UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Martex Farms, S.E.,) Docket No. FIFRA-02-2005-5301
)
RESPONDENT)
)

ORDER ON RESPONDENT'S MOTION REQUESTING RECOMMENDATION OF INTERLOCUTORY REVIEW OF PRIOR ORDERS DENYING SUCH SAME RELIEF, AND/OR FOR RECONSIDERATION, AND TO SET-ASIDE JOINT STIPULATION

I. Background

On October 21, 2005, Respondent filed the instant "Motion To Request That The Order Denying Respondent's Motion Requesting Recommendation For Interlocutory Review Of Order On Accelerated Decision Be Certified to the Environmental Appeals Board (EAB); Alternatively, To Reconsider Its Order" ("Second Motion for Review").[1] Respondent's Motion seeks, pursuant to "40 C.F.R. § 22.29(a)" (Second Motion for Review at 1), a recommendation from this Tribunal that the Environmental Appeals Board ("EAB") interlocutorily review this Tribunal's October 12, 2005 "Order Denying Respondent's Motion Requesting Recommendation for Interlocutory Review of Order on Accelerated Decision" ("First Interlocutory Order"), which denied Respondent's October 11, 2005 "Motion to Request that the Order On Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability be Certified to the Environmental Appeals Board" ("First Motion for Review"), which sought a recommendation from this Tribunal that the EAB interlocutorily review this Tribunal's October 4, 2005 "Order on Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability

[1]This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 ("Rules" or "Rules of Practice"). Respondent's Motion certifies that it was sent "via FedEx" to the Hearing Clerk on October 20, 2005. Second Motion for Review at 6-7. The Motion was "received" by the Hearing Clerk, and therefore "filed," on October 21, 2005. *See* Rule 22.5(a), 40 C.F.R. § 22.5(a).

("Order on Accelerated Decision"). To date, no response to Respondent's Second Motion for Review has been received from Complainant. However, in view of the fact that the hearing of this case is scheduled to commence in three days (including only one business day – today), the volume of other motions that have been recently filed in this matter, and the outcome of this Order, it is hereby deemed unnecessary to wait for a response from Complainant before ruling on the Motion.

The essence of Respondent's Second Motion for Review is a reiteration of Respondent's arguments that, first, "Stipulation No. 23 only refers to the two (2) ClearOut applications of Monday April 26, 2004, and therefore [sic] limited to Counts 150 and 151 [and to Counts 303 and 304]" (Second Motion for Review at 4-5, 6 (emphasis in original)), and second, that, except for the two applications of the pesticide "ClearOut" which occurred on April 26, 2004 (the date of the inspection), Complainant's Exhibit ("CX") 21 in Complainant's Prehearing Exchange ("PHE") "demonstrates that posting of the ClearOut herbicide was realized as shown." Second Motion for Review at 4.

On August 19, 2005, the parties filed "Joint Prehearing Stipulations" ("Stipulations") in this matter. Stipulation No. 23, in full, states: "On April 26, 2004, no applications of the herbicide ClearOut 41 Plus were included in the WPS posting in the central posting area for workers at Respondent's Juaca [sic] facility." Stipulations ¶ 23. As this Tribunal explained in its "First Interlocutory Order:"

> Nothing in Stipulation 23 (or in any other part of the Stipulations) "limits" Stipulation 23 to any specific Counts. To the contrary, Stipulation 23 informs *any* Count of the Complaint to which a "ClearOut" posting (or lack thereof) on April 26, 2004 is relevant. In this regard, Respondent's Motion for Review itself quotes the WPS at 40 C.F.R. § 170.122, which states in part:
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>> When workers are on an agricultural establishment and, ***within the last 30 days***, a pesticide covered by this subpart has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display ... specific information about the pesticide... The information shall be posted before the application takes place, if workers will be on the establishment during application. Otherwise, the information shall be posted at the beginning of any worker's first work period... The information ***shall continue to be displayed for at least 30 days*** after the end of the restricted-entry interval (or, if there is no restricted-entry interval, ***for at least 30 days*** after the end of the application) or at least until workers are no longer on the establishment, whichever is earlier.[[2]]

