electronics, Inc., 2 E.A.D. 381, 385 (CJO 1987).

20 Finally, we note that, unlike the Cavenham Forest and Simpson  
21 Paper EAB permit decisions cited by the Board in Rhee, slip. op. at  
22 12, this matter does not involve speculative or hypothetical  
23 concerns. The ALJ's erroneous legal conclusion concerning the  
24 assessability of separate penalties for FIFRA section 12(a)(1)(A)  
25 and 12(A)(1)(E) violations establishes a tangible and present  
26 compliance disincentive for the regulated community by encouraging  
27 violators of one part of FIFRA section 12(a) to violate additional  
28

1 parts of FIFRA section 12(a) without penalty. For all of the above  
2 reasons, Appellant believes that there is a compelling rationale  
3 for the Board to reverse the ALJ's finding that separate penalties  
4 cannot be assessed for violations of FIFRA section 12(a)(1)(A) and  
5 12(a)(1)(E) arising from the same transaction.

#### 6 IV. BACKGROUND

##### 7 A. Facts

8 Rizing Sun, L.L.C. ("Respondent" or "Appellee") is a Nevada  
9 corporation that is owned and operated by Mr. Allen H. Smith of  
10 Peoria, Arizona. Since 2003, Respondent has engaged in wholesale  
11 distribution or sale of various pet flea and tick products to pet  
12 shops throughout the United States.<sup>2</sup> Several inspections  
13 established that Respondent distributed or sold 14 different types  
14 of "Frontline" brand of pet flea and tick products in 31 separate  
15 transactions in 2003 and 2004.

16 EPA's Office of Pesticide Programs ("OPP") examined the  
17 labeling and packaging of the samples collected during the  
18 inspections and concluded that all the samples of "Frontline" pet  
19 flea and tick products obtained during these inspections were not  
20 "registered" and were "misbranded" within the meaning of FIFRA.  
21 (Compl.Ex. 11 at 1-3; 12 at 1-4).

##### 22 B. Procedural History

23 On September 28, 2004, Appellant filed an administrative  
24

---

25 <sup>2</sup>Appellant does not appeal any of the findings of fact in  
26 the Initial Decision. Because this appeal is of a single legal  
27 issue, the facts presented here are limited to those which place  
28 the appeal in context. The Initial Decision provides a full  
recitation of the facts in this matter. Initial Decision at 6-  
18.

1 complaint against Respondent alleging 31 counts of distribution or  
2 sale of unregistered pesticides in violation of FIFRA section  
3 12(a)(1)(A) and 31 counts of distribution or sale of misbranded  
4 pesticides in violation of FIFRA section 12(a)(1)(E). Appellant  
5 subsequently proposed a \$214,200 penalty for these violations.

6 On November 4, 2005, Appellant filed a motion for accelerated  
7 decision as to liability in this matter. On February 1, 2006, the  
8 ALJ granted, in part, Appellant's motion, finding Respondent liable  
9 for 31 counts of distribution or sale of misbranded pesticides in  
10 violation of FIFRA section 12(a)(1)(E).

11 The ALJ held a hearing on February 7, 2006. On May 8, 2007,  
12 the ALJ issued his Initial Decision, in which he found Respondent  
13 liable for the 31 violations of FIFRA section 12(a)(1)(A) and the  
14 31 violations of FIFRA section 12(a)(1)(E). However, the ALJ  
15 determined that the non-registration and misbranding violations are  
16 dependent violations and thus a penalty could only be assessed for  
17 either distribution or sale of an unregistered pesticide or  
18 distribution or sale of a misbranded pesticide. Accordingly, the  
19 ALJ determined that the appropriate penalty, before consideration  
20 of Respondent's ability to pay, was \$107,100 - half of the original  
21 proposed penalty. Initial Decision at 27. However, based on  
22 Respondent's ability to pay, the ALJ assessed a civil penalty of  
23 \$10,000.

24

25

26

27

28



V. ARGUMENTA. FIFRA Provides for Assessment of Separate Civil Penalties for Violations of FIFRA Section 12(a)(1)(A) and 12(a)(1)(E) Arising From a Single Distribution or Sale of a Same Pesticide.

The statutory language and legislative history of FIFRA, as well as the regulatory framework of the Act, and case law all demonstrate that a single act of distribution or sale of a pesticide can violate both section 12(a)(1)(A) and 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), 136j(a)(1)(E), and subject the violator to separate penalties for each violation.

