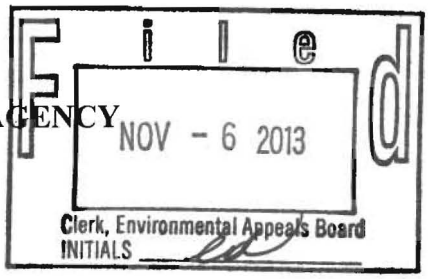
ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)	
Maralex Disposal, LLC	)	SDWA Appeal No. 13-01
Docket No. SDWA-08-2011-0079	)	

ORDER DENYING MOTION FOR RECONSIDERATION

I. *INTRODUCTION*

On September 3, 2013, the Environmental Appeals Board ("Board") issued an order dismissing as untimely a notice of appeal and accompanying appeal brief filed by Maralex Disposal, LLC ("Maralex"). Order Dismissing Appeal As Untimely at 4 (Sept. 3, 2013) ("Order"). Maralex previously had attempted to file its notice of appeal and accompanying appeal brief on August 15, 2013, thirty-eight days after the Presiding Officer for Region 8 ("Region") of the U.S. Environmental Protection Agency ("EPA" or "Agency") issued an Initial Decision assessing a penalty of $88,900 against Maralex for violations of the Safe Drinking Water Act ("SDWA"), section 1423(c), 42 U.S.C. § 300h-2, and the regulations set forth at 40 C.F.R. part 144 that govern the SDWA's Underground Injection Control program. The Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. part 22, govern this administrative proceeding.

The Board's Order explained that 40 C.F.R. section 22.7(c) plainly states that except for the complaint, service of all documents is complete upon mailing. *See* Order at 2. For documents served by first class mail, as was the case here, five days are added to the time allowed to file a responsive document. 40 C.F.R. § 22.7(c). The Consolidated Rules also specify that any party may

appeal an adverse ruling of the Presiding Officer to the Board within thirty days after the initial decision is served, 40 C.F.R. § 22.30(a). The Initial Decision in Maralex was served on July 8, 2013. Consequently, Maralex had thirty-five days, or until August 12, 2013, to file a timely appeal of the Presiding Officer's Initial Decision. See Order at 2-3. The Board strictly construes threshold procedural requirements such as timeliness unless there are special circumstances to justify the untimeliness. Order at 3 (citing cases). Although the Board has found "special circumstances" to exist in cases where delays resulted from circumstances outside of the litigant's control, in this instance the Board held that special circumstances did not exist where the untimely filing was the result of counsel for Maralex erroneously assuming that its appeal period ran from receipt of service of the Initial Decision, not service as 40 C.F.R. § 22.7(c) provides. *See id.* at 3-4.

On September 10, 2013, Maralex timely filed an unopposed motion for reconsideration of the Board's Order dismissing Maralex's appeal as untimely. Maralex avers that special circumstances exist that justify the untimely filing of its appeal, including: (1) the Regional Hearing Clerk "implicitly confirmed" counsel for Maralex's understanding that the filing deadline for a notice of appeal pursuant to 40 C.F.R. part 22 is based on the date of receipt of service of an initial decision, rather than the date the initial decision is mailed; (2) the Region's attorney does not oppose this motion, and thus Region 8 is willing to litigate this appeal on the merits and not have it dismissed based on the error of counsel for Maralex; (3) in contrast to permit appeals, enforcement actions such as this one are not time-sensitive, and thus the Board should accept Maralex's late-filed appeal; (4) resolution of the substantive issues in this appeal will benefit both EPA enforcement efforts as well as operators of injection wells to ensure compliance with the SDWA; and (5) precluding a resolution of Maralex's position on the merits due to its counsel's error will

prejudice Maralex's opportunity to defend its reputation. Unopposed Motion for Reconsideration of Order Dismissing Appeal As Untimely at 2-5 (Sept. 10, 2013) ("Motion").

II. *STANDARD OF REVIEW FOR MOTIONS FOR RECONSIDERATION*

A motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 2 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration), *quoted in In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02, at 3 (EAB Mar. 16, 2011) (Order Granting Partial Reconsideration); *see also In re Pepperell Assocs.*, CWA Appeal Nos. 99-1 & 99-2) (EAB June 28, 2000) (Order Denying Reconsideration) (denying reconsideration in a CWA penalty case based on respondent's failure to identify any error of fact or law); *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992) ("A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion."). Federal courts employ a similar standard. *See, e.g.*, *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for Reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citation omitted); *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004).

III. DISCUSSION

Maralex has failed to demonstrate that the Board made a demonstrable error of law or fact that warrants reconsideration. As the Board stated in its Order, the Board has found special circumstances that would excuse an otherwise untimely filing in cases where delays resulted from circumstances *outside* of the litigant's control. *See* Order at 3 (citing cases). In this instance, counsel for Maralex avers that he mistakenly applied the procedural rules for the Bureau of Land Management to the instant appeal because he was working concurrently on the two appeals. Motion at 2 n.1.[1] Counsel's error in applying the procedural rules is not a circumstance outside of the litigant's control that excuses an otherwise untimely filing. As this Board has explained before, an attorney stands in the shoes of his or her client, and ultimately, "the failings of a client's attorney does not excuse compliance with the Consolidated Rules." *In re Pyramid Chem. Co.*, 11 E.A.D.