2 It is undisputed that approximately 20 workers were present at the Jauca facility on April 26, 2004, thus this final sentence would not apply to shorten the notice period. *See*, Second Amended Complaint ¶ 64; Answer to Second Amended Complaint ¶ 64; Stipulations ¶ ¶ 20 and

> 40 C.F.R. § 170.122 (*quoted in* [First] Motion for Review at 6-7) (emphases added). All of the 151 alleged applications set forth in paragraphs 56 and 71 of the Complaint allegedly occurred between March 29 and April 26, 2004 (*i.e.*, within thirty days of April 26, 2004). Thus, the absence of a required WPS posting on April 26, 2004 is clearly relevant to *all* of the alleged applications set forth in paragraphs 56 and 71 of the Complaint. Therefore, Respondent has failed to identify "substantial grounds for difference of opinion" regarding this Tribunal's Order on Accelerated Decision on any Count from 1 to 151 of the Complaint.

First Interlocutory Order at 12 (footnote added). Respondent's Second Motion for Review fails to articulate any new argument in this regard and does not persuade this Tribunal that the above-quoted reasoning of the First Interlocutory Order is in error.

II. Procedural Errors in Respondent's Filing of Second Motion for Review

Rule 22.29, 40 C.F.R. § 22.29, governs "[a]ppeal from or review of interlocutory orders or rulings" in this case. Specifically, Rule 22.29 states:

> (a) *Request for interlocutory appeal*. Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, *requesting that the Presiding Officer* forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal. (b) *Availability of interlocutory appeal*. The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when: (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective. (c) *Interlocutory review*. If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer **declines** to recommend review of an order or ruling, it may be reviewed **by the Environmental Appeals Board** only upon appeal from the initial decision, **except** when the ***Environmental Appeals Board*** **determines, *upon motion* of a party and in exceptional circumstances**, that to

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27. Clear out also has a restricted interval period of 12 hours which would extend the posting time even beyond thirty days after application. *See*, Complainant's Prehearing Exhibit No. 20.

delay review would be contrary to the public interest. Such motion **shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend** such order or ruling for interlocutory review.

40 C.F.R. § 22.29 (emphases added).

Respondent's instant Second Motion for Review, filed pursuant to "Section 22.29***(a)*** of the Consolidated Rules of Practice" (Second Motion for Review at 1 (emphases added)), and filed with this Tribunal but ***not with the EAB***, appears to be a motion asking this Tribunal to "recommend" to the EAB for review its *previous* Order *declining* to "recommend" to the EAB for review its underlying Order on Accelerated Decision. As such, Respondent's instant Second Motion for Review is not properly made. That is, if a respondent were permitted to continually seek a "recommendation for review" of previous denials of such recommendations on the same underlying Orders, then such motions could go on *ad infinitum* without the matter ever reaching the EAB. This absurd process is clearly not what Rule 22.29 contemplates. Rather, a respondent must first file a motion with *this Tribunal*, pursuant to *subsections (a) and (b)* of Rule 22.29, requesting that this Tribunal "recommend" an interlocutory Order to the EAB for review. However, if such a motion is denied and this Tribunal declines to so recommend an Order (as is the case in the present proceeding), then a respondent may thereafter file a motion *with the EAB*, pursuant to *subsection (c)* of Rule 22.29, requesting that *the EAB nevertheless* interlocutorily review the *underlying Order* based upon the existence of *" exceptional circumstances."*

Therefore, to the extent that Respondent's Second Motion for Review is (at it appears to be) a motion requesting that this Tribunal recommend its "First Interlocutory Order" of October 12, 2005 to the EAB for interlocutory review, such "Second Motion for Review" is **denied** because it is not properly made pursuant to Rule 22.29.[3] Further, even if such a Motion were proper, this Tribunal would **deny** the Motion and **decline** to recommend either its First Interlocutory Order or its Order on Accelerated Decision for review because Respondent's Second Motion for Review, as did its First Motion for Review, fails to identify any "important question of law or policy concerning which there is substantial grounds for difference of opinion." 40 C.F.R. § 22.29(b) (1).