In the Initial Decision, the ALJ erroneously concluded that the unit of violation for a distribution or sale of a pesticide where the individual violations set forth at FIFRA section 12(a)(1)(A) (unregistered pesticides) and FIFRA section 12(a)(1)(E) (misbranded pesticides) both accrued is the distribution or sale giving rise to a single assessable violation and that despite the distribution or sale being unlawful for both reasons, the number of distributions or sales is the only basis for assessing a penalty.<sup>3</sup> The ALJ thereby ignores the separate and distinct elements of liability; Appellant must demonstrate that the pesticide is unregistered under FIFRA section 12(a)(1)(A) and misbranded under FIFRA section 12(a)(1)(E) - distribution or sale alone is not enough. The ALJ demotes these required elements of liability into mere reasons why a distribution or sale is unlawful. Accordingly,

---

<sup>3</sup> Initial Decision at 24. See also the Order at 18. The ALJ correctly concluded that the pesticides at issue were both unregistered and misbranded in violation of FIFRA section 12(a)(1)(A) and 12(a)(1)(E). Initial Decision at 22-23.

1 he erroneously determined that Appellant cannot assess a penalty  
 2 for both distribution or sale of an unregistered pesticide and  
 3 distribution or sale of a misbranded pesticide for a single  
 4 distribution or sale of a pesticide. The Initial Decision at 24.  
 5 See also the Order at 18-19.

6 The statutory language of FIFRA is clear that a violation of  
 7 section 12(a)(1)(A) is not dependent upon a violation of section  
 8 12(a)(1)(E) and vice versa. Specifically, FIFRA section 12(a)(1)  
 9 states in relevant part:

10 Except as provide by subsection (b), it shall be unlawful  
 11 for any person in any State to distribute or sell to any  
 person -

12 (A) *any pesticide* that is not registered under section 3  
 13 or whose registration has been canceled or suspended;

14 (B) *any registered pesticide* if any claims made for it as  
 15 a part of its distribution or sale substantially differ  
 16 from any claims made for it as a part of the statement  
 required in connection with its registration under  
 section 3;

17 . . .

18 (E) *any pesticide* which is adulterated or misbranded. .  
 . . .

19 7 U.S.C. § 136j(a)(1) (emphasis added).

20 At the outset, it is important to note that the violations for  
 21 non-registration and misbranding protect separate interests. The  
 22 registration process provides EPA the opportunity to evaluate the  
 23 risks and benefits of a pesticide prior to marketing. Misbranding  
 24 requires that all pesticides have correct labeling. The two  
 25 violations can occur simultaneously or singularly.

26 Under FIFRA section 12(a)(1), a violation of section  
 27 12(a)(1)(A) and a violation of section 12(a)(1)(B) are mutually  
 28

1 exclusive. A single distribution or sale cannot give rise to  
2 violation of both provisions. Either one sold an unregistered  
3 pesticide or one sold a registered pesticide with claims that  
4 differ from those approved for registration. Conversely, a  
5 violation of FIFRA section 12(a)(1)(A) and a violation of section  
6 12(a)(1)(E) are *not* mutually exclusive. Both subsections apply to  
7 "any pesticide." If Congress had intended that an "unregistered"  
8 pesticide cannot be assessed a separate penalty as a "misbranded"  
9 pesticide, it would have drafted section 12(a)(1)(E) to apply to  
10 only a "registered pesticide," like section 12(a)(1)(B). It did  
11 not do so.

12 The ALJ's construction of FIFRA section 12(a)(1)(A) and  
13 12(a)(1)(E) violates one of the most basic canons of statutory  
14 construction - it essentially nullifies the effect of section  
15 12(a)(1)(E) for unregistered pesticides. The linchpin of the ALJ's  
16 argument is the incorrect assertion that the six separate  
17 subprovisions of FIFRA section 12(a)(1) form a single provision of  
18 law. Initial Decision at 23-25 and fn. 30. That construction  
19 would then suggest that the 18 separate wide-ranging subprovisions  
20 of FIFRA section 12(a)(2) also form a single provision of law.  
21 Such a construction of either provision is nonsensical. FIFRA  
22 section 12(a)(1) and (2) are each lists of individual violations  
23 with each subprovision of the list constituting a separate  
24 violation of law. For example, FIFRA section 12(a)(2)(B) has three  
25 subprovisions (prepare, maintain or submit records; submit reports;  
26 and allow entry or inspection), each of which is substantively  
27 discrete and a separately cognizable violation. The ALJ's parsing  
28

1 of the statute would not only conglomerate the three subprovisions  
2 of FIFRA section 12(a)(2)(B), but all the subprovisions of FIFRA  
3 section 12(a)(2) as well. Thus, the plain language of FIFRA  
4 section 12(a)(1) allows a single distribution or sale of a  
5 pesticide to trigger two independently assessable violations of  
6 both section 12(a)(1)(A) and 12(a)(1)(E).

