IN RE GARY DEVELOPMENT COMPANY

RCRA (3008) Appeal No. 96-2

ORDER DISMISSING APPEAL

Decided August 16, 1996

Syllabus

Following an evidentiary hearing, an EPA Administrative Law Judge (ALJ) concluded that Gary Development Company (Gary) had unlawfully accepted hazardous waste for disposal at a landfill in Indiana. In an initial decision dated April 8, 1996, the ALJ ordered Gary to comply with RCRA closure, post-closure care, and groundwater monitoring requirements governing hazardous waste disposal facilities, and to pay an $86,000 civil penalty. According to a certificate of service signed by the Regional Hearing Clerk for U.S. EPA Region V, the initial decision was sent to Gary's attorney by certified mail on April 12, 1996.

Based on the service date shown on the certificate of service, EPA's Consolidated Rules of Practice (40 C.F.R. Part 22) required any appeal from the ALJ's initial decision to be filed with the Environmental Appeals Board (Board) not later than May 7, 1996. No appeal was filed on or before that deadline, and the initial decision became the final order of the Board by operation of law on May 28, 1996.

On June 4, 1996, the Board received from Gary a petition claiming that the initial decision had never been correctly served, and requesting that the decision be re-served and that Gary be authorized to file an appeal within twenty days of the new date of service. Gary later explained, in a separate pleading filed at the Board's request, that its attorney had not actually received a copy of the initial decision until the last week of April, 1996, because the attorney had changed his business address (without informing the Regional Hearing Clerk); moreover, a substantial period of time had elapsed between the submission of post-hearing briefs to the ALJ and the service of the initial decision. On June 21, 1996, the Board received from Gary a proposed notice of appeal and appellate brief seeking to challenge various findings and conclusions set forth in the initial decision. The complainant, EPA Region V, subsequently urged the Board to dismiss Gary's proposed appeal as untimely without reaching the merits of Gary's objections to the initial decision.

Held: The Board rejects Gary's claim that the initial decision was improperly served. Further, the Board concludes that Gary has identified no "special circumstances" warranting relaxation of the deadline for filing an appeal in this case. Gary's petition for re-service of the initial decision is therefore denied, and Gary's appeal is dismissed.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

Respondent Gary Development Company (Gary) seeks to appeal an initial decision issued by Administrative Law Judge J.F. Greene (ALJ) in this RCRA enforcement action. The deadline for filing an appeal from the initial decision expired on May 7, 1996, and, by operation of law, the initial decision became the final order of the Environmental Appeals Board (the Board) on May 28, 1996. The Board, however, did not receive any communication of any kind from Gary until June 4, 1996, and did not receive its notice of appeal until June 21, 1996. Finding no special circumstances that might justify reopening the Agency's final disposition of this matter, we dismiss the appeal as untimely.

I. *BACKGROUND*

On April 8, 1996, the ALJ issued her initial decision, concluding that Gary unlawfully accepted hazardous waste for disposal at a landfill that had neither achieved interim status under the Resource Conservation and Recovery Act (RCRA) nor obtained a RCRA permit. In the initial decision, the ALJ ordered Gary to undertake closure and post-closure care of the landfill in a manner consistent with the RCRA regulatory requirements governing hazardous waste disposal facilities — by, among other things, submitting a closure plan for approval by the State of Indiana's Department of Environmental Management and submitting a plan for a groundwater quality assessment program capable of determining whether any plume of contamination has entered the groundwater from the landfill. *See* Initial Decision at 59 and Compliance Order attached thereto. In addition, the initial decision assesses an $86,000 civil penalty for Gary's unlawful disposal of hazardous waste.

Pursuant to the requirement in EPA's Consolidated Rules of Practice, 40 C.F.R. § 22.06, the Regional Hearing Clerk sent a copy of the initial decision to Gary's counsel of record by certified mail, return receipt requested, on April 12, 1996. Therefore, as provided in 40 C.F.R. § 22.30(a), any appeal from the initial decision was required to be filed with the Board not later than May 7, 1996.[1] Because no appeal was filed by May 7, 1996, and because the Board did not elect to review the initial decision *sua sponte*, the initial decision became the

[1] Section 22.30(a) required Gary's notice of appeal and appellate brief to be filed with the Board "within twenty (20) days after the initial decision is served upon the parties." Service of the initial decision was complete upon mailing, but five days were added to the time for filing an appeal because the initial decision was served by mail. *See* 40 C.F.R. § 22.07(c). Thus, the time for filing an appeal from the initial decision expired twenty-five days after April 12, 1996.

