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### U.S. ENVIRONMENTAL PROTECTION AGENCY

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# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)			
	)			
BOLLMAN HAT COMPANY,	)	DKT.	No.	EPCRA- I I I - 182
	)			
Respondent	)			

#### ORDER ON COMPLAINANT'S MOTION FOR EXTENSION OF TIME

### TO DETERMINE WHETHER TO SEEK RECONSIDERATION

An Initial Decision was served in this matter on March 20, 1998, finding Respondent liable for having violated Section 313 of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11023, and assessing a civil penalty of \$8,166. By motion dated March 30, 1998, Complainant requested an extension of time to determine whether to seek reconsideration of the Initial Decision. On April 6, 1998, Respondent filed an Opposition to the Motion.

Complainant asserts that it needs additional time to consider filing the motion for reconsideration because the Initial Decision "implicates issues of national significance regarding the inapplicability of settlement policies in an adjudicatory context" and thus requires coordination with EPA Headquarters. Respondent opposes the Motion on the grounds that such a Motion is procedurally and substantively improper, arguing, *inter alia*, that the Environmental Appeals Board ("EAB") has jurisdiction over the Motion.

Respondent's argument that the Motion for Extension is being brought in the wrong forum is well-founded. The Consolidated Rules of Practice provide generally that the EAB "shall rule on all motions filed or made after service of the initial decision upon the parties," (40 C.F.R. § 22.16(c)), although those Rules specifically provide for two exceptions which allow the presiding Administrative Law Judge to rule on motions to reopen a hearing (40 C.F.R. § 22.28) and to set aside a default order (40 C.F.R. § 22.17(d)). The rationale therefor is to avoid the possibility of conflicting orders from the presiding judge and the EAB, unnecessarily protracted administrative proceedings and the uncertainty of when a decision has become final. See, Fisher-Calo Chemicals & Solvents Corp., RCRA App. 83-2, 1983 EPA App. LEXIS 1 (CJO, April 20, 1983); Asbestos Specialists, Inc., 4 E.A.D. 819, 824 n.15 (EAB, Oct. 6, 1993). Thus, under the Agency procedural rules

and precedent, jurisdiction over the Complainant's "Motion for Extension of Time to Determine Whether to Seek Reconsideration" does not properly lie before the undersigned. (2)

The EPA's former Chief Judicial Officer (preceding the establishment of the EAB) has suggested that where a party seeks reconsideration of an initial decision, it should file an appeal under 40 C.F.R. § 22.30 and then request a stay of proceedings and permission to file a motion for reconsideration with the Presiding Judge. (3) O.M. Scott & Sons, RCRA Appeal No. 87-2 (CJO, Order Dismissing Appeal, June 12, 1987); LTV Steel Co. Canton Works, RCRA Appeal No. 87-10 (CJO, Remand, June 12, 1987). Complainant has indicated in its Motion for Extension that it intends to follow this procedure.

Therefore, Should an extension still be required at that point in the proceedings, Complainant could file with its request to the EAB for permission to file a motion for reconsideration, a motion for extension of time to do so.

Accordingly, Complainant's Motion for Extension of Time is hereby, **DENIED**, on the basis that it lies properly before the EAB and not before the undersigned Presiding Judge.

Susan L. Biro Chief Administrative Law Judge

Dated: April 7, 1998 Washington, D.C.

1. Three additional narrow exceptions for jurisdiction have also been carved out by case precedent. Those exception involve the Presiding Judge issuing errata notices to correct minor errors in the decision, orders clarifying the decision, and ruling on orders for reconsideration where the Presiding Judge had explicitly given the parties in the Initial Decision the right to move for reconsideration within a certain set time period. See, Joe Mortiboy, EPA Docket No. RCRA-UST-1092-12-01-9006. slip op. at 4 (ALJ, Clarification of Default Order, Aug. 18, 1995); Associated Products, EPA Docket No. I.F.&R. III-412-C, 1997 FIFRA LEXIS 36 (ALJ, Decision Upon Reconsideration, Sept. 10, 1997)(presiding judge specifically provided in initial decision that parties had 30 days within which to seek reconsideration). None of those exceptions are applicable here.

- 2. It is observed that EPA's proposed amendments to the Rules of Practice, published as a Proposed Rule at 63 Fed. Reg. 9464 (Feb. 25, 1998), provide at Section 22.16(c) that "an Administrative Law Judge shall rule on all motions filed or made . . . before an initial decision has become final [45 days after service or the initial decision) or has been appealed." 63 Fed. Reg. at 9486. Although the presiding judge would have authority thereunder to rule on the motion for extension, as a proposed rule it is not binding in this proceeding.
- 3. Although not provided for in the Rules of Practice, 40 C.F.R. Part 22, motions to reconsider an initial decision have been considered useful to "correct errors in the [EAB's] review of the initial decision." Fisher-Calo Chemicals, 1983 EPA App. LEXIS \*3.

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Last updated on March 24, 2014