7 In concluding that "the distribution or sale of a pesticide"  
8 is the triggering act for a violation of any or all of the  
9 provisions of FIFRA section 12(a)(1) and that the statute provides  
10 for only a single penalty for a single act of distribution or sale,  
11 the ALJ relied on "the fact that the conjunctive 'or' separates the  
12 cited listing of unlawful acts in FIFRA § 12(a)(1)." The Initial  
13 Decision at 24. This misreads the grammar of the statute. FIFRA  
14 section 12(a)(1) uses the conjunctive 'or' to conclude the list of  
15 distinct and independent violations, as discussed above, and to  
16 distinguish between violations pertaining to pesticides, set forth  
17 at section 12(a)(1)(A) through 12(a)(1)(E), and violations  
18 pertaining to "devices," set forth at section 12(a)(1)(F).  
19 Pesticides and devices are mutually exclusive; a product must be  
20 one or the other.<sup>4</sup>

21 The ALJ also relies on EPA's FIFRA ERP, "which provides that  
22 dependent violations may be listed in the complaint, but will not  
23 result in separate civil penalties." Initial Decision at 24.

---

24  
25 <sup>4</sup>FIFRA section 2(h) defines the term "device" as "any  
26 instrument or contrivance . . . which is intended for trapping,  
27 destroying, repelling, or mitigating any pest." 7 U.S.C. §  
28 136(h). FIFRA section 2(u) defines the term "pesticide" as "any  
substance or mixture of substances intended for preventing,  
destroying, repelling, or mitigating any pest." 7 U.S.C. §  
136(u).

1 However, this reliance is misplaced. In fact, the ERP directly  
2 supports assessability of separate penalties for violations of  
3 FIFRA section 12(a)(1)(A) and 12(a)(1)(E) arising from a single  
4 transaction. The ERP provides:

5 A separate civil penalty . . . shall be assessed for each  
6 independent violation of the Act. A violation is  
7 independent if it results from an act (or failure to act)  
8 which is not the result of any other charge for which a  
9 civil penalty is to be assessed, or if the elements of  
10 proof for the violations are different.

11 ERP at 25. In this case, pesticides are misbranded because of  
12 facts other than the lack of registration and the lack of  
13 registration does not result from the misbranding. Moreover, with  
14 the exception of distribution or sale, the elements of proof with  
15 respect to FIFRA section 12(a)(1)(A) and 12(a)(1)(E) are completely  
16 different. FIFRA section 12(a)(1)(A) requires a showing of the  
17 distribution or sale of a pesticide that is not registered under  
18 FIFRA section 3, while FIFRA section 12(a)(1)(E) requires a showing  
19 of the distribution or sale of a pesticide that is misbranded for  
20 labeling or packaging deficiencies, including labeling bearing  
21 incorrect registration or establishment numbers, inadequate  
22 directions for use or false or misleading statements. See FIFRA §  
23 2(q), 7 U.S.C. § 136(q). The ERP is clear that multiple penalties  
24 can be assessed for independent violations.<sup>5</sup>

25 In Blockburger v. U.S., 284 U.S. 299 (1932), the Supreme Court  
26 devised a test for determining whether there are two offenses, or

---

27 <sup>5</sup>The ERP does limit the assessment of penalties for  
28 dependent violations, such as multiple types of misbranding on a  
single product label, but that is clearly not the case with the  
violations at issue here. ERP at 26.

1 only one, in cases where the same act or transaction constitutes a  
2 violation of two distinct statutory provisions. The Court  
3 declared:

4 The applicable rule is that where the same act or  
5 transaction constitutes a violation of two distinct  
6 statutory provisions, the test to be applied to determine  
7 whether there are two offenses or only one is, whether  
8 each provision requires proof of a fact which the other  
9 does not.

8 Id. at 304. See also Missouri v. Hunter, 459 U.S. 359 (1983).  
9 Applying this test, the Court held that a sale of morphine  
10 hydrochloride to a purchaser violated two separate provisions of  
11 the Narcotic Act and upheld the prison sentence and fine assessed  
12 for each violation. Id. at 304-305.