Board's final order as of May 28, 1996. *See* 40 C.F.R. § 22.27(c) (absent an appeal (within twenty days) or an election by the Board to undertake *sua sponte* review (within forty-five days of service of the initial decision), "[t]he initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board * * * without further proceedings").

On June 4, 1996, the Board received from Gary a document styled "Verified Petition for Order Directing Service of Initial Decision and Establishing Time to File Notice of Appeal with Environmental Appeals Board" (Petition). In the Petition, Gary asserted that the ALJ's initial decision had not been properly served,[2] because it had been sent to Gary's attorney (Warren D. Krebs) at the address of a law firm with which Mr. Krebs was previously but no longer affiliated. Gary therefore requested that the Board order the Regional Hearing Clerk to serve the initial decision again, directly on Respondent Gary Development Company, and further requested that the Board "confirm" that any notice of appeal might be submitted to the Board within twenty days after the new date of service. Petition at 2. While that request was pending, Gary submitted a proposed notice of appeal and appellate brief, which were received by the Board on June 21, 1996.

Also on June 21, 1996, the Board issued an order directing Gary to explain with greater specificity the basis for its contention that the initial decision had not been properly served. The June 21, 1996 order requested Gary to identify, among other matters, the date of counsel's actual receipt of the initial decision — a matter left unaddressed in Gary's original submission to the Board. In addition, the Board's June 21, 1996 order requested Gary to indicate whether counsel's change of address was ever communicated to Region V,[3] directing Gary's attention to the requirement in 40 C.F.R. § 22.05(c)(4) that any party to an administrative enforcement proceeding must promptly inform all parties to the proceeding, the Presiding Officer, and the Regional Hearing Clerk of any change of address that occurs during the pendency of that proceeding. The Board received Gary's response on July 3, 1996.

Following the Board's receipt of Gary's response, the Board issued an order on July 17, 1996, requesting Region V to respond to Gary's

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[2] *See* Petition at 1 ("Respondent * * * petitions for correct service of the Initial Decision and Order of the Administrative Law Judge"); *id.* at 2, paragraph 5 ("service was not made properly upon Respondent GDC [Gary] nor upon its counsel of record").

[3] The Board's June 21, 1996 order also requested Gary to answer questions relative to the arrangements for Gary's representation in this matter that were made at the time of Mr. Krebs' departure from the Parr, Richey, Obremskey & Morton (Parr, Richey) law firm.

Petition and to identify any environmental consequences or prejudice that might arise if there were a further delay in the resolution of the matter. In its submission, dated July 30, 1996, and received on August 1, 1996, Region V opposed Gary's effort to institute this appeal out of time.

II. *DISCUSSION*

The Board consistently has required strict compliance with the time limits prescribed by regulation for perfecting an appeal, and only rarely has it accepted appeals that are not timely filed. By insisting on strict compliance the Board has sought, among other things, to promote certainty and uniformity in the application of regulatory deadlines; to limit reliance on the infinitely variable "internal operations" of litigants and law firms as determinants of when obligations must be met; to preserve the Agency's adjudicative resources for litigants who timely exercise their appeal rights; and to ensure that the Agency's procedural rules are applied equally to all affected parties.

Thus, for example, in *In re Outboard Marine Corp.*, 6 E.A.D. 194 (EAB 1995), the Board rejected as untimely an appeal sought to be filed by EPA Region V on the twenty-first day after service of an ALJ's initial decision — one day after the filing deadline established in 40 C.F.R. § 22.30. In rejecting an argument that service by "interoffice mail" should be deemed complete only as of the date of counsel's actual receipt, the Board stated that that approach would undermine "the primary aim of the 'computation of time' rules governing appeals to the Board, which is to provide the parties and the Board with certainty in determining when obligations must be fulfilled." *Outboard Marine*, 6 E.A.D. at 197. The Board has similarly dismissed, in the context of administrative enforcement proceedings, appeals that were received eleven days,[4] sixteen days,[5] and twenty-one days[6] after the expiration of the section 22.30 appeal period. The Board has been guided in such cases by the principle that "[t]he time requirements for appeals must be followed unless *special circumstances* warrant [their] relaxation." *B&B Wrecking*, 4 E.A.D. at 17 (emphasis added); *see also Apex Microtechnology*, EPCRA Appeal No. 93-2, at 4.[7]

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[4] *In re Apex Microtechnology, Inc.*, EPCRA Appeal No. 93-2 (EAB, July 8, 1994).

