

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

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ENVIR. APPEALS BOARD

In the Matter of:

Martex Farms, S.E.

Docket No. FIFRA-02-2005-5301

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) FIFRA Appeal No. 07-01
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**COMPLAINANT'S UNOPPOSED MOTION FOR CLARIFICATION
OR EXTENSION OF TIME TO FILE CROSS-APPEAL**

Pursuant to Sections 22.7(b) and 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (hereinafter "CROP"), 40 C.F.R. §§ 22.7(b) and 22.16(a), the Complainant, United States Environmental Protection Agency ("EPA" or "Agency"), files this Motion for Clarification or Extension of Time to File Cross-Appeal ("Complainant's Motion") seeking clarification of the proper calculation of time for filing a cross-appeal under CROP § 22.30(a)(1) or, alternatively, requesting an extension of time to file a cross-appeal and/or response brief. Complainant contacted Respondent's counsel by telephone on February 21, 2007, to discuss Complainant's Motion, and Respondent does not oppose Complainant's Motion.

On February 13, 2007, Respondent, Martex Farms, S.E., served its Notice of Appeal from the Initial Decision in the above-captioned case, and simultaneously filed a Motion to Request an Extension of Time to File the Appeal Brief. On February 16, 2007, the Environmental Appeals Board ("EAB") issued its Order Granting Extension of Time to File Appeal Brief, which granted Respondent an extension until Friday, March 9, 2007, to file its appeal brief. CROP § 22.30(a)(1) states that "[i]f a timely notice of appeal is filed by a party, any other party may file

a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.” 40 C.F.R. § 22.30(a)(1). This sentence, if taken in isolation and apart from the context of the rest of CROP § 22.30, could be interpreted to mean that under CROP §§ 22.7 and 22.30(a)(1), the twenty-five day allotment of time¹ for Complainant to file a cross-appeal would run from the date of Respondent’s Notice of Appeal, which was served on February 13, 2007, rather than from the date Respondent files its appellate brief, which under the EAB’s February 16 Order, is due by March 9, 2007.

This possible interpretation seems to Complainant to be counterintuitive in light of both CROP § 22.30(a)(1), which anticipates that the notice of appeal and supporting brief will be filed simultaneously,² and CROP § 22.30(a)(2), which sets a deadline “within 20 days of service of notices of appeal *and briefs* under [§ 22.30(a)(1)]” for filing a response brief responding to issues raised by a party on appeal. 40 C.F.R. §§ 22.30(a)(1) and (a)(2) (emphasis added). Additionally, CROP § 22.30(a)(1) states that the notice of appeal “shall summarize the order or ruling, or part thereof, appealed from.” 40 C.F.R. § 22.30(a)(1). The accompanying brief is required to set forth “a statement of the issues presented for review, . . . argument on the issues presented, . . . alternative findings of fact, and alternative conclusions of law or discretion.” *Id.* It is after this description of all the appellate requirements that the CROP sets the twenty day time period for

¹Because Respondent served Complainant via certified mail, five days would be added to the twenty days set forth under CROP § 22.30(a)(1).

²CROP § 22.30(a)(1) states that “[w]ithin 30 days after the initial decision is served, any party may appeal any adverse order or ruling . . . by filing an original and one copy of a notice of appeal *and an accompanying appellate brief*” with the EAB. 40 C.F.R. § 22.30(a)(1) (emphasis added). It goes on to state “appellant shall *simultaneously serve* one copy of the notice *and brief* upon all other parties and non-party participants.” *Id.* (emphasis added)

any other party to cross-appeal. *Id.* When this paragraph is taken as a whole and the last sentence of the paragraph read within this larger context, it appears that the regulatory intention is for a party's time for cross-appeal to run twenty days from its knowledge of the full scope of appeal.

This intention is logical for two additional reasons: principles of fairness and judicial economy would be better served if the timing for filing a cross-appeal did not commence until the full grounds for appeal have been set forth. With regard to the principle of fairness, it is not an uncommon practice for the notice of appeal to be fairly cursory with the actual bases for appeal addressed in the supporting brief, and it is also not uncommon for parties to seek, and the EAB to grant, extensions of time for filing an appellate brief separate from the notice of appeal. While this practice is in no way objectionable in and of itself, it creates situations like the one at hand, where a party has filed a cursory notice of appeal, reserving the full explanation of the bases of appeal for a to-be-filed brief.³ In such situations, the notice of appeal operates more as a placeholder for an appeal that will be explained when the brief is filed at a later date. Such divisions between notice of appeal and appellate brief do mean that the other party does not know the full extent of the first party's intended appeal and will not know this until it receives the appellate brief. The resources a party must devote to analysis, drafting, and filing of a cross-appeal are considerable, and such analysis inevitably involves questioning and balancing whether cross-appeal, a response brief, or no response at all will be the best use of a party's resources. To make such decisions requires an understanding of the scope and basis of the original appeal.

