

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

**In re:** )  
 )  
**Polo Development, Inc.,** )  
**AIM Georgia, LLC, and** ) **CWA Appeal No. 16-02**  
**Joseph Zdrilich,** )  
 )  
**Docket No. CWA-05-2013-0003** )

**COMPLAINANT’S RESPONSE IN OPPOSITION TO RESPONDENTS’ MOTION FOR  
EXTENSION OF TIME TO FILE NOTICE OF APPEAL FROM DECISION DATED  
DECEMBER 1, 2015 AND APPEAL BRIEF**

**I. Introduction**

Now comes Complainant, the Director of the Water Division, U.S. Environmental Protection Agency (“U.S. EPA”), Region 5, by and through its counsel, and files this Response in Opposition to Respondents’ *Motion for Extension of Time to File Notice of Appeal From Decision Dated December 1, 2015 and Appeal Brief* (Extension Request) in accordance with Sections 22.16(a), (b) and 22.30(e) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (“Consolidated Rules”), 40 C.F.R. §§ 22.16(a), (b) and 22.30(e), and the Environmental Appeals Board’s (“Board’s”) *Order Directing Briefing* dated May 27, 2016.

**II. Factual and Procedural Background**

On December 1, 2015, Administrative Law Judge M. Lisa Buschmann issued her Initial Decision and Order (“Initial Decision”) in this case assessing a penalty of \$32,550 against Respondents for violations of Sections 301(a) and 404 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a) and 1344. Pursuant to 40 C.F.R. 40 C.F.R. §§ 22.16(a), (c) and 22.30(a), Respondents had until January 5, 2016, to file a notice of appeal of the Initial Decision and an

accompanying brief *See In re: Polo Development, Inc.*, CWA Appeal No. 16-01, 2016 EPA App. LEXIS 18, at \*2 (EAB Mar. 17, 2016) (“Order at 2”). However, Respondents, through their counsel-of-record, Dennis DiMartino, filed a “Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal *Nunc pro Tunc*” (“First Appeal Request”) on January 13, 2016 - eight days after the appeal deadline. The First Appeal Request did not include an accompanying appellate brief, a request for an extension of time to file the brief nor a summary of the grounds upon which Respondents sought to appeal the Initial Decision. Instead, Respondents asserted that special circumstances existed to allow late filing of an appeal in this case because Mr. DiMartino had not received a copy of the Initial Decision sent by regular mail; had not monitored his email spam folder; and had not actively monitored the case with the Office of the Administrative Law Judges. *See Order at 2.*

On January 15, 2016, the Board issued its *Order Extending Deadlines for Deciding Whether to Exercise Sua Sponte Review*, (“Extension Order”), in which it set February 1, 2016, as the deadline for Complainant to file a response to the First Appeal Request and February 17, 2016, as the deadline for Respondents to file a reply brief. *See Extension Order.* The Board also extended the time period for it to exercise *sua sponte* review of the case until 30 days after it ruled on Respondents’ First Appeal Request.<sup>1</sup> *Id.* On January 29, 2016, Complainant filed its *Response in Opposition to Respondents’ Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal Nunc pro Tunc.* Respondents did not file a reply brief.

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<sup>1</sup> If the Board decides to exercise *sua sponte* review, it will file a notice with the Regional Hearing Clerk, the Presiding Officer, and the parties. *See* 40 C.F.R. § 22.30(b). The Board will include in the notice a statement of issues to be briefed by the parties and a time schedule for the briefing. *Id.* This notice is typically filed within 45 days of the effective date of service of the Initial Decision. In this case, the period would have expired on January 21, 2016, if the Board had not extended the time period.

