

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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IN THE MATTER OF:)
)
Zaclon, Incorporated;)
Zaclon, LLC;)
Independence Land)
Development Company;)
2981 Independence Road)
Cleveland, Ohio 44115)
EPA ID No. OHD 004 184 768)
)
Respondents)
)
DOCKET No. RCRA-05-2004-0019)
_____)

ENVIR. APPEALS BOARD

**Motion Requesting an Extension of Time
in which to Consider Filing Notice of Appeal of Recommended Decision**

Pursuant to 40 C.F.R. §§ 22.16 and 22.30(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits* ("Consolidated Rules"), the Complainant in the case captioned above, the Chief of the Enforcement and Compliance Assurance Branch of the Waste, Pesticides and Toxics Division, U.S. Environmental Protection Agency, Region 5, hereby files this Motion requesting an extension of time in which the Agency may consider whether or not the Agency should file a Notice of Appeal (and a Brief in Support thereof) to appeal a recommended decision (Initial Decision) of the Chief Administrative Law Judge, in the above-captioned matter.

On June 13, 2007, the United States Environmental Protection Agency (U.S. EPA), Region 5, Office of Regional Counsel, received a copy of an Initial Decision from Chief Administrative Law Judge Susan Biro in the matter of Zaclon Inc. Another copy of the same Initial Decision was received in the Region on the same day by the Regional Hearing Clerk, on Wednesday, June 13, 2007.

Both copies of the Initial Decision had been sent in double envelopes, by certified mail, in accordance with the regulations governing the Agency's obligation to safeguard the confidentiality of information for which a party has claimed the protections afforded by the regulations codified at 40 C.F.R. Part 2, regarding claims that specific information is entitled to protection from disclosure as confidential business information (CBI) because it includes

information which can be claimed as proprietary or trade secrets.

Although the copies of the Initial Decision which eventually reached the Region did not arrive until Wednesday June 13, 2007, the Initial Decision was dated June 4, 2007. The Certificate of Service which accompanied the Initial Decision stated that the Initial Decision was served on June 4, 2007.

Respondents have made extremely broad claims as to the alleged confidentiality of almost all information it has provided to U.S. EPA in response to information requests or in the course of inspections. The courtroom was closed for the hearing held on this matter, and the transcript of the hearing, as well as a great deal of the evidence presented, has been claimed as CBI..

The Judge has indicated that she wishes to make an edited version of her decision available to the public, but she has only recently begun to discuss with Respondents which parts of her decision must be redacted to protect Respondent's CBI claims.

U.S. EPA is burdened in this instance by being unable to circulate and discuss freely the Judge's Initial Decision. The constraints imposed by the CBI regulations have already limited, even within Region 5 itself, the number of people able to review and discuss the unredacted Initial Decision.

The record of this case shows that the facts of this case involve other Regions. The regulations involved are being interpreted in a novel way by the Initial Decision, that will affect enforcement of rules governing the generation and transport of hazardous waste in all Regions. The Judge's interpretation of the regulations will have precedential effect that make this a matter of national significance for the Agency. In order to properly weigh and evaluate the decision of whether or not to file an appeal in this matter, it is essential for EPA Headquarters Offices and other Regions to be able to more widely circulate, review carefully and discuss thoroughly the Judge's Initial Decision, and its potential ramifications for enforcement of the RCRA Subtitle C program..

U.S. EPA Region 5 is considering the filing of an Appeal of the ALJ's Recommended Decision with the Environmental Appeals Board. But Region 5 needs to be able to conduct thorough consultations with other Regions and with personnel at U.S. EPA Headquarters Offices, before any decision on whether or not to file an appeal can be reached. At this point, nobody outside Region 5 has seen the Judge's opinion, and dissemination within Region 5 has been limited to a handful of individuals.

Transmission of materials which a party has claimed as CBI, entitled to the protections afforded by 40 C.F.R. Part 2, is a time consuming process, requiring a number of relatively cumbersome steps to protect against unauthorized disclosure of what has been claimed as CBI.. In this case, that means that in order to ensure that the Regions and Headquarters Offices are afforded a genuine opportunity to consult and thoroughly evaluate the question of whether or not the

Agency should appeal this Initial Decision, the Agency must ask the Board to grant an extension of the time allotted in which to file an appeal of the Initial Decision.

