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

In Re:	)	SDWA Appeal No. 13-01
	)	
Maralex Disposal, LLC	)	
	)	
Dkt. No. SDWA-8-2011-0079	)	

UNOPPOSED MOTION FOR RECONSIDERATION OF ORDER DISMISSING APPEAL AS UNTIMELY

Appellant, Maralex Disposal, LLC ("Maralex"), by and through counsel, William E. Zimsky, hereby respectfully requests that the Board reconsider its Order Dismissing Appeal as Untimely that it issued on September 3, 2013. I n support whereof, the following is shown:

Maralex seeks to appeal the Initial Decision of Presiding Officer Elyana R. Sutin issued on July 8, 2013. As 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. Undersigned counsel mistakenly believed

that the Notice of Appeal was due on August 15, thirty days after the return receipt was signed.[1]

Maralex submits that special circumstances exist that justify the untimely filing of Maralex's Notice of Appeal and Appellant's Appeal Brief. First, on August 5, 2013, undersigned counsel informed the Regional Hearing Clerk by email that Maralex was going to file a Notice of Appeal in this matter. In that email, undersigned counsel acknowledged that the Initial Decision was issued on July 8, 2013, and then asked "Could you provide me with the date of receipt of service of the Initial Decision?" Thus, undersigned counsel indicated an understanding that the due date for the Notice of Appeal was based on the date of receipt of service of the Initial Decision, not on the date of the Initial Decision. Otherwise, there would have been no need know the date of receipt of service of the Initial Decision and no reason to communicate with the Regional Hearing Clerk regarding the appeal. The Regional Hearing Clerk responded by email informing undersigned counsel that the date on

[1] Undersigned counsel error regarding the date the Notice of Appeal due stems from the fact that at the same time that counsel was working on the instant appeal, counsel was also working on an appeal of a decision issued by the State Director of the Bureau of Land Management on July 9. (That appeal has been docketed as IBLA 2013-205). Under the BLM rules, a notice of appeal taken from a decision of a State Director is due 30 days after the date of service of the decision. 43 C.F.R. § 4.411(a)(2)(i). In turn, 43 C.F.R. § 4.422(c)(6), service on counsel to a party is deemed to have been completed upon the document being delivered. Undersigned counsel mistakenly applied these rules to the appeal in this case, as evidenced by the August 5 email to the Regional Hearing Director.

the return receipt is July 16, 2013. A copy of this email exchange is attached hereto as Exhibit 1. Undersigned counsel copied Amy Swanson, the Senior Enforcement Officer for Region 8, who prosecuted this case on behalf of the EPA. Ms. Swanson was also copied on the Regional Clerk's email response.

The Regional Hearing Clerk's response implicitly confirmed the premise of undersigned counsel's August 5 inquiry, *viz*., that the date for filing the Notice of Appeal is based on the date of receipt of service and not on the date the Initial Decision is mailed. Had the Regional Hearing Clerk or Ms. Swanson indicated that undersigned counsel's premise was incorrect, undersigned counsel would have proceeded accordingly and filed the Notice of Appeal in a timely manner. Under similar circumstances, the Board accepted a late-filed appeal. In *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997), the delay in filing the appeal was attributable to the permitting authority mistakenly instructing the petitioners to file appeals with EPA's Headquarters Hearing Clerk instead of the Board. While unlike *Kawaihae*, the Regional Hearing Officer did not initiate the mistaken information, that fact that she provided an answer to a question that was based on a false premise constituted a confirmation of that false premise.

Second, undersigned counsel has consulted with Amy Swanson, the Senior Enforcement Officer for Region 8, regarding this Motion. Ms. Swanson indicated that Region 8 will not interpose an objection to this Motion. The fact that Region 8

has no objection to this motion forms another basis for granting this motion since Region 8 is willing to litigate this appeal on the merits and not have it dismissed based on the error of counsel.

Third, appeals involving the issuance of permits are time sensitive. *See, e.g.*, Shell Offshore, Inc., OCS 11-02, 15 E.A.D. ___, Slip Op. at 74. Moreover, delays in processing appeals can prejudice the rights of the permittee and/or objectors. Thus, it is necessary to strictly enforce the procedural deadlines. Enforcement actions, on the other hand, are not time sensitive. In addition, in this case no party will be prejudiced if the Board accepts the Notice of Appeal as evidenced by the fact that Region 8 will not be opposing this motion. While Maralex understands that there is a need to ensure that procedural deadlines are followed in enforcement cases, Maralex submits that under the unique circumstances of this enforcement action, the Board should accept the late-filed appeal.

Fourth, the appeal involves an enforcement action under the Safe Drinking Water Act centering on the legal issue of what constitutes failure to maintain the mechanical integrity of an underground injection well. Specifically, in her Initial Decision, the Presiding Judge held that the well at issue failed to maintain mechanical integrity under 40 C.F.R. § 146.8 based on her finding that the annulus pressure was above zero on several occasions and the excess annulus pressure was more likely caused by a leak and/or loose connections rather than thermal

fluctuations. Initial Decision at 10. She held Maralex liable despite finding that the "Complainant provided no evidence on how significant the leak or amount of fluid movement was with respect to the [subject well]," *id*. at 15-16, and also finding that there was "no loss of mechanical integrity." *Id*. at 9, n. 14. Maralex contends that absent evidence of a significant the leak in the tubing, packing or casing or evidence of significant fluid movement into an underground source of drinking water, then there is no loss of mechanical integrity under 40 C.F.R. § 146.8. It is submitted that resolution of this issue will be helpful to both the EPA enforcement efforts and to operators of injection wells to ensure compliance with the SDWA.

Fifth, Maralex is seeking review of the Initial Decision in order to vindicate its reputation as an operator of underground injection wells. As set forth above, Maralex believes that its injection well did not lose mechanical integrity as defined by 40 C.F.R. § 146.8. Precluding 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. By contrast, if the Board allows the appeal to proceed on the merits, no other party will be prejudiced.

Finally, to the extent that the assessment of a monetary fine is intended to act as a deterrence and/or penalty for violation of the SDWA, dismissing an appeal based on error of counsel will negate that purpose since the alleged violator

believes that it has not violated the rules and will also escape any liability for such violations.

In sum, Maralex submits that equitable considerations involving the Regional Hearing Clerk's confirmation of undersigned counsel's mistaken belief of when the Notice of Appeal was due, coupled with the willingness of Region 8 to litigate the appeal on the merits and the lack of prejudice to any other party, militate against dismissing Maralex's Notice of Appeal as untimely under the unique circumstances of this case.

WHEREFORE, premises submitted, Maralex respectfully requests that the Board accept the Notice of Appeal and Appellant's Appeal Brief as timely filed.

Respectfully submitted, this 10th day of September, 2013

ABADIE & SCHILL, PC

/s/ William E. Zimsky

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **UNOPPOSED MOTION FOR RECONSIDERATION** was sent on September 10, 2013, via First Class Mail, Postage Prepaid (and via email) to the following persons:

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By: */s/ William E. Zimsky*

William E. Zimsky