---

[1] Maralex does not argue he lacked notice that the Consolidated Rules govern this matter. Rather, Maralex states, "[a]s the Board correctly notes, pursuant to 40 C.F.R. § 22.7(c), Maralex's appeal was due on August 12, thirty-five days after it was served by mail by the Regional Hearing Clerk." Motion at 1. In this instance, the record makes clear that throughout the pendency of this enforcement action, Maralex not only received a copy of the Consolidated Rules with the Complaint, but also cited to the Consolidated Rules in its own pleadings. *See* Proposed Penalty Complaint and Notice of Opportunity for Hearing at 1 (Sept. 27, 2011) (explaining that the Consolidated Rules apply to the proceeding and that a copy of the Consolidated Rules was enclosed) (dkt. #1); Respondent's Answer to Proposed Penalty Complaint and Request for Hearing at 5 (Oct. 31, 2011) (requesting a hearing pursuant to 40 C.F.R. § 22.15(c)) (dkt. #3); Notice and Order (Nov. 1, 2011) (explaining that a Presiding Officer had been assigned to the matter and that the Consolidated Rules applied) (dkt. #5); Respondent's Pre-Hearing Exchange at 1 (Feb. 29, 2012) (stating that Maralex "submits its Pre-Hearing Exchange pursuant to 40 C.F.R. § 22.19") (dkt. #13); Respondent's Proposed Findings of Fact and Conclusions of Law at 1, 14 (Dec. 17, 2012) (filing proposed findings pursuant to 40 C.F.R. § 22.26 and citing both the burden of persuasion and the Presiding Officer's standard of review set forth at 40 C.F.R. § 22.24(a)-(b)) (dkt. #40), *available at* http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Filings?SearchView&Query=%22Maralex%20Disposal%22+and+(%5bRegion%5d=(08))&SearchMax=0&SearchWV=TRUE&SearchOrder=4. Thus, Maralex had both actual and constructive notice that the Consolidated Rules govern this proceeding.

657, 665 (EAB 2004), *quoted in In re Willie P. Burrell & The Willie P. Burrell Trust*, TSCA Appeal No. 11-05, at 13 (EAB Aug. 21, 2012), 15 E.A.D. ___.

Despite admitting that he confused the two sets of procedural rules, counsel for Maralex contends that the Board erred and special circumstances justifying Maralex's untimely appeal exist because the Regional Hearing Clerk "implicitly confirmed" counsel's false premise that the date for filing a notice of appeal and appeal brief is calculated based on the date of receipt of service in an email exchange that occurred on August 5, 2013, one week prior to the appeal deadline. Motion at 2-3. The email counsel refers to states the following in its entirety:

> Tina,
>
> I am going to file a Notice of Appeal and Appellant's Brief in the above reference [sic] matter. The Presiding Judge issued her Initial Decision on July 8, 2013.
>
> Could you provide me with the date of receipt of service of the Initial Decision?
>
> Thank you.
>
> Bill Zimsky

Motion, att. 1 (Email from William Zimsky to Tina Artemis, Regional Hearing Clerk, U.S. EPA Region 8 (Aug. 5, 2013, 3:22 p.m. MDT)). The Regional Hearing Clerk responded shortly thereafter, "Mr. Zimsky: The date on the return receipt is July 16, 2013. Let me know if there is anything else you need." *Id.*, att. 1 (Email from Tina Artemis, Regional Hearing Clerk, U.S. EPA Region 8, to William Zimsky (Aug. 5, 2013, 3:35 p.m. MDT)). The Board rejects counsel's assertion that it was the Regional Hearing Clerk's responsibility to intuit anything from his email or provide any further information other than what he asked. The Regional Hearing Clerk responded promptly with the information counsel requested, the date of receipt of service. Counsel did not ask the Regional Hearing Clerk when the notice of appeal and accompanying appeal brief were due, and

it is not the Regional Hearing Clerk's responsibility to infer what information counsel might need outside of what is asked.[2] It is the party's responsibility to adhere to the applicable procedural deadlines. The Board declines to hold the Regional Hearing Clerk accountable for counsel's own mistake.