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[3]As a courtesy to Respondent, this Tribunal has, on the date of this Order, sent Respondent's "Second Motion for Review," along with this Order, to the EAB by facsimile. However, this Tribunal expresses no opinion as to whether the EAB may or may not consider Respondent's Motion received in such manner to thus be properly and/or timely "filed" with it pursuant to 40 C.F.R. § 22.29.

III. Respondent's "alternative" "Motion to Reconsider"

Respondent's Second Motion for Review further states: "To the extent that good cause has been established for instant petition, it is respectfully requested to this Honorable Court to, *alternatively*, *reconsider* its Order..." Second Motion for Review at 6 (emphasis added).[4]

The Consolidated Rules of Practice at 40 C.F.R. Part 22 do not provide for reconsideration of an interlocutory order, but they do provide for reconsideration of a final order of the EAB. The standard for ruling on a motion to reconsider an interlocutory order should be at least as strict as the EAB's standard for reconsidering a final decision. *See, Oklahoma Metal Processing, Inc., EPA* Docket No. TSCA-VI-659C, 1997 EPA ALJ LEXIS 16 * 2 (ALJ, Order Denying Motion for Reconsideration, June 4, 1997) (requiring a motion for reconsideration of an interlocutory order not only to meet the EAB's standard for reconsideration under 40 C.F.R. § 22.32, but also to demonstrate that a variance from the rules, which do not provide for reconsideration of ALJ orders and decisions, will further the public interest); *Ray & Jeanette Veldhuis*, EPA Docket No. CWA–9-99-0008, 2002 EPA ALJ LEXIS 47 * 7 (ALJ, Order Denying Motion to Reopen Hearing, Aug. 13, 2002) ("assuming that a motion for reconsideration from an initial decision may be brought properly before an administrative law judge, such motion would be subject to the same standard of review as that of the EAB").

The Rules provide that a motion for reconsideration of a final decision of the EAB "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. The Preamble discussion of the 1999 amendments to the Rules describes the intent of reconsideration as follows:

> The purpose of § 22.32 is to provide a mechanism to bring to the EAB's attention a manifest error, such as a simple oversight, or a mistake of law or fact, or a change in the applicable law. *See, In the Matter of Cypress Aviation, Inc.,* 4 E.A.D. 390, 392 (EAB 1992). The motion for reconsideration is not intended as a forum for rearguing positions already considered or raising new arguments that could have been made before.

64 Fed. Reg. 40138, 40168 (July 23, 1999). The EAB stated, in *Southern Timber Products*, 3 E.A.D. 880, 889 (EAB 1992), that "reconsideration of a Final Decision is justified by an intervening change in the controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice."[5] The EAB therein quoted an earlier decision of the appellate

[4]While it is somewhat unclear whether Respondent seeks "reconsideration" of the underlying Order on Accelerated Decision or, rather, on the First Interlocutory Order of October 12, 2005, this Tribunal's conclusion is the same in either event.

[5] New evidence would not be an appropriate basis for reconsideration of an initial decision because the Rules provide for a motion to reopen the hearing to address new evidence.

tribunal, *City of Detroit*, TSCA Appeal No. 89-5 (CJO Feb. 20, 1991), slip op. n. 18 at 2, which stated:

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

The standard enunciated by the EAB is similar to that used by Federal trial courts under Federal Rule of Civil Procedure 60(b), with which courts may grant relief from judgment for, *inter alia,* "obvious errors of law, apparent on the record." *Van Skiver v. United States,* 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied,* 506 U.S. 828 (1992), *citing, Alvestad v. Monsanto Co.*, 671 F.2d 908, 912-13 (5th Cir.), *cert. denied,* 459 U.S. 1070 (1982). Motions for reconsideration are not for presenting the same issues ruled upon by the court, either expressly or by reasonable implication. *United States v. Midwest Suspension & Brake,* 803 F. Supp. 1267, 1269 (E.D. Mich. 1992), *aff'd*, 49 F.3d 1197 (6th Cir. 1995). However, some courts have stated that a motion for reconsideration is appropriate where the court has mistakenly decided issues outside of those the parties presented for determination. *United States v. MPM Contractors, Inc.,* 767 F. Supp. 231 (D. Kan. 1990); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.,* 99 F.R.D. 99, 101 (E.D. Va. 1983).