On March 9, 2016, Respondent Joseph Zdrilich called and left a voice mail message for Complainant's Counsel, Richard Clarizio. *See Exhibit A, Conversation Record - March 30, 2016 - Rich Clarizio.* Mr. Zdrilich stated that Mr. DiMartino was no longer practicing law and was no longer representing Respondents. *Id.* On March 16, 2016, Mr. Clarizio sent Mr. Zdrilich an email message advising him to notify the Board of the potential change in counsel for Respondents. *See Exhibit B, email from Richard Clarizio to Joseph Zdrilich dated March 16, 2016.* The email message included the names and addresses of the Regional and Headquarters Hearing Clerks, the Presiding Officer, and Mr. Clarizio. *Id.* The email server confirmed that the message was successfully relayed to the email address associated with Mr. Zdrilich. *Id.*

On March 17, 2016, the Board issued its *Order Dismissing Notice of Appeal as Untimely* ("Order") in this case. The Board arranged for service of the Order by first class mail, return receipt requested on March 17, 2016. *See Exhibit C, Domestic Return Receipt.* It was sent to Mr. DiMartino at 839 Southwestern Run, Youngstown, Ohio. Order, Certificate of Service for Order. According to the U.S. Postal Service's (USPS's) tracking service, the copy of the Order was delivered to Mr. DiMartino's address at 12:52 p.m. on March 23, 2016, and the domestic return receipt shows that a person by the name of "Christine Haluska" accepted the mail for Mr. DiMartino.<sup>2</sup> *Id.* at Product & Tracking Information for Tracking Number 7008 3230 0000 9476 6180 reproduced from USPS website.

On March 18, 2016, Mark Hanni left a voice mail message for Mr. Clarizio stating that he had replaced Mr. DiMartino as counsel for Respondents and would be representing Respondents in this matter. *See Exhibit A.* On March 23, 2016, Mr. Clarizio sent Mr. Hanni a copy of the Order and a letter informing Mr. Hanni that he should notify the Board that he was

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<sup>2</sup> Mr. DiMartino's affidavit in support of the First Appeal Request is notarized by a "Shannan Haluska."

replacing Mr. DiMartino as Respondents' counsel. *See* Exhibit D, letter from Richard Clarizio to Mark Hanni dated March 23, 2016. The letter and Order were addressed to Mr. Hanni at 839 Southwestern Run, Youngstown, Ohio. *Id.* They were sent via first class mail, return receipt requested. According to the USPS's tracking service, the letter and copy of the Order were delivered to the identified address at 11:23 a.m. on March 28, 2016, and the domestic return receipt shows that a person by the name of "Debbie Sakura" at the identified address accepted the mail.<sup>3</sup> *Id.* at Product & Tracking Information for Tracking Number 7001 0320 0006 1458 0621 reproduced from USPS website.

On April 14, 2016, Mr. Hanni filed his *Entry of Appearance for Combined Respondents Substitute Counsel* ("Appearance") with the Board.<sup>4</sup> On April 18, 2016, the 30-day period from the date of the Order that the Board set for deciding whether to exercise *sua sponte* review expired.<sup>5</sup> *See* Extension Order. Consequently, on April 18, 2016, the Initial Decision in this case became a Final Order under the Consolidated Rules. *See* 40 C.F.R. § 22.27(c).

Subsequently, on May 19, 2016, Mr. Hanni filed the instant Extension Request.<sup>6</sup> Specifically, Respondents request that the Board use its equitable powers to provide the Respondents with additional time to file a notice of appeal of the Initial Decision and accompanying brief by June 15, 2016. The Respondents assert that "special circumstances"

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<sup>3</sup> The fact that Mr. Hanni did not sign the return receipt is not an impediment to proper service at his address of record. *See*, Order at 4, n. 2 citing to *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (holding that service by certified mail does not require proof of actual receipt by the addressee).

<sup>4</sup> Mr. Hanni's signature block on his Appearance has the typed address as 829 Southwestern Run, Youngstown, Ohio. This is apparently a typographical error and the correct address for Mr. Hanni is 839 Southwestern Run, Youngstown Ohio. *See* Exhibit E, Extension Request, signature block and accompanying envelope with stamped return address.