13 While this test was first devised in the context of a criminal  
14 proceeding, the Blockburger test is applicable to civil proceedings  
15 as well.<sup>6</sup> Applying Blockburger to a claim under FIFRA section  
16 12(a)(1)(A) and a claim under FIFRA section 12(a)(1)(E), it is  
17 clear each provision requires proof of elements which the other  
18 does not. Consequently, assessment of a penalty recognizing  
19 violation of each provision is appropriate in general, and in this  
20 case. By way of analogy, a person driving recklessly with a  
21 suspended license is not penalized only for one violation because  
22 a single act of driving triggers both violations. Because each  
23 violation requires proof of elements that the other does not, each  
24 violation warrants separate penalties. It should be no different  
25

---

26 <sup>6</sup>See Lovgren v. Byrne, 787 F.2d 857 (3<sup>rd</sup> Cir. 1986). Since  
27 criminal matters involving potential loss of liberty typically  
28 yield more narrow rulings, the Blockburger test is merely the  
floor for civil judicial and civil administrative matters.

1 with FIFRA section 12(a)(1).

2        Additionally, the legislative history of FIFRA supports  
3 assessment of separate penalties for any distribution or sale of a  
4 pesticide violative of both FIFRA section 12(a)(1)(A) and  
5 12(a)(1)(E). Misbranding is a violation that is associated with  
6 pesticide labeling. See FIFRA § 2(q), 7 U.S.C. § 136(q). The  
7 labeling requirements associated with FIFRA section 12(a)(1)(E)  
8 originate from the Insecticide Act of 1910, formerly 7 U.S.C. § 121  
9 et seq. (1910), which predates FIFRA and established labeling  
10 requirements for insecticides, fungicides, and lead arsenate only.  
11 See Insecticide Act, Pub. L. No. 61-152, 36 Stat. 331 (1910). This  
12 act also imposed penalties of up to \$200 for the first violation  
13 and up to \$300 and/or imprisonment of up to one year for any  
14 subsequent violations of the labeling requirements. Id. When  
15 FIFRA was later enacted in 1947, it subsumed and broadened the  
16 labeling requirements of the Insecticide Act, separately created  
17 the pesticide registration scheme, and introduced section 14 that  
18 provided that "[a]ny registrant, commercial applicator, wholesaler,  
19 dealer, retailer, or other distributor who violates any provision  
20 of this Act may be assessed a civil penalty . . . of not more than  
21 \$5,000 for each offense."<sup>7</sup> There is nothing in the legislative  
22 history that suggests that Congress intended that EPA cannot assess  
23 a separate penalty for a single transaction that violates the  
24 misbranding and the lack of registration provisions. Section  
25 14(a)(1) of FIFRA which addresses assessment of civil penalties for  
26 all violations of the Act does not expressly limit recovery for

---

27  
28 <sup>7</sup> 7 U.S.C. § 1361(a)(1) (emphasis added).

1 multiple violations of FIFRA section 12(a)(1) nor does the ALJ  
2 point to any such language.

3 Several prior initial decisions have considered this question  
4 and found these violations to be independently assessable. In In  
5 re Avril, Inc., Docket No. I.F. & R. III-441-C (ALJ March 24,  
6 1997), EPA initiated an enforcement action against a chemical  
7 blender that sent 22 separate shipments of a cleaning agent to a  
8 customer in 1989 and 1990. This product was not registered with  
9 EPA and was misbranded, lacking a complete list of active and  
10 inactive ingredients as well as the producer's establishment  
11 number. The presiding officer held that each shipment violated  
12 both FIFRA section 12(a)(1)(A) and 12(a)(1)(E); "The violations of  
13 selling an unregistered pesticide and of selling a pesticide that  
14 is misbranded are not dependent on each other and may properly be  
15 charged separately for each shipment." Id. at 18. See also  
16 Aquarium Products, Inc., Docket No. I.F. & R. I11-439-C, 1995 EPA  
17 ALJ LEXIS 87 (ALJ June 30, 1995); Rek Chem Manufacturing Corp.,  
18 Docket No. I.F. & R. VI-437C, 1993 WL 256445, EPA (ALJ May 10,  
19 1993).<sup>8</sup>

