

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

_____)
In the Matter of:)
Spitzer Great Lakes, Ltd. Co.) TSCA Appeal No. 97-4
_____)

ORDER DISMISSING APPEAL

On March 20, 1997, Spitzer Great Lakes, Ltd., Company ("Spitzer") filed an appeal from an initial decision served on February 3, 1997, assessing a \$165,000 penalty against Spitzer for numerous violations of the regulations pertaining to the use and storage of PCBs and PCB items. U.S. EPA Region V filed a motion to dismiss this appeal on the grounds that it is untimely. For the reasons that follow, the Region's motion is granted.

The certificate of service accompanying the initial decision in this matter indicates that the initial decision was served upon the parties on February 3, 1997.' Under the applicable Consolidated Rules of Practice, 40 C.F.R. Part 22, any appeal from that initial decision had to be filed "within twenty (20) days after the initial decision [was] served upon the parties." 40 C.F.R. § 22.30(a). Because the initial decision was served upon Spitzer by mail, five days are added to Spitzer's twenty-day appeal period. 40 C.F.R. § 22.07(c). Applying these rules here, the deadline for Spitzer to file an appeal from the initial decision served by mail on February 3, 1997, was February 28,

'See 40 C.F.R. § 22.07(c) ("Service of all other pleadings and documents is complete upon mailing.").

1997. Spitzer's notice of appeal, however, was not filed with the Board until March 20, 1997, and it is therefore untimely.

Spitzer argues that its appeal is timely because it was filed on the forty-fifth day after the initial decision was served, and the presiding officer indicated in the initial decision that "the decision would become final within forty-five days from the date of service unless an appeal was taken to the Environmental Appeals Board." Brief of Respondent-Appellant's Spitzer Great Lakes at 2. Actually, what the presiding officer said was:

Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision.

Initial Decision at 16. Apparently, Spitzer construed this language to mean that it had forty-five days to file an appeal.

Spitzer's argument lacks merit. In addressing a similar claim based upon similar language in an initial decision, we explained:

The above-quoted statement merely specifies the period of time (45 days) that it takes for [an initial decision] to become a final decision in the absence of an appeal (or sua sponte review). While the statement can be faulted for not divulging the time period for perfecting an appeal (20 days), which is the more pertinent time period from the perspective of a potential appellant, this dereliction is one of parsimony, not deception. Accordingly, we do not think that it is asking too much of a potential appellant to consult the rules themselves, to ensure an adequate and full understanding of the procedures for perfecting an appeal. There, in Section 22.30, under the bold-face

heading, "[a]ppeal from or review of initial decision," the appellant will find the 20-day requirement in the clearest of terms.

In re Production Plated Plastics, Inc., 5 E.A.D. 101, 103-104 (EAB 1994).² See also *The Environmental Appeals Board Practice Manual* at 17 n.65 (1994) ("The initial decision will become the final agency decision after 45 days of service unless (1) an appeal to the EAB is taken or (2) the EAB elects, sua sponte, to review the initial decision. A party seeking to appeal must file an appeal within 20 days of service of the initial decision.") (emphasis supplied) .³

Spitzer's appeal was filed twenty days after the appeal period expired. Spitzer advances no special circumstances warranting a relaxation of the time for filing an appeal. See *Production Plated Plastics*, 5 E.A.D. at 104. Accordingly, its

"Nevertheless, as we explained in *Production Plated Plastics*, "we strongly recommend that in future cases the Regional Administrator should either expressly inform the parties of the 20-day time period in Section 22.30, or, at least, make specific reference to that section when informing the parties of when a default order becomes final." 5 E.A.D. 104, n.4 (emphasis added). Although *Production Plated Plastics* involved a default order issued by a Regional Administrator under 40 C.F.R. §§ 22.16 and 22.17, the concern that prompted the recommendation applies equally to initial decisions issued by presiding officers under the Consolidated Rules. Therefore, in the future, presiding officers are also urged to follow the recommendation.

³We note that from the inception of these proceedings Spitzer has been advised that the Consolidated Rules of Practice, 40 C.F.R. Part 22, which include section 22.30, apply to these proceedings. The cover letter to the complaint indicates that a copy of those rules was enclosed with the complaint when it was served upon Spitzer.

untimely appeal is hereby dismissed.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: *April 15, 1997*

By: _____
Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Appeal in the Matter of Spitzer Great Lakes, Ltd., Company, TSCA Appeal No. 97-4, were sent to the following persons in the manner indicated:

Certified Mail,
Return Receipt Requested:

Anthony B. Giardini
Bradley & Giardini Co., L.P.A.
520 Broadway Avenue, 3rd Floor
Lorain, Ohio 44052

Richard R. Wagner
Associate Regional Counsel
U.S. EPA Region V
77 West Jackson Blvd.
Chicago, IL 60604-3590

Interoffice Mail:

Bessie Hammiel
Headquarters Hearing Clerk (1900)

Dated: *APR 16 1997*

Mildred T. Johnson
Secretary