Background and Procedural History

This matter was initiated on September 29, 2004, by Complainant, the United States Environmental Protection Agency, Region 5, filing a Complaint alleging that Respondent, Zaclon Incorporated, (Zaclon) had violated the Resource, Conservation and Recovery Act (RCRA), as amended, 42 U.S.C §§ 6901 *et seq.* Specifically, the Complaint alleged, in a single Count, that Zaclon owns and operates a facility at which hazardous wastes, Zinc Sash and Baghouse Dust, were stored without a permit or interim status for at least six years prior to Agency sampling of the alleged hazardous wastes that took place on September 19, 2002. The Complaint alleged that this storage of hazardous wastes without a permit or interim status was a violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio administrative Code (OAC) 3745-50-45.

An Answer to the Complaint was filed on November 2, 2004, denying the alleged violation. By Order dated May 26, 2005, the parties were requested to file their prehearing exchanges, and on July 21, 2005 the prehearing exchange process was completed. By Order dated October 7, 2005, Complainant was granted leave to amend the Complaint to add Zaclon LLC and Independence Land Development Company (ILDC) as Respondents.¹ Complainant was also granted leave, by the same Order dated October 7, 2005, to file a Second Amended Complaint alleging in a second count, Count 2, that Respondents illegally receive, store and treat hazardous waste, namely spent stripping acid, shipped without hazardous waste manifests, from galvanizers around the country, in violation of the RCRA regulations applicable to generators, and that this illegal receipt, storage and treatment of hazardous waste by Zaclon, without either a permit or interim status, is a violation of RCRA.² The Second Amended Complaint was filed on October 14, 2005.

On August 19, 2005, Complainant filed a Motion for Accelerated Decision on Liability

¹ Zaclon, Incorporated, Zaclon LLC, and ILDC are hereinafter collectively referred to as "Respondents" or "Zaclon."

² The Second Amended Complaint was based in part on new information that became available to U.S. EPA Region 5 from OEPA after an inspection of the Zaclon facility conducted on August 10-12, 2005, and upon information provided to U.S. EPA Region 5 by another U.S. EPA Region, Region 1, regarding a complaint by the Massachusetts Department of Environmental Protection (DEP) that a RCRA generator in Massachusetts, Voigt & Schweitzer, was illegally sending spent stripping acid, a RCRA hazardous waste, to the Zaclon facility in Cleveland, Ohio, without the hazardous waste manifests required by the RCRA regulations for the shipment of hazardous waste.

and Memorandum in Support (Motion) asserting that there were no genuine issues of material fact as to Count 1, and that upon the arguments of both parties addressing the inferences and legal conclusions each party would draw, Complainant is entitled to judgment as a matter of law as to Count 1. On September 8, 2005, Respondents submitted their Memorandum in Opposition to Complainant's Motion.

By Order dated November 3, 2005, the Complainant's Motion for Accelerated Decision on Liability was Granted. Respondents are liable for the violations alleged in Count 1 of the Complaint.

On February 3, 2006, Complainant filed a Motion for Accelerated Decision on Liability on Count Two and Memorandum in Support. On the same day Respondents filed a Motion for Accelerated Decision as to Count 2 and a memorandum in Support. On February 13, 2006, Complainant filed a Motion for Leave to Submit Corrected Copy of Complainant's Memorandum in Support and attached corrected Memorandum in Support of Accelerated Decision on Count Two. On February 17, 2006, Complainant filed a Response to Respondent's Motion along with a Memorandum in Support. Respondents filed a Memorandum in Opposition to EPA's Motion for Accelerated Decision on February 24, 2006, and Complainant filed a Reply on March 6, 2006. Respondents submitted a Surreply on March 15, 2006.

In an Order, dated May 18, 2006, this Honorable Court denied Respondent's Motion for Accelerated Decision as to Count 2. The Honorable Court, by the same Order, granted, in part, Complainant's Motion for Accelerated Decision. The Honorable Court concluded that the Complainant is entitled to judgment, as a matter of law, that the spent stripping acid Respondent receives, stores and treats is a "spent material."