---

21 <sup>8</sup>While choosing not to follow the Avril, Aquarium Products,  
22 and Rek Chem decisions, the ALJ cites FRM Chem, Inc., a/k/a  
23 Industrial Specialties, FIFRA Appeal No. 05-01, 2006 EPA App.  
24 LEXIS 28 (EAB June 13, 2006) for the proposition that the EAB  
25 somehow "accepted" the view that the statutory maximum penalty  
26 for three sales of an unregistered and misbranded pesticide was  
27 \$16,500 [\$5,500 being the statutory maximum for a single  
28 violation in this case]. This reliance is unwarranted. Each  
case stands on its own facts, and it is incorrect to draw a  
conclusion from an issue not in dispute. In FRM Chem, the EPA  
regional office in question sought a single penalty for a sale of  
a pesticide that violated both FIFRA section 12(a)(1)(A) and  
12(a)(1)(E) from the outset. Thus, the EAB never addressed  
whether EPA may assess separate penalties for two or more



1 Finally, the ALJ's overly narrow reading of FIFRA section  
2 12(a)(1) imposes an artificial ceiling on the assessment of  
3 penalties that eviscerates the wide-ranging protections afforded by  
4 that provision. FIFRA section 12(a)(1) enumerates six different  
5 prohibitions intended to protect public health and welfare from  
6 distribution or sale of certain pesticides and devices. Thus,  
7 section 12(a)(1)(A) targets unregistered pesticides to ensure that  
8 EPA can scrutinize the safety and effectiveness of pesticides  
9 before they are sold to the public. Section 12(a)(1)(B) and  
10 12(a)(1)(C) prohibit distribution or sale of registered pesticides  
11 that make any claims different than those for which they were  
12 registered and distribution or sale of registered pesticides whose  
13 composition differs from the composition approved for registration,  
14 respectively. Section 12(a)(1)(D) and 12(a)(1)(E) address threats  
15 posed by pesticides which have not been colored as required or have  
16 labeling or packaging deficiencies, respectively.

17 Under the ALJ's reading of FIFRA section 12(a)(1), if a person  
18 violates any one of these provisions, he or she obtains a free pass  
19 to violate any other provision without penalty. For example, if a  
20 pesticide manufacturer sold a registered pesticide that made claims  
21 different than those accepted for registration and also contained  
22 active ingredients not approved by the registration in flagrant  
23 violation of both FIFRA section 12(a)(1)(B) and (C), it would only  
24 be penalized for one violation. With penalties thus capped, there  
25 would be less incentive for this manufacturer or any other

26  
27  
28 

---

violations of FIFRA section 12(a)(1) arising from the  
distribution or sale of the same pesticide.

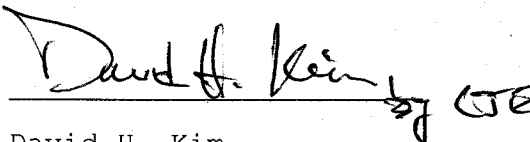
1 | registrant to adhere to all of the terms of its registration.

2 | VI. CONCLUSION

3 | Thus, the ALJ incorrectly concluded that EPA cannot assess  
4 | separate civil penalties for a violation of FIFRA section  
5 | 12(a)(1)(A) and a violation of FIFRA section 12(a)(1)(E) arising  
6 | from the same distribution or sale of a pesticide. Appellant asks  
7 | the Board to set aside the portions of Initial Decision that  
8 | pertain to this erroneous conclusion.

9 |  
10 | June 8, 2007

Respectfully submitted,

11 |  *David H. Kim* by CJE

12 |  
13 | David H. Kim  
14 | Assistant Regional Counsel (ORC-3)  
15 | U.S. Environmental Protection Agency  
16 | Region 9  
17 | 75 Hawthorne Street  
18 | San Francisco, CA 94105  
19 | Ph: (415) 972-3882  
20 | FAX: (415) 947-3570

21 | Of Counsel:

22 | Carl Eichenwald  
23 | Gary Jonesi  
24 | Office of Enforcement and Compliance Assurance  
25 | U.S. Environmental Protection Agency  
26 | 1200 Pennsylvania Avenue, N.W.  
27 | Washington, DC 20460-0001  
28 |

CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing Brief in Support of Complainant's Notice of Appeal was hand delivered to:

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, DC 20005

and that a true and correct copy of the said document was sent by First Class United States Mail, addressed to the following:

Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges (M/C 1900L)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

....

Allen H. Smith  
P.O. Box 5491  
Peoria, AZ 85385

....

Regional Hearing Clerk  
Office of Regional Counsel (ORC-1)  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Dated: 6/8/07

By:   
Carl Eichenwald

Office of Enforcement and  
Compliance Assurance  
U.S. EPA