<sup>5</sup> When the Board elects not to exercise *sua sponte* review no notice is required and the Initial Decision becomes a Final Order. *See*, 40 C.F.R. §§ 22.27(c) and 30(b) and *In re B & L Plating, Inc.*, 11 E.A.D. at 189, n. 11.

<sup>6</sup> The certificate of service indicates that it was only served upon Complainant's counsel, Mr. Clarizio. However, the Extension Request is docketed as received by the Board on May 19, 2016.

exist because their prior counsel was suspended from the practice of law and did not adequately represent their interests.

### **III. Argument**

A party may request the Board to review any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Board within thirty days after the initial decision is served. *See* 40 C.F.R. § 22.30(a). The Board may provide an extension of time upon timely motion; for good cause shown; and after consideration of prejudice to the other party. *See* 40 C.F.R. § 22.7(b). For the second time in this proceeding, Respondents have filed a request for an extension to file a notice of appeal and accompanying brief after the deadline for such filing has passed and without a demonstration of justifiable special circumstances.

Motions for extension of time are to be filed before the due date. *See* 40 C.F.R. § 22.7(b); *see also* *Outboard Marine Corp.*, 6 E.A.D. at 198 n. 7; *Farmers Union Oil Co.*, 2000 EPA ALJ LEXIS 74 (E.P.A. Nov. 3, 2000) (“Rule 22.7(b) and the preamble explanation leave no doubt that the rule requiring motions for extensions of time to be filed in advance of the due date for the filing of the document in question is to be strictly enforced”). The Board requires strict adherence to filing deadlines. Order at 3. It has stated that “[t]imely filings promote certainty and uniformity in the application of regulatory deadlines; limit reliance on the infinitely variable internal operations of litigants and law firms 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.” *Id.* at 3 citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996).

However, the Board has articulated two scenarios under which it may relax a filing deadline. Order at 3. The Board may relax a filing deadline if either: (1) there is a timely filed motion requesting an extension, for good cause shown after considering prejudice to other parties; or (2) on its own initiative. If a request is not timely filed, then the first scenario does not apply and Respondents can only rely upon the equitable authority of the Board to extend the deadline on its own initiative i.e., the second scenario. In the second scenario, the Board will allow for a late filed appeal only if it finds “special circumstances.” *Id.*

Respondents do not argue that their Extension Request is timely and it is clear that it is not timely when viewed in light of the Consolidated Rules and the Board’s precedent. The notice of appeal of the Initial Decision and accompanying brief were due January 5, 2016. *Id.* at 2. The Board has already found that Respondents were untimely when they filed their First Appeal Request on January 13, 2016, eight days after the appeal deadline. *Id.* The Board has similarly dismissed appeals that were received eleven days,<sup>7</sup> sixteen days,<sup>8</sup> and twenty-one days<sup>9</sup> after the expiration of the appeal period in 40 C.F.R. § 22.30. Clearly, an extension request filed four months after the deadline to file the notice and brief on appeal is not timely filed pursuant to 40 C.F.R. § 22.30. Consequently, in order to prevail on their Extension Request, Respondents must demonstrate “special circumstances.”

Similar to their First Appeal Request, Respondents contend that the “special circumstances” for their Extension Request arise from the inadequacy of representation by their previous counsel, Mr. DiMartino. Respondents urge the Board to find special circumstances

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<sup>7</sup> *In re Apex Microtechnology, Inc.*, EPCRA Appeal No. 93-2 (EAB, July 8, 1994).

<sup>8</sup> *In re B&B Wrecking & Excavating, Inc.*, 4 E.A.D. 16 (EAB 1992).