[5] *In re B&B Wrecking & Excavating, Inc.*, 4 E.A.D. 16 (EAB 1992).

[6] *In re Production Plated Plastics, Inc.*, 5 E.A.D. 101 (EAB 1994).

[7] While the Board has also occassionally used the term "extraordinary circumstances" (*see, e.g., Outboard Marine*, 6 E.A.D. at 196), it did not by the use of this term mean to suggest a different

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In its submissions to the Board, Gary cites essentially two principal factors to support relaxation of the applicable filing deadline in this case. Firstly, Gary notes that the ALJ's initial decision did not reach its attorney, Mr. Krebs, within the time period usually associated with the delivery of certified mail because the initial decision was sent to Mr. Krebs at a place at which he had not maintained an address for over two years prior to service of the initial decision. Related to this, Gary asserts that its counsel, Mr. Krebs, was not individually served, and that no one at Mr. Krebs' former law firm was authorized to accept service on his behalf. Secondly, Gary notes that the most recent "activity" in these proceedings, before the issuance of the initial decision, occurred when post-hearing briefs were submitted in May, 1991, and that in March, 1994, when Mr. Krebs withdrew from his former law firm and moved to a new address, Mr. Krebs considered the matter "inactive." We will examine each of these factors in turn.

The Consolidated Rules of Practice directly address the first of the factors cited by Gary, and they preclude reliance on an unreported change of address as grounds for filing an untimely appeal. Specifically, 40 C.F.R. § 22.05(c)(4) provides:

> The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

The first responsive document Gary filed in this matter, a Request for Hearing and Answer and Responsive Pleading to Complaint and Compliance Order, was signed by Warren D. Krebs of Parr, Richey, Obremskey & Morton, "Attorneys for Gary Development Company, Inc.," with a listed address of 121 Monument Circle, Suite 500, Indianapolis, Indiana. The last document that Gary filed in this matter prior to the service of the initial decision was a May 29, 1991 Post-Hearing Reply Brief signed by Warren D. Krebs of Parr, Richey,

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standard. In fact, *Outboard Marine* relied on *Apex Microtechnology* for the applicable rule, thus confirming that nothing in *Outboard Marine* should be understood as a departure from the "special circumstances" standard articulated in *Apex, B&B Wrecking,Production Plated Plastics*, and the Order Dismissing Notice of Appeal in *In re Cypress Aviation, Inc.*, RCRA (3008) Appeal No. 91-6 (CJO, Jan. 9, 1992). Henceforth, the Board intends to articulate the standard consistently as "special circumstances."

Obremskey & Morton, "Attorneys for Gary Development Company, Inc.," with a listed address of 1600 Market Tower Building, Ten West Market Street, Indianapolis, Indiana. The certificate of service that accompanied the initial decision indicates that the initial decision was sent to Mr. Krebs at the last address of record that was on file with the Regional Hearing Clerk, specifically at 1600 Market Tower Building, Ten West Market Street, Indianapolis, Indiana.[8]

Gary admits that no information regarding Mr. Krebs' change of address or withdrawal from his law firm, both of which Gary states occurred during March, 1994, was ever reported, "promptly" or otherwise, to the Presiding Officer or to anyone in the Regional office. Accordingly, the initial decision was properly sent to Warren Krebs at the address listed in Gary's most recent pleading. Therefore, as specifically provided in 40 C.F.R. § 22.05(c)(4), Gary is "deemed to have waived [its] right to notice and service," and cannot rely on any alleged insufficiency of service to justify the untimely filing of its appeal.[9] *See also In re Chemical Management, Inc.*, 2 E.A.D. 772 (CJO 1989) (where attorney's withdrawal from pending case was not communicated to EPA, EPA's service of initial decision by delivery to attorney was valid and effective; untimely appeal from the initial decision was not justified on grounds of "improper" service).

