

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

In re:)

Roger Antkiewicz and)
Pest Elimination Products)
of America, Inc.)

FIFRA Appeal No. 97-12)

Docket No. IF&R-V-002-95)

ORDER DISMISSING RESPONDENTS' APPEAL

An initial decision was signed in the above-entitled matter by administrative law judge Andrew S. Pearlstein ("ALJ") on September 25, 1997. Service of the initial decision occurred on September 29, 1997, when the Regional Hearing Clerk sent a copy of the decision by interoffice mail to Associate Regional Counsel Richard R. Wagner (representing the complainant, U.S. EPA Region V), and a copy by certified mail to respondents Roger Antkiewicz and Pest Elimination Products of America, Inc. (who were not represented by counsel in the proceedings before the ALJ). Service of an initial decision is complete upon mailing. 40 C.F.R. § 22.07(c). Under the governing rules of practice, 40 C.F.R. Part 22, any appeal seeking to challenge the initial decision was required to be filed with the Environmental Appeals Board within twenty days after the date of service of the initial decision. 40 C.F.R. § 22.30(a) (1). The rules also provide, however, that the respondents -- because their copy of the initial decision was sent to them through the U.S. mail -- were entitled to an additional five days in which to file an appeal.

40 C.F.R. § 22.07(c).¹ For those reasons, any notice of appeal from Region V was required to be filed with the Environmental Appeals Board by October 20, 1997, whereas any notice of appeal from the respondents was required to be filed with the Board by October 24, 1997.

On October 8, 1997, Region V filed a motion requesting an extension, until October 31, 1997, of the Region's deadline for appealing the initial decision. The Environmental Appeals Board granted the requested extension and, on October 30, 1997, Region V filed a timely notice of appeal and appellate brief, commencing an appeal that is now pending on the Board's docket as FIFRA Appeal No. 97-11.

In contrast, when respondents' October 24, 1997 appeal deadline passed, respondents had neither commenced an appeal nor requested an extension of time within which to commence an appeal. On November 18, 1997, the Environmental Appeals Board received an untimely notice of appeal and appellate brief from the respondents. Respondents' appeal, which appears on the

¹The Region, having been served by interoffice mail, was not similarly entitled to an additional five days in which to commence an appeal. See *In re* Outboard **Marine Corp.**, CERCLA penalty Appeal No. 95-1, slip op. at 4-5 (EAB, Oct. 11, 1995), 6 E.A.D. ___ (service by interoffice mail is a form of "personal service" under 40 C.F.R. § 22.06, and therefore the recipient of the document cannot claim the benefit of the additional five days provided in 40 C.F.R. § 22.07(c) for service by mail).

Board's docket as FIFRA Appeal No. 97-12, is hereby dismissed as untimely.*

In addition, the Board notes that the materials received from respondents on November 18 do not include a response to Region V's appeal (FIFRA Appeal No. 97-11). Respondents are not required to file a reply brief addressing the Region's arguments, but the Part 22 rules allow them to do so. According to those rules, and specifically according to 40 C.F.R. § 22.30(a) (2), respondents' deadline for submitting a reply brief was November 18, 1997. The Board, however, on its own initiative, hereby grants respondents an additional two weeks from the date of this

²The Board acknowledges that respondents are not represented by counsel in this proceeding, and that as pro se litigants they are properly subject to somewhat "more lenient standards of competence and compliance." In re Rybond, Inc., RCRA (3008) Appeal No. 95-3, slip op. at 19 (EAB, Nov. 8, 1996), 6 E.A.D. (quoting Hall v. *Dworkin*, 829 F. Supp. 1403, 1414 (N.D.N.Y. 1993)). Nonetheless, after careful consideration the Board remains firmly persuaded that the untimeliness of respondents' appeal requires that the appeal be dismissed. The Board notes that respondents were informed in very clear terms, in the text of the initial decision itself, that "this Initial Decision shall become the final order of the Agency, unless an appeal is taken to the Environmental Appeals Board within 20 days of service of this order." Initial Decision at 15. Moreover the Board reaffirms its view that, as a general matter, "a litigant who elects to appear pro se takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance." *Rybond*, slip op. at 20.

order in which to file a response to Region V's appeal, if they so choose.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____
Edward E. Reich
Environmental Appeals Judge

Dated: NOV 2 I 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Respondents' Appeal in the matter of Roger Antkiewicz and Pest Elimination Products of America, Inc., FIFRA Appeal No. 97-12, were served upon the following persons in the manner indicated:.

Certified Mail:

Roger Antkiewicz
Pest Elimination Products
of America, Inc.
35211 23 Mile Road
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Interoffice Mail:

Richard R. Wagner
Associate Regional Counsel
U.S. EPA, Region 5 (C-29A)
77 W. Jackson Blvd.
Chicago, IL 60604

Mildred T. Johnson
Staff Assistant

Dated: NOV 21 1997