An evidentiary hearing was held, beginning on June 6, 2006, and concluding on June 9, 2006, to consider the evidence on the sole remaining issue left unresolved as to liability on Count Two of the Second Amended Complaint, *i.e.*, whether the spent stripping acid, which Zaclon admits it stores and then processes, is **reclaimed**, as that term is defined at 40 C.F.R. 261.1(c)(4) and at OAC 3745-51-01(C)(4). The same evidentiary hearing also considered the evidence regarding the assessment of an appropriate penalty for both Count One and Count Two of the Second amended Complaint in this matter.

On June 4, 2007, the Chief Administrative Law Judge issued an Initial Decision. U.S. EPA personnel did not receive a copy of this Initial Decision until Wednesday, June 13, 2007. The Initial Decision was sent certified mail, in double envelopes, with the full protection of the regulations codified at 40 C.F.R. Part 2, which require the Agency to take certain precautions to protect against the unauthorized disclosure of information which a party (Zaclon in this case) has claimed are confidential business information (CBI) entitled to the protections of the regulations.

The Judge has not yet issued a redacted version of the Initial Decision. Key Agency personnel, at Headquarters Offices and in the Regions, have not yet had any opportunity to see

the Judge's Initial Decision, much less any opportunity to review, discuss or consult meaningfully regarding the potential implications of the decision for future enforcement of the RCRA Subtitle C regulations. Although the Judge has not yet made her Initial Decision publicly available, she has informed the parties that she intends to prepare a redacted version, subject to the approval of Respondents, and she has stated her intention to make that redacted version publicly available as soon as possible.

Because the Regions and Headquarters Offices are presently unable to consult meaningfully on the question of whether or not to file a notice of appeal in this matter until a redacted version of the Initial Decision is made publicly available, the U.S. EPA is asking the Board to stay the running of the period in which an appeal notice may be filed. U.S. EPA also asks that the agency be granted an extension of thirty (30) days for consultation, with the deadline for filing notice of appeal falling thirty days after the date on which the redacted Initial Decision is made publicly available. Respondents, through their attorney, have indicated that they will not object to such a request for extension, provided that they are also given the same opportunity to consider the matter, for thirty days after the Judge issues a redacted decision, before deciding whether to file a notice of appeal. Therefore, Respondent does not object to, and will not be prejudiced by, the Board's granting the extension requested to both parties.

Request for Extension

Therefore, because of the need to obtain sufficient opportunity for meaningful consultation between Region 5, other EPA Regions and Headquarters Offices, prior to making a decision as to whether or not it is in the Agency's best interest to file a notice of appeal in this matter, U.S. EPA respectfully asks the board to grant a stay and an extension of time in which to consult before deciding whether or not to file a notice of appeal. U.S. EPA respectfully requests the Board to stay the running of the appeal period until the Initial Decision is redacted and made publicly available, and grant an extension of 30 days to the time provided for filing a notice of appeal, from the date that redacted version of the Initial Decision is served upon the Complainant and Respondents herein.

Respectfully requested



Thomas C. Nash
Associate Regional Counsel

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**In the Matter of Zaclon, Incorporated; Zaclon, LLC; Independence Land Development Company; 2981 Independence Road Cleveland, Ohio 44115 EPA ID No. OHD 004 184 768
Docket No. RCRA-05-2004-0019**

CERTIFICATE OF FILING AND SERVICE

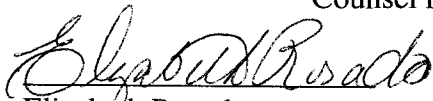
I hereby certify that on June 28, 2007, the attached **Motion Requesting an Extension of Time in which to Consider Filing Notice of Appeal of Recommended Decision** was sent by pouch mail for filing to:

U.S. Environmental Protection Agency
Attention: Ms. Eurika Durr
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001
Fax: 202-233-0121

I certify further that on June 28, 2007, I arranged for the attached **Motion Requesting an Extension of Time in which to Consider Filing Notice of Appeal of Recommended Decision** to be sent by certified mail to:

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Counsel for Zaclon, LLC



date 6/28/2007

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