Even if we were to disregard 40 C.F.R. § 22.05(c)(4), we would nonetheless be unwilling to recognize counsel's delayed receipt of the initial decision as a "special circumstance" favoring acceptance of this appeal. Gary's counsel acknowledges having received actual notice of the ALJ's initial decision during the "last week of April,"[10] that is, at

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[8] Although service of the initial decision is complete upon mailing, not receipt, 40 C.F.R. § 22.07(c), we note that the return receipt accompanying service of the initial decision indicates receipt on April 15, 1996, and Gary acknowledges that the Parr, Richey law firm accepted service in mid-April, 1996. Verified Response to Order Issued June 21, 1996, at ¶7.

[9] Gary was aware of the rules governing this proceeding. The Complaint itself informed Gary that "[t]he Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ***, 40 CFR Part 22, are applicable to this administrative action," Complaint and Compliance Order at 20 (May 30, 1986), and further indicated that "[a] copy of these [Part 22] rules is enclosed with this Complaint." *Id.* The Part 22 rules established the prehearing and hearing procedures employed by the ALJ, and the Part 22 rules likewise established the requirements for reporting changes of address and for filing an appeal within twenty days of service of the initial decision—requirements that have not been altered or amended in any respect material to our ruling on this appeal since the issuance of the Complaint in this matter. Gary, in any event, has not disputed the applicability of the Part 22 rules, including section 22.05(c)(4), to its proposed appeal.

[10] Actually, counsel states that he "received [the] Decision and Order during the last week of April, 1994," Verified Response to Order Issued June 21, 1996, at ¶ 8, but the intended reference

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least one full week before the expiration of the applicable appeal period on May 7, 1996. During that period, Gary's counsel had sufficient time to submit a protective notice of appeal and to request, from opposing counsel and the Board, an extension of time within which to prepare and file an appellate brief. Gary did not do so and, for reasons that are still unexplained, simply failed to communicate with the Board in any fashion until June 4, 1996.[11]

Similarly, even if we were to calculate Gary's appeal deadline with reference to the date of counsel's actual receipt of the initial decision, we would still have to reject an appeal filed on June 21, 1996, as untimely. Counsel received the initial decision, by his own account, not later than April 30, 1996. Reckoning from that date, a twenty-day filing period would have expired May 20, 1996, and a twenty-five-day filing period would have expired May 28, 1996. Counsel's delayed receipt of the initial decision simply cannot explain the untimeliness of Gary's June 21, 1996 appeal, even if every chronological uncertainty were to be resolved in Gary's favor. In short, counsel's change of address and withdrawal from his law firm are decidedly not the kind of "special circumstances" that might justify our acceptance of Gary's untimely appeal.

A second factor cited by Gary to support relaxation of the Board's filing deadline is apparently the length of time during which this matter, having been heard by the ALJ and fully briefed by the parties, remained pending and unresolved. Gary specifically asserts that by March, 1994, when its attorney withdrew from his former law firm, three years had already passed since the matter was heard, and he therefore viewed the matter as "inactive." *See* Verified Response to Order Issued June 21, 1996, at ¶ 6. Gary further points out that by the time an initial decision was issued, nearly five years had passed since Gary filed its last pleading with the ALJ during May, 1991. Although

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is obviously to the last week of April, 1996. Counsel goes on to state that his client did not authorize the filing of an appeal until May 10, 1996. *Id.* Although the timing of Gary's decision to authorize the filing of this appeal is of no direct relevance to our present inquiry, we note that May 10, 1996, was twenty-five days before the date of Gary's first communication with this Board.

[11] Although Gary has offered a number of reasons for failing to notify the Region of its attorney's change of address in March, 1994, Gary has suggested no reason for failing to request an extension of the appeal deadline after receiving the ALJ's initial decision in April, 1996.

