

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

In re:)	
)	
Ray and Jeanette Veldhuis)	CWA Appeal No. 02-05
)	
Docket No. CWA-9-99-0008)	
)	

ORDER DISMISSING NOTICE OF APPEAL WITHOUT PREJUDICE

On June 24, 2002, Administrative Law Judge Barbara A. Gunning ("ALJ") issued an Initial Decision in which she assessed a civil penalty of \$87,930 for violations of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). See Initial Decision, Docket No. CWA-9-99-0008 (ALJ, June 24, 2002). The Initial Decision appears to rely on the Ninth Circuit decision in *Borden Ranch P'ship v. United States Army Corp's of Eng'rs*, 261 F.3d 810 (9th Cir. 2001).

Pursuant to section 22.28 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP"), 40 C.F.R. part 22, Respondent, Ray and Jeanette Veldhuis, filed a Motion to Reopen Hearing with the ALJ under 40 C.F.R. § 22.28. See Motion to Reopen Hearing (filed July 19, 2002). Respondent argued that the Supreme Court's decision to grant certiorari in *Borden Ranch* provided a basis for granting

its motion because two of the issues under review by the Supreme Court are the same for the case at hand. Respondent's motion sought, in the alternative, a stay of the ALJ's initial decision. *Id.* at 2.

Pursuant to section 22.30 of the CROP, Respondent also filed a Notice of Appeal with the Environmental Appeals Board ("EAB" or "Board") on August 1, 2002. See Notice of Appeal (filed Aug. 1, 2002).

On August 13, 2002, the ALJ denied Respondent's motion and request for a stay of the Initial Decision. See Order Denying Motion to Reopen Hearing and Order Denying Motion for a Stay of the Initial Decision (ALJ, Aug. 13, 2002). Respondent was served by certified mail, return receipt.

DISCUSSION

Under the CROP, the filing of a motion to reopen a hearing automatically stays the "running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30." 40 C.F.R. § 22.28(b). An order denying any such motion begins anew the time for filing a notice of appeal with the Board. 40 C.F.R. § 22.28(b) (providing that the time period for appeal "shall begin again in full when the motion is denied * * * .").

Accordingly, we find that because Respondent had filed a motion to reopen the hearing under section 22.28, Respondent's Notice of Appeal was prematurely filed with the Board. The motion before the ALJ automatically stayed the effect of her Initial Decision and the time period for filing an appeal of the Initial Decision with the Board. Thus, on August 1, 2002, there was not an initial decision from which an appeal could be filed. Because the ALJ's Initial Decision was not perfected until she ruled on Respondent's motion on August 13, 2002, the Board hereby dismisses Respondent's Notice of Appeal prematurely filed on August 1, 2002, without prejudice.

Respondent may file a notice of appeal within the renewed time period for filing based on the ALJ's August 13, 2002 Order.

So ordered.

ENVIRONMENTAL APPEALS BOARD¹

Dated: 8/15/2002

By: /s/
Edward E. Reich
Environmental Appeals Judge

¹ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1) (2001).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Notice of Appeal Without Prejudice, in the matter of Ray and Jeanette Veldhuis, CWA Appeal No. 02-05, were sent to the following persons in the manner indicated:

Via Pouch Mail:

Judge Barbara A. Gunning
Office of Administrative Law Judges
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Danielle E. Carr
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By Certified Mail,
Return Receipt Requested:

William E. Gnass, Esq.
Mason, Robbins, Gnass & Browning
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Date: 8/15/2002

 /s/
Annette Duncan
Secretary