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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

<p>In re:)</p> <p style="text-align: center;">))</p> <p>Zoo Med Laboratories, Inc.)</p> <p>0886- 98- 11)</p> <p style="text-align: center;">))</p> <p style="text-align: center;">Respondent)</p>	<p>Docket No. FIFRA- 09-</p>
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Order Denying Complainant's Motion for Interlocutory Appeal

On August 9, 1999, Complainant, EPA filed a Motion, pursuant to 40 C.F.R. Section 22.29(a), seeking "Certification of Interlocutory Appeal" from the Court's July 28, 1999 Orders on Motions. On August 24, 1999, Zoo Med filed its Opposition to the Motion, asserting that EPA's Motion was untimely filed and should also be denied on substantive grounds. For the reasons which follow, EPA's Motion is DENIED.

The Consolidated Rules provide that a party seeking interlocutory appeal from an Order, other than an initial decision, must file the Motion within the time allowed and satisfy the substantive requirements for such review by the Environmental Appeals Board ("Board"). In this instance, EPA has satisfied the procedural rules for a timely filing but, for the reasons which follow, the Court denies the Motion on the basis that the substantive requirements for certifying interlocutory appeal have not been met.

First, procedurally, EPA's Motion was timely filed. Section 22.29(a) of the Part 22 Consolidated Rules of Practice, 40 C.F.R. Part 22, provides that requests for certification for interlocutory appeal "shall be filed within six (6) days⁽¹⁾ of notice of the ruling or service of the order..." In this instance the Court's Orders on Motions, which is the subject of the present matter, was mailed on July 28, 1999. Rule 22.07(c) provides that in such instances "five (5) days shall be

added to the time allowed ... for the filing of a responsive pleading or document." Two considerations come into play. First, the day of the event from which the designated period begins to run is not included in the computation, and, second, when the time expires on a Saturday or Sunday the time period is extended to include the next business day. Applying these factors in this instance, the eleven (11) days permitted began running on July 29th and the eleventh day fell on a Sunday, August 8th. Thus, Complainant had until August 9th to file the instant Motion. [\(2\)](#)

Substantively, 40 CFR Section 22.29(b) provides that the Judge "may certify any ruling for appeal to 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 (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective."

In this instance the Complaint involves 15 (fifteen) Counts. Of these, only four (Counts XI through XIV) are the subject of EPA's Motion for Certification of Interlocutory Appeal. The four New York based Counts did not even appear in the original Complaint, but instead were tacked on in the Complainant's First Amended Complaint. Were it not for the Court's determination in the July 28th Orders on Motions that the EPA's failure to follow its own enforcement procedures, as provided in the cooperative agreement with New York, resulted in the application of the doctrine of *res judicata*, the four New York based Counts which are the subject of EPA's present motion, would have been granted as to liability for the same reasons advanced by the Court as to Counts I through VIII. Such a determination would have been required because, apart from the *res judicata* aspect, Respondent's Answer for Counts XI through XIV was no different than those advanced for Counts I through VIII.

The Court takes notice that the Environmental Appeals Board, under the new Consolidated Rules at Section 22.30(f), [\(3\)](#) has the authority to modify matters of fact or law contained in an initial decision and to modify the penalty. In appropriate circumstances, the Board has acted to apply a penalty where none had been assessed by the presiding judge. See, for example, the Board's decision in Roger Antkiewicz & Pest Elimination Products of America, Inc., FIFRA Appeal Nos. 97-11 & 97-12, 1999 EPA App. LEXIS 8, March 26, 1999, wherein it reversed the Presiding Judge's dismissal of a Count and determined the appropriate penalty instead of remanding the matter "[i]n the interest of bringing [the] case to conclusion without further delay..." *Id.* at LEXIS *48. Given these considerations, the Court is of the view that, should the Board disagree with the determination of the July 28, 1999 Order, dismissing Counts XI through XIV, there would not be any impediment to its assessing an appropriate penalty for those Counts without the necessity for a remand.

Thus, the Court finds that an immediate appeal would not materially advance the ultimate termination of the proceeding. Indeed, with liability determined for the bulk of the Counts and with significant determinations on liability remaining for Counts IX and X, as well as the determination of an appropriate penalty for all Counts, except Counts XI through XIV, the unnecessary delay of a final determination by the Court would only operate to *materially retard* the ultimate termination of the proceeding.

So Ordered

William B. Moran
United States Administrative Law Judge

Dated: August 27, 1999

1. It is noted that under the newly revised Consolidated Rules of Practice, 10 days are now allowed for the filing of a motion seeking interlocutory appeal. Section 22.29(a). However the current motion was filed before the August 23, 1999 effective date of the new rules. Therefore the prior rules' 6 days standard is applied.
2. Respondent's Opposition incorrectly asserts that EPA's Motion was filed on August 11th. In fact, the Motion was date stamped as filed on August 9th. Counsel should carefully check to be sure that it accurately represents dates of occurrence, particularly when they are critical to resolution of an issue.
3. Under the prior Consolidated Rules, the Board had the same authority under Section 22.31.

In the Matter of Zoo Med Laboratories, Inc., Respondent
Docket No. FIFRA-09-0886-98-11

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion For Interlocutory Appeal**, dated August 27, 1999 was sent this day in the following manner to the addressees listed below:

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Dated: August 27, 1999

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