<sup>9</sup> *In re Production Plated Plastics, Inc.*, 5 E.A.D. 101 (EAB 1994).

because Mr. DiMartino did not adequately represent their interests and compromised their appeal rights. Mr. DiMartino admitted as much in the First Appeal Request when he stated that he failed to diligently monitor the case. Order at 4. The Board previously considered and rejected this argument when it decided the First Appeal Request. *Id.* This is consistent with prior Board opinions where special circumstances were not found when there was “insufficient oversight and inattentiveness” by Respondent’s counsel. *See In re Tri-County Builders Supply*, CWA Appeal No. 03-04, 2004 EPA App. LEXIS 25, at \*7-9 (July 26, 2004) (no special circumstances where attorney leaving the office on family emergency assigned no one to monitor the case during his absence, nor did he review the case’s status upon his return); *see also In re Maralex Disposal, LLC*, SDWA Appeal No. 13-01, 2013 EPA App. LEXIS 33, at \*5-6 (EAB Sept. 3, 2013); (no special circumstances where counsel erroneously assumed that the appeal period ran from receipt of service, and not from service itself).

The Board expressly stated in *In re Willie P. Burrell & The Willie P. Burrell Trust*, 15 E.A.D. 677, 688 (EAB 2012): “The neglect of a party's attorney does not excuse an untimely filing. *Pyramid*, 11 E.A.D. at 665 (“[The Board] ha[s] made clear, time and again, that the failings of a client's attorney does not excuse compliance with the Consolidated Rules.”) (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 531-32 (EAB 1996), and *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990)). The Board has repeatedly held that “an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings.” *Pyramid*, 11 E.A.D. at 667; *accord Four Strong Builders*, 12 E.A.D. at 770; *JHNY*, 12 E.A.D. at 382-83 & n. 15; *Jiffy Builders*, 8 E.A.D. at 320-21; *see also Detroit Plastic Molding*, 3 E.A.D. at 105-06 (pre-Board case). In general, a client voluntarily chooses its attorney as its representative in an action and thus cannot avoid the consequences of the acts or omissions of its

freely selected agent: "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L. Ed. 955 (1879)); accord *United States v. Boyle*, 469 U.S. 241, 249-52, 105 S. Ct. 687, 83 L. Ed. 2d 622 (1985) (tax return must be timely filed regardless of whether a client entrusted its attorney with the duty to make a timely filing).

Respondents state that additional time should be granted because they did not know that Mr. DiMartino was suspended from practicing law in Ohio, nor did they know that he had not taken steps to properly assert Respondents' appeal rights.<sup>10</sup> The Supreme Court of Ohio provides a history of attorney disciplinary proceedings available to the public on-line at [http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/Public\\_AtorneyInformation.asp](http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/Public_AtorneyInformation.asp). A simple search of this site would have informed the Respondents that since 1994 Mr. DiMartino had been disciplined three times for actions related to mismanaging his client accounts or dishonest conduct involving his marital status. The most recent complaint was filed against Mr. DiMartino on September 15, 2015, and decided on February 17, 2016. It was related to his mishandling of an unrelated client account. See Exhibit F, *Mahoning Cty. Bar Assn. v. DiMartino*, Slip Opinion No. 2016-Ohio-536. Respondents selected Mr. DiMartino to represent them. With on-line access to attorney disciplinary actions, they cannot assert ignorance of Mr. DiMartino's disciplinary problems.

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<sup>10</sup> To the extent the Respondents are seeking redress for incompetent representation they may either file a complaint with the Ohio Supreme Court or sue Mr. DiMartino for malpractice. See *Alsobrook v. UPS Ground Freight, Inc.* 352 Fed. Appx. 1 (6<sup>th</sup> Cir. 2009), cert. denied by *Alsobrook v. UPS Ground Freight, Inc.*, 176 L. Ed. 2d 182, (U.S., Mar. 1, 2010) (holding that the appropriate remedy for ineffective assistance of counsel is a malpractice action against the attorney and not an attack on an adverse judgment).