Thus, to the extent that Respondent's Second Motion for Review is, in the "alternative," a "Motion to Reconsider," it may be granted, if at all, where there is "an obvious error of law" or "clear error" has been shown, or perhaps where there is merely "a mistake of law or fact," but not merely where there are grounds for a different opinion. Because Respondent has failed to demonstrate "an obvious error of law," "clear error," or "a mistake of law or fact" in either the Order on Accelerated Decision or the First Interlocutory Order, Respondent's "alternative" "Motion for Reconsideration" is **denied**.

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40 C.F.R. § 22.28.

IV. Respondent's "Motion to Set Aside Stipulation No. 23"

Finally, Respondent's Second Motion for Review states that "it is respectfully requested to this Honorable Court to ... set aside *Stipulation 23* because its interpretation is in conflict with previous Respondent's assertions and is inconsistent with the evidence before this Tribunal." Second Motion for Review at 6 (emphases added). Respondent cites to no administrative or judicial decisions, regulations, or other guidance regarding the authority of this Tribunal to "set aside" a "joint stipulation" which has been voluntarily filed and become part of the record of this case and has been reasonably relied upon by this Tribunal in issuing numerous Orders (which are themselves now the "law of the case" in this matter[6]), nor does Respondent suggest any standard by which such a decision might be made. Respondent does not claim that Complainant is agreeable to this Joint Stipulation being set aside. Respondent does not point to any specific evidence currently in the record suggesting that Stipulation No. 23 is factually incorrect, *i.e.*, that, in fact, ClearOut was included in the WPS postings on site on April 26, 2004. If at hearing evidence produced proves that this joint factual stipulation is erroneous, then reconsideration of findings made thereon will, of course, be undertaken. As it stands now, however, Respondent's instant Motion to "set aside" Stipulation No. 23 is **denied**.

ORDER

For all of the forgoing reasons, this Tribunal **declines** to recommend *either* its October 4, 2005 "Order on Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability," *or* its October 12, 2005 "Order Denying Respondent's Motion Requesting Recommendation for Interlocutory Review of Order on Accelerated Decision," to the Environmental Appeals Board for review. Further, this Tribunal

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[6]The prior rulings of this Tribunal in the present matter are the law of this case and may not be relitigated in subsequent stages of this proceeding except to prevent "plain error," defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process." *See, e.g.*, Black's Law Dictionary 563 (7th ed. 1999) *See, e.g., J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States,*1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001) (citing JAMES W. MOORE, MOORE'S FEDERAL PRACTICE PP 404[1] & 404[10](2d ed. 1991)) (a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation); *Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999); *Lyon County Landfill*, 2002 EPA App. LEXIS 4, *27 , 2002 EPA App. LEXIS 4 (EAB 2002); *Rogers Corporation*, 2000 EPA App. LEXIS 28, * , 2000 EPA App. LEXIS 28 (EAB 2000); *Bethenergy*, 1992 EPA App. LEXIS 74, *7; 3 E.A.D. 802 (EAB 1992) (while the doctrine of the law of the case is a heavy deterrent to vacillation on arguable issues, it is not designed to prevent the correction of plain error) *citing* 1B Moore's Federal Practice § 0.404[1] (2nd Ed. 1991). This Tribunal finds that Respondent has not shown "plain error" in any prior ruling in this case.

denies Respondent's "Motion for Reconsideration" and **denies** Respondent's "Motion to Set Aside Stipulation No. 23." Therefore, Respondent's instant "Motion To Request That The Order Denying Respondent's Motion Requesting Recommendation For Interlocutory Review Of Order On Accelerated Decision Be Certified to the Environmental Appeals Board (EAB); Alternatively, To Reconsider Its Order" is **DENIED**. **The hearing of this matter currently scheduled to begin on Monday, October 24, 2005 will proceed as planned.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 21, 2005
Washington, D.C.