



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

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

SDWA Appeal No. 13-01

ORDER DISMISSING APPEAL AS UNTIMELY

On July 8, 2013, the Presiding Officer for Region 8 (“Region”) of the U.S. Environmental Protection Agency issued an Initial Decision in the above-captioned matter. The Initial Decision assessed a penalty of \$88,900 against respondent Maralex Disposal, LLC, (“Maralex”), a Colorado corporation in the oil and gas produced water disposal business, for violations of section 1423(c), 42 U.S.C. § 300h-2, of the Safe Drinking Water Act (“SDWA”) 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.

On August 15, 2013, Maralex attempted to electronically file a notice of appeal and accompanying appeal brief before the Environmental Appeals Board (“Board”), but was unable to complete the registration requirement for the Board’s new electronic filing system. In a motion filed the next day, Maralex requested that the Board consider the notice of appeal and accompanying appeal brief that Maralex had e-mailed to the Clerk of the Board on August 15, 2013, as timely filed on August 15, noting that it had also emailed copies to opposing counsel and the Regional Hearing Clerk on August 15. Motion to Accept Notice of Appeal and Appellant’s Brief Filed via Email at 1-

2 (Aug. 16, 2013). In its motion, Maralex averred that good cause existed for the Board to consider its notice of appeal and accompanying appeal brief as timely filed, stating that the notice of appeal and accompanying brief “were submitted to the Board and served on opposing counsel within the appeal period,” and that “there is no prejudice to EPA if the Board grants this [m]otion.” *Id.* at 2.

Contrary to Maralex’s statement, its notice of appeal and accompanying brief were not due on August 15, but on August 12, and thus regardless of the method of transmittal, they were not filed in a timely manner. The Consolidated Rules state the following with respect to the service of documents:

Service of the complaint is complete when the return receipt is signed. Service of *all other documents* is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same day delivery, 5 days shall be added to the time allowed by these CROP for the filing of a responsive document.

40 C.F.R. § 22.7(c) (emphasis added). The certificate of service accompanying the Initial Decision indicates that the Regional Hearing Clerk served copies of the Initial Decision upon all parties on July 8, 2013. Maralex’s copy of the Initial Decision was placed in the U.S. mail certified/return receipt requested on July 8, 2013. Initial Decision at 30 (July 8, 2013); *see also* 40 C.F.R. § 22.6 (stating that among other things, service of rulings, orders, decisions, or documents may be achieved via first class mail, including certified mail or return receipt requested). Thus, service of the Initial Decision on Maralex was perfected on July 8, 2013, when the Regional Hearing Clerk placed it in the mail.

Because the Regional Hearing Clerk achieved service of the Initial Decision on Maralex via first class mail, Maralex had thirty-five days after service was perfected on July 8 to timely file a

notice of appeal and accompanying appeal brief before the Board. 40 C.F.R. § 22.7(c); *id.* § 22.7(a) (stating that when computing any period of time, the day of the event from which the designated period runs shall not be included); *see also* 40 C.F.R. § 22.30(a) (stating that within thirty days after the initial decision is served, any party may appeal an adverse ruling of the Presiding Officer to the Board). Counting from July 9, 2013, which was day one of the appeal period, Maralex had until August 12, 2013, to timely file its notice of appeal and accompanying brief.

Failure to submit a petition for review within the time provided will ordinarily result in the dismissal of the petition. *E.g., In re B & L Plating, Inc.*, 11 E.A.D. 183, 189-90 (EAB 2003); *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996). In general, the Board strictly construes threshold proceeding requirements unless there are special circumstances to justify the untimeliness. *B & L Plating*, 11 E.A.D. at 190; *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). The Board has found “special circumstances” to exist in cases where delays resulted from circumstances outside of the litigant’s control. *See, e.g., In re Avon Custom Mixing Servs.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay due to mail sterilization); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999) (aircraft problems of an otherwise reliable overnight delivery service), *aff’d sub nom Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *see also In re Stonehaven Energy Mgmt., LLC*, UIC Appeal No. 12-02, slip op. at 9-10 (EAB Mar. 28, 2013), 15 E.A.D. ____ (delay attributable to permitting authority erroneously directing petitioners to file appeals with the EPA Administrator); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (delay attributable to permitting authority that mistakenly instructed petitioners to file appeals with EPA’s Headquarters Hearing Clerk).

In this instance, the Board is not persuaded that special circumstances exist that would

justify the untimely filing of Maralex's notice of appeal and accompanying brief. Counsel for Maralex erroneously assumed that its appeal period ran from its receipt of service of the Initial Decision, not service as 40 C.F.R. § 22.7(c) provides. Board precedent dictates that the neglect of a party or a party's attorney does not excuse an untimely filing, nor does lack of willfulness, by itself, affect the determination. *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 667 (EAB 2004) (stating that "an attorney stands in the shoes of his or her client"); *see also In re Jiffy Builders*, 8 E.A.D. 315, 317-21 (EAB 1999); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990).

Based on the foregoing, the Board concludes that the notice of appeal and accompanying appeal brief submitted by Maralex is untimely, and there are no special circumstances to justify the late arrival of the notice and the appeal brief.¹ As such, Maralex's notice of appeal and accompanying appeal brief are DISMISSED.

So ordered.²

ENVIRONMENTAL APPEALS BOARD

Date: September 3, 2013

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

¹ Maralex's request that the Board accept as timely the notice of appeal and accompanying appeal brief sent to the Clerk of the Board via e-mail on August 15, 2013, is moot, and the Board does not address it.

² The three-member panel deciding this matter is comprised 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 Dismissing Petition for Review as Untimely 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
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By EPA Pouch Mail:

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

Dated:

September 3, 2013


Annette Duncan
Secretary