Moreover, notwithstanding Gary's failure to file an appeal within the required time, the Board could have elected to undertake *sua sponte* review of this matter within forty-five days after service of the initial decision. Having missed the deadline for filing an appeal, Gary should have made every effort to communicate its objections to the Board before May 28, 1996, while *sua sponte* review was still available and before the initial decision became the Board's final order.

this matter was pending before the ALJ for a long time after the conclusion of the evidentiary hearing and the filing of post-hearing briefs, that delay does not justify Gary's failure to commence an appeal in a timely fashion.[12]

Based on our review of the record, we find that EPA Region V did nothing to mislead Gary as to the status of the case and did not suggest to Gary that it had decided to dismiss or abandon the matter. This case thus stands in sharp contrast to those cases where a petitioner claims to have relied on erroneous information given by EPA. *See, e.g., In re BASF Corp.*, 2 E.A.D. 925, 926 (Adm'r 1989) ("Where * * * a Region gives erroneous filing information in writing and a petitioner relies on and complies with it, the petition for review will not normally be rejected as untimely.").

Similarly, the ALJ did not mislead Gary as to the status of the matter.[13] As far as we can tell from the written record, following submission of post-hearing briefs Gary never inquired as to the status,[14] a fact which detracts from its own alleged claim of unfairness. Under those circumstances, and knowing that a hearing had been held and no decision had yet been issued, we see no reasonable basis for Gary's counsel to assume that the case had somehow become "inactive."

Ultimately, we are not persuaded that there is any relevant distinction between Gary's situation and that of any other litigant who, through no fault of the Agency, simply overlooks or does not meet the deadline for filing an appeal. If such conduct were to be regarded as a "special circumstance" warranting suspension of an otherwise

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[12] Our conclusion that the appeal must be dismissed as untimely in no way reflects our approval of the period of time it has taken the Agency to resolve this matter, from Region V's issuance of the Complaint in May, 1986, to the ALJ's issuance of the initial decision in April, 1996.

[13] We note, however, that the initial decision included no explicit reference to the availability, pursuant to 40 C.F.R. § 22.30, of further administrative review as of right. Although such references often appear in the Agency's initial decisions in enforcement matters, and are advisable, they are not required. Gary has not contended that the absence of an explicit reference to appeal rights in the initial decision contributed in any way to the untimeliness of its own appeal. In any event, Gary had been provided with a copy of the rules of practice that set forth the time limits for appeal, *see supra* note 9, and as a matter of law Gary is charged with knowledge of published federal regulations such as EPA's Part 22 rules of practice. *See, e.g., United States v. McGaughey*, 977 F.2d 1067, 1074 (7th Cir. 1992), *cert. denied*, 507 U.S. 1019 (1993); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947).

[14] As far as we can tell from the written record, it is equally true that counsel for EPA Region V never formally inquired about status or requested an expedited or other resolution of this matter at any time after the parties submitted their final briefs to the ALJ in May, 1991.

valid order entered in a contested matter, the finality of the Agency's decisions would be severely compromised. We therefore decline to depart in this case from the Board's established precedents requiring strict adherence to the time limits for appeal. As we stated in rejecting an untimely appeal from a RCRA permit decision issued by Region V, "the Agency's limited resources are best reserved for addressing the concerns of petitioners who are diligent enough to adhere to the filing requirements." *In re Heritage Environmental Services*, RCRA Appeal No. 93-8, at 5 (EAB, Aug. 3, 1994) (quoting *In re Georgetown Steel Corp.*, 3 E.A.D. 607, 609 (Adm'r 1991)).

We are particularly unwilling to depart from our precedents in a case, such as this, in which appeal proceedings would not only suspend the collection of a monetary penalty but also further delay the implementation of an injunctive remedy designed to ensure protection of public health and the environment. In its July 30, 1996 brief, the Region asserts that the injunctive relief, including installation of an appropriate groundwater monitoring system, is still needed, and that a plume of contamination could be migrating undetected into groundwater or the Calumet River. *See* Region V Response to Gary's Request to File Appeal Out of Time at 1-2.

Moreover, having examined the initial decision and the arguments set forth in Gary's proposed appellate brief, we think it unlikely that acceptance of the appeal for decision on the merits would affect our ultimate disposition of this matter. A lengthy evidentiary hearing was conducted by the ALJ in this matter, first in 1987 and subsequently in 1990. The ALJ's decision appears to be well-reasoned; we have detected no obvious errors of law; and the factual findings appear to be supported by the record.

III. *CONCLUSION*

For these reasons, we deny the relief Gary seeks in its Petition, and dismiss RCRA (3008) Appeal No. 96-2 as untimely.

So ordered.