Maralex next argues that the Region's willingness "to litigate this appeal and not have it dismissed based on error of counsel," combined with the fact that enforcement actions are not time-sensitive, constitute "unique circumstances" under which "the Board should accept the late-filed appeal." Motion at 4. These arguments both contravene longstanding Board precedent, and also fall short of demonstrating that the Board erred when it determined that there are no special

---

[2] Counsel for Maralex attempts to analogize the circumstances in this matter to a previous Board case wherein the permitting authority mistakenly instructed petitioners to file appeals with the EPA Headquarters Hearing Clerk instead of the Board. *See In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997), *cited in* Motion at 3. In *Kawaihae* the Board accepted two petitions for review originally mailed to the Headquarters Hearing Clerk, noting that petitioners "should not be prejudiced for relying on the erroneous mailing address provided by the permitting authority." *Kawaihae*, 7 E.A.D. at 124. Counsel asserts that although in the current circumstances the Regional Hearing Clerk did not disseminate incorrect information, "the fact that she provided an answer to a question that was based on a false premise constituted a confirmation of that false premise." Motion at 3.

Counsel's analogy is unconvincing. Although in *Kawaihae* the incorrect information was disseminated in the final permit decision, in an enforcement proceeding, the analogous document is the Initial Decision. In this instance, the Presiding Officer's Initial Decision made clear that the Initial Decision would become the final order of the agency 45 days after service upon the parties and without further proceedings unless, among other things, "an appeal to the [Board] is taken within 30 days after this Initial Decision is served upon the parties." Initial Decision at 29 (July 8, 2013) (including multiple citations to the Consolidated Rules and making clear not only the deadline for appeal but also where to send it). The "false premise" counsel for Maralex refers to was of his own design, and the Board rejects the suggestion that the Regional Hearing Clerk or any other Agency actor was responsible for counsel's confusion. *Cf. Spitzer Great Lakes Ltd. v. U.S. EPA*, 173 F.3d 412, 415-17 (6th Cir. 1999) (reversing the Board's decision to deny an untimely appeal under the Consolidated Rules based on misleading language regarding the length of the appeal period included in the Administrative Law Judge's Initial Decision). Maralex was not only aware that the Consolidated Rules governed this proceeding, *see supra* note 1, but also received in the Initial Decision correct information regarding where to file an appeal and within what time period that appeal would be timely.

circumstances in this case that would excuse a late-filed appeal. The Board consistently has required strict compliance with the time limits prescribed by regulation for perfecting an appeal in an effort to, among other things, promote certainty and uniformity in the application of regulatory deadlines, limit reliance on the infinitely variable "internal operations" of litigants and counsel as determinants of when obligations must be met, preserve the Agency's adjudicative resources for litigants who timely exercise their appeal rights, and ensure that the Agency's procedural rules are applied equally to all affected parties. *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996); *see also In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995) (explaining that to adopt a rule whereby the appeal period is triggered by the *receipt* of service because such a rule would "contravene the primary aim of the 'computation of time' rules governing appeals to the Board," which is to provide parties and the Board with "certainty in determining when obligations must be fulfilled"); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006) (explaining that the procedural requirements within the Consolidated Rules "are not procedural niceties that parties are free to ignore"); *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005) (same).

The Board has an interest in preserving adjudicative resources for those litigants that adhere to the procedural deadlines set forth in the Consolidated Rules. *See, e.g.*, *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191 (EAB 2003); *Outboard Marine Corp.*, 6 E.A.D. at 196 (rejecting as untimely EPA Region 5's appeal of a Presiding Officer's civil penalty assessment because the notice of appeal and appeal brief arrived one day after the filing deadline established in 40 C.F.R. § 22.30). Although the Board retains discretion to accept a late-filed appeal when needed to achieve an equitable result, in this instance counsel's erroneous application of the Consolidated Rules does not augur in favor of the Board exercising its discretion. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (stating that "it is within the

discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it"), *quoted in B & L Plating*, 11 E.A.D. at 191 n.6; *see also In re House Analysis & Assocs.*, 4 E.A.D. 501, 505 (EAB 1993) (exercising discretion to consider the appeal of a default order entered by a pro se respondent based on sufficient compliance with 40 C.F.R. § 22.30(a)).

Maralex's remaining arguments similarly fall short of demonstrating that the Board made a demonstrable error of law or fact when it determined that no special circumstances exist that would excuse an otherwise untimely appeal. Motion at 4-6 (raising substantive arguments and asserting for the first time that to preclude a resolution of Maralex's position on the merits "due to the error of its counsel will prejudice Maralex's opportunity to defend its reputational interests").

IV. CONCLUSION

For the foregoing reasons, Maralex's motion to reconsider the Board's September 3, 2013, Order Dismissing Appeal As Untimely is denied.

So ordered.[3]

ENVIRONMENTAL APPEALS BOARD

Date: November 6, 2013

By: Leslye M. Fraser for
Kathie A. Stein
Environmental Appeals Judge

[3] The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Maralex Disposal, LLC, SDWA Appeal No. 13-01, were sent to the following persons in the manner indicated:

By First Class U.S. Mail:

William E. Zimsky
Abadie & Schill, PC
555 Rivergate Lane
Suite B4-180
Durango, CO 81301

By EPA Pouch Mail:

Amy Swanson
Senior Enforcement Attorney
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202

Tina Artemis
Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202

Dated: NOV - 6 2013

Annette Duncan
Secretary