

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

_____)
In re: Henry R. Stevenson, Jr. Individually)
And as Owner of Parkwood Land Company))
United States Environmental Protection)
Agency, Region 6)
Dkt. No. CWA-06-2010-2708)
_____)

MOTION FOR RECONSIDERATION

On April 19, 2011 the Environmental Appeals Board (“Board”) issued an Order Dismissing Appeal for Lack of Jurisdiction. According to the Order of the Board, “The Administrative Order at issue here is not an initial decision or interlocutory ruling or order of an administrative law judge or regional judicial officer.”

ARGUMENT

The Consolidated Rules of Practice §22.4(a) states in part that “[t]he Environmental Appeals Board rules on appeals from the initial decisions, ruling and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice.” 40 C.F.R. §22.4(a). §22.4(b) states that “[e]ach Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice...” 40 C.F.R. §22.4(b).

The Administrative Order from which this appeal springs begins with:

“[t]he following Findings of Fact and Conclusions of Law are made and order issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (‘EPA’) by Section 309(a) of the Clean Water Act (‘the Act’). 33 U.S.C. §1319(a). The Administrator has delegated the authority to issue this Order to the Regional Administrator, EPA Region 6, who has further delegated such authority to the Director of the Water Quality Protection Division, EPA Region 6.” *See* Appellant’s Brief, Exhibit C.

The Director of Water Quality Protection Division, EPA Region 6, Mr. Miguel Flores, signed the Administrative Order with the title of “Director, Water Quality Protection Division.” *See* Appellant’s Brief, Exhibit C.

The begged question at issue with regards to the Board’s Dismissal for Lack of Jurisdiction becomes this: Is Mr. Miguel Flores a Regional Judicial Officer?

The Consolidated Rules of Practice define a “Regional Judicial Officer” as “a person designated by the Regional Administrator under §22.4(b).” 40 C.F.R. 22.3(a).

From the original Administrative Order issued by Mr. Flores, it appears that Mr. Flores plainly states that his authority to issue such an Order derives from a delegation of such power from the Regional Administrator. *See* Appellant’s Brief, Exhibit C. While the Administrative Order does not specifically state, it is implied that the Regional Administrator, EPA Region 6 granted Mr. Flores his authority as a Regional Judicial Officer under the provisions of the Consolidated Rules of Practice §22.4(b). *See* 40 C.F.R. 22.3(a).

If Mr. Flores is not a Regional Judicial Offer, delegated authority as such under §22.4(b) by the Regional Administrator, then by what authority does Mr. Flores have to issue an order of any type directing Appellate to take specified actions or “Respondents may be ordered to pay a monetary penalty?” If Appellant is not received “an initial decision” in the matter, then why is there a Docket Number assigned with the Administrative Order....why is Appellant continually referred to as “Respondent”...and why are there “Findings of Fact and Conclusions of Law?” *See* Appellant’s Brief, Exhibit C. May the Director of the Water Quality Protection Division, EPA Region 6, by delegation of authority from the Regional Administrator, present “Findings of Fact and Conclusions of Law” if he is not a Regional Judicial Officer? *See* Appellant’s Brief, Exhibit C; *see also* 40 C.F.R. §§22.3(a); 22.4(b).

The Consolidated Rules of Practice provide that a “Presiding Officer...presides in an administrative adjudication until an initial decision becomes final or is appealed.” 40 C.F.R. 22.3(a). §22.4(c) provides that the “Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues and avoid delay.” 40 C.F.R. §22.4(c). In order to assure that the facts are fully elicited, the Presiding Officer may

administer oaths; take affidavits; examine witnesses; receive documentary evidence; and *decide questions of facts, law or discretion*. 40 C.F.R. §22.4(c) [emphasis added]. Because Mr. Flores provides “Findings of Fact and Conclusions of Law” in the original Administrative Order, it is also implied that his delegation of authority is that of Presiding Officer in this dispute as well. *See id.* However, Appellant has been provided with no opportunity to provide testimony under oath, present witnesses, present affidavits, examine or cross-examine witnesses or provide documentary evidence.

Appellant met with representatives of EPA Region 6 on-site in an effort to mediate the dispute over the property. The representatives discussed the issues and adjourned the site survey with the promise to “get back” to Appellant with options. No further discussion occurred until the presentation of the original Administrative Order signed by Mr. Flores.

NOTICE OF SERVICE/CERTIFICATE OF SERVICE

Counsel for Appellant regrets that the Certificate of Service requirement set forth in 40 C.F.R. §§22.5(a)(3) and 22.5(b) were not followed to the letter of the regulation. This requirement was merely oversight as the rules differ somewhat from state and federal practice. However, a copy of the Notice of Appeal as well as a copy of the Appeals Brief was forwarded to Legal Counsel for EPA Region 6, Russell Murdock, and case officer for the dispute for EPA Region 6, Barbara J. Aldridge at 8:36 p.m., March 6, 2011 via email. *See Exhibit A*, attached. A telephone confirmation of receipt by Appellant’s counsel to Mr. Murdock and Ms. Aldridge was accomplished on March 7, 2011 at 10:24 a.m. and 10:21 a.m. respectively. *See Exhibit B*, Matter Notes, attached. While Appellant counsel failed to follow the letter of the regulation, the spirit of proper notice was accomplished.

CONCLUSION AND PRAYER

The original Administrative Order provides the very substance upon which jurisdiction is conferred upon the Board. The Administrative Order confers authority of “Regional Judicial Officer” from the Regional Administrator to Mr. Flores, presumably under §22.4(b). Mr. Flores’ “Findings of Fact and Conclusions of Law” indicate that he acted not only as “Regional Judicial Officer” but also as “Presiding Officer” in the dispute. Therefore, the original Administrative Order is an “initial decision” by a “Regional Judicial Officer,” and confers jurisdiction upon the Board. Appellant prays that the Board reconsider its initial ruling in this dispute and grant Appellant the opportunity to be heard in the administrative process, and to all other such relief that Appellant may be entitled to in law or equity.

Respectfully Submitted,

THE KIBLER LAW FIRM

/s/ Charles M. Kibler, Jr.

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CERTIFICATE OF SERVICE

On this 27th day of April, 2011, the undersigned provided a copy of Appellant’s Motion for Reconsideration to legal counsel for EPA Region 6, Russell Murdock, via email (Murdock.russell@epa.gov) and certified mail U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

/s/ Charles M. Kibler, Jr.

Charles (Chuck) Kibler, Jr.