³Respondent's Notice of Appeal states that it intends to appeal the Initial Decision with regard to findings relating to joint stipulations made prior to hearing, but states that this issue is only one "[a]mong other matters" that it intends to appeal. Respondent's Notice of Appeal at 2.

Were CROP § 22.30(a)(1) to be interpreted as setting the time for cross-appeal based solely on the date the document technically labeled “notice of appeal” was served, rather than on when all required elements of the notice of appeal - including the submission of the supporting brief - were served, such interpretation would have the effect of requiring a party to determine whether it should cross-appeal without knowledge of what the other party plans to appeal.⁴ To require such an analysis in the dark strikes Complainant as unfair.

Second, and perhaps of greater concern, to read CROP § 22.30(a)(1) as being timed solely by the filing of a notice of appeal, rather than by filing the notice of appeal and the appellate brief, runs directly counter to the principle of judicial economy embodied in the CROP.⁵ See *In re: JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, CAA Appeal No. 04-09, slip op. at 13, fn.14 (EAB, Sept. 30, 2005) 12 E.A.D. __; *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 729 (EAB 2002). Such a reading would require additional and potentially wasteful work from everyone involved: to protect their rights, parties would be forced either to approach the EAB in every case for an extension of time to file its own cross-appeal, or a party may decide to file its own summary notice of cross-appeal with request to file the supporting brief at a later time, which could conceivably lead to two sets of response and reply brief deadlines (e.g., a potential scenario being where a party’s response brief is due on the original appeal before its

⁴For example, in this particular instance, Respondent’s appellate brief is not due until Friday, March 9, 2007. If Complainant’s deadline for filing a cross-appeal with the Board run from the date Respondent served its Notice of Appeal, Complainant’s cross-appeal would be due Monday, March 12, 2007. It is not inconceivable that Complainant would therefore not even have Respondent’s brief prior to March 12, 2007.

⁵CROP § 22.4(a)(2) states that the EAB and ALJ’s may “do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding. . .” 40 C.F.R. §§ 22.4(a)(2), (c)(10).

cross-appellate brief is due). Such a scenario seems needlessly inefficient and thus contrary to the principle of judicial economy. It therefore makes the most sense to ensure that the streamlined process envisioned by CROP §§ 22.30(a)(1) and (a)(2) operate as intended - i.e., that when there is an appeal, any other party has twenty days to file a cross-appeal and/or response brief, and that there are then twenty days for the filing of a response to the cross-appeal. 40 C.F.R. §§ 22.30(a)(1) and (a)(2).

It therefore seems to Complainant that the most logical interpretation of CROP § 22.30(a)(1), which would be true to the intention of the full context of the section and would also ensure fairness among parties and the conservation of judicial resources, would be for the due date of Complainant's cross-appeal to be calculated twenty days from the filing of Respondent's appeal brief. Complainant therefore requests that the EAB clarify the proper interpretation of CROP § 22.30(a)(1) in this regard.

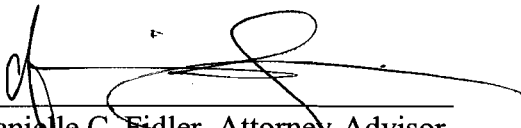
Alternatively, if the EAB does not agree that the additional twenty days for a cross-appeal under CROP § 22.30(a)(1) is automatically tolled until Respondent files its appeal brief, then Complainant moves for good cause shown that the EAB rule that *in this instance* Complainant's deadline for filing a cross-appeal and/or response brief shall be extended until twenty days after Respondent's appeal brief has been filed with the EAB.⁶ As a factual matter, this case involves a team comprised of members from two of Complainant's regional offices and two headquarters divisions. As Chief Administrative Law Judge Susan L. Biro's January 19, 2007 Initial Decision involves very complex issues, some of which are novel interpretations of the Federal Insecticide,

⁶Assuming Respondent submits its brief on the EAB deadline of March 9, 2007, Complainant would have until March 29, 2007 to file a cross-appeal.

Fungicide, and Rodenticide Act's Worker Protection Standard regulations, and this matter has a lengthy record consisting of several pre- and post-hearing motions and briefs as well as a hearing transcript nearly 2,000 pages long, Complainant needs twenty days to coordinate whether a cross-appeal would be an appropriate or necessary response to Respondent's appeal, or whether Respondent's issues could be comprehensively addressed in a response brief, as well as to draft, review, and file the appropriate documents with the EAB.

Respectfully submitted,

22 Feb 07
Date



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complainant's Unopposed Motion For Clarification or Extension of Time to File Cross-Appeal was sent to the following persons, in the manner specified, on the date below:

Original and five copies, via interoffice mail:

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Dated: 2/22/07


Sanda Howland
U.S. EPA