Assuming *arguendo* that Mr. DiMartino's suspension is relevant<sup>11</sup> it is not sufficient to justify an extension. When a Respondent seeks to invoke the equitable authority of the Board the Respondent must demonstrate that it has acted in a timely and responsible manner. The Board has refused to grant an extension where a Respondent failed to communicate their objections during the time for *sua sponte* review. See *Gary Dev. Co.*, 6 E.A.D. at 532, n. 11. By March 9, 2016, at the latest, Respondent Zdrilich knew that Mr. DiMartino had been suspended from the practice of law in Ohio.<sup>12</sup> See Exhibit A. By March 18, 2016, Mr. Hanni had notified Complainant that he was representing Respondents. *Id.* By March 23, 2016, Respondents' new attorney had received the Order. Respondents could have filed their Extension Request shortly after receiving the Order on March 23, 2016. See Exhibit D. They could have filed the Extension Request before April 18, 2016, the date when the Board's *sua sponte* review period ended. They did not.

This is not the first time that Respondents have missed a deadline in this proceeding. In addition to the late filed First Appeal Request, the Respondents failed to meet the deadlines to file their prehearing exchange, and they submitted no post-hearing brief. See Initial Decision at 2. Deadlines "serve an important role in helping to bring repose and certainty to the administrative enforcement process" and "ensure that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants." *Tri-County*

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<sup>11</sup> Respondents have not identified how Mr. DiMartino's suspension impacted their appeal. He was admitted to the Ohio State bar at the time he filed the First Appeal Request. Although he was suspended at the time Respondents' reply brief was due, the substance of his arguments were presented in the First Appeal Request. That First Appeal Request, unlike the present Extension Request, included a Memorandum of Law citing to cases in support of Respondents' First Appeal Request. Additionally, the Board conducted its own independent review of the Initial Decision to determine if there were any errors of fact or law. It did not find any.

<sup>12</sup> Respondents or their new counsel may have known at an earlier date of Mr. DiMartino's most recent disciplinary problems. Their new attorney, Mr. Hanni, used the same business as Mr. DiMartino and represented him in his most recent disciplinary proceeding. See Exhibits E and F. The Respondents do not indicate in their Extension Request when they first became aware of either Mr. DiMartino's most recent disciplinary problems or his suspension.


*Builders Supply*, 2004 EPA App. LEXIS 14, at \*8. The Board has therefore refused to find special circumstances to excuse a late-filed appeal, as in *B & L Plating, Inc.*, when the late filing is only the most recent oversight in a “succession of . . . failures to abide by the rules and orders designed to promote the efficient resolution of disputes.” *B & L Plating, Inc.*, 11 E.A.D. at 191. In this proceeding, Respondents’ repeated failure to meet the deadlines weighs against the Board’s exercise of its equitable authority to grant Respondents’ late-filed Extension Request.

**V. Conclusion**

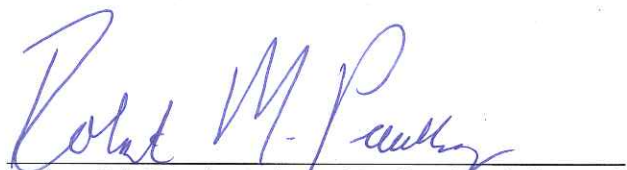
For the reasons stated above, Respondents have failed to demonstrate that special circumstances exist to grant an extension of time to file a notice of appeal of the Initial Decision and accompanying brief. Accordingly, Respondents’ Extension Request should be denied.

Respectfully submitted,

June 2, 2016  
Date

  
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
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**AIM Georgia, LLC, and** ) **CWA Appeal No. 16-02**  
**Joseph Zdrilich,** )  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing "Complainant's Response in Opposition to Respondents' Motion for Extension of Time to File Notice of Appeal from Decision Dated December 1, 2015 and Appeal Brief," CWA Appeal No. 16-02 was sent this day in the following manner to the addressed listed below:

An electronic filing was made to: Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1200 Pennsylvania Avenue, NW  
Mail Code 1103M  
Washington, D.C. 20460-0001

Copy by USPS Certified Mail to: Sybil Anderson  
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U.S. Environmental Protection Agency  
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Mail Code 1900R  
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Copy by USPS Certified Mail to: M. Lisa Buschmann  
Administrative Law Judge  
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Copy hand-delivered to:


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