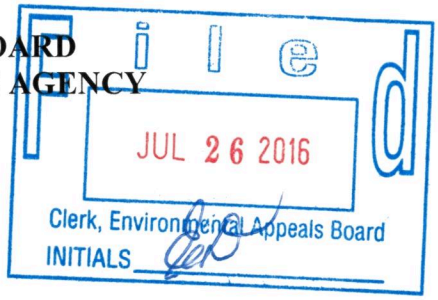
BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

ORDER DISMISSING APPEAL

In May 2016, Polo Development, Inc., AIM Georgia, LLC, and Mr. Joseph Zdrilich ("Respondents") filed a Motion for Extension of Time to appeal an Initial Decision and Order entered against them on December 1, 2015. In their Motion, Respondents acknowledge that any appeal now is untimely, and so request that the Board grant them leave to file – out of time – a notice of appeal and brief in support.

This is Respondents' second request to appeal the Initial Decision and Order. The Environmental Appeals Board ("Board") denied the first request filed by Respondents' prior counsel on January 13, 2016, as untimely. *In re Polo Dev., Inc.*, CWA Appeal No. 16-01 (EAB Mar. 17, 2016), 17 E.A.D. ___ ("Order"). The Board further elected not to exercise its authority to review the Initial Decision and Order on its own initiative pursuant to 40 C.F.R. § 22.30(b). The Board now denies this second request to file an untimely appeal by Respondents' new counsel. First, Respondents fail to show any demonstrable error in the Order denying Respondents' first request. Second, Respondents otherwise fail to demonstrate special circumstances to warrant the Board's granting their second request to accept an untimely appeal.

In its Order denying the first request, the Board noted that it may accept late-filed appeals when "special circumstances" justify the untimeliness. *Id.* at 3 (citing 40 C.F.R. § 22.7(b), which

allows the Board to relax a filing deadline "on its own initiative," and Board precedents requiring a showing of special circumstances to allow a late-filed appeal). However, the Board found there that special circumstances did not exist. Instead, the evidence established that Respondents' prior counsel was served with the Initial Decision and Order, that Respondents' prior counsel received the Initial Decision and Order at least two weeks before the appeal deadline, and that Respondents' prior counsel did not exercise due diligence in monitoring the docket of the enforcement proceedings below. The Board concluded that all of these factors weighed against finding special circumstances. *Id.* at 3-5.

Respondents' second request to file an untimely appeal likewise lacks merit. First, if viewed as a motion for reconsideration of the Order denying the first request, the motion is untimely. 40 C.F.R. § 22.32 (party must file motion for reconsideration within 10 days of service of an order). And Respondents fail to show that the Board made a demonstrable error, such as a mistake on a material point of law or fact, based on the record then before it. *See In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, at 2 (EAB Nov. 8, 2004) (Order Denying Motion for Reconsideration); *see also In re Town of Newmarket*, NPDES Appeal No. 12-05, at 1-2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration) (collecting Board precedent describing the standard for reconsideration).

Second, as a motion to file an untimely appeal, Respondents again fail to demonstrate special circumstances warranting the late filing in May 2016, some four months after the appeal deadline in 40 C.F.R. § 22.30(a). In their Motion, Respondents state that they were unaware that their prior counsel: (i) had been subject to bar proceedings resulting in counsel's suspension from the practice of law; and (ii) had failed to take the necessary steps to perfect an appeal.

Respondents further state that they recently engaged new counsel, who needed time to review the case file and prepare the necessary appeal papers. Motion at 1.

Respondents' arguments regarding their prior counsel do not demonstrate special circumstances. Under well-established Board precedent, "'the failings of a client's attorney [do] not excuse compliance with the Consolidated Rules.'" Order at 4 (quoting *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 665, 667 (EAB 2004); citing *In re Burrell*, 15 E.A.D. 679, 688-89 (EAB 2012); *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)).

And even if the Board excused Respondents' lateness because of prior counsel's actions, it cannot excuse the additional delay of Respondents' new counsel. Respondents engaged new counsel at least as early as April 14, 2016, more than one month before Respondents, through their new counsel, filed the second request to file an untimely appeal. *See* Entry of Appearance for Combined Respondents' Substitute Counsel, CWA Appeal No. 16-01 (Apr. 14, 2016). EPA Region 5 asserts, and Respondents do not deny, that new counsel was in fact engaged as early as March 18, 2016, one day after the Board issued its Order denying the first request. *See* Complainant's Opposition to Respondents' Motion at 3. Yet Respondents provide no explanation for new counsel's (at least) one-month delay in filing the second request or need for yet more time to prepare a brief.

In Reply, Respondents argue that the Board should apply to this second request a more lenient "excusable neglect" standard, citing as support the U.S. Supreme Court decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). In *Pioneer,* the Supreme Court addressed the federal courts' "excusable neglect" standard for

late-filed pleadings, a standard based on specific language in federal procedural rules for bankruptcy, district, and appellate court proceedings.

As an initial matter, the Board need not consider this new argument because Respondents raise it for the first time in their Reply. 40 C.F.R. § 22.16(b) (replies "shall be limited to issues raised in the response").

In any event, the Board is not bound by the federal courts' procedural rules. *In re Chempace Corp.*, 9 E.A.D. 119, 135 n.22 (EAB 2000); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543-44 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"). The Board does have the discretion to consider federal court decisions on similar procedural rules to inform the Board's interpretation of its administrative rules. *See, e.g., In re Lazarus, Inc.*, 7 E.A.D. 318, 330 & n.25 (EAB 1997); *see also Chempace*, 9 E.A.D. at 135 n.22. The Board also has the discretion not to do so. *See In re Zaclon Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998).

But here, the federal rules' "excusable neglect" standard is simply inapposite. That standard finds no counterpart in part 22 rules for late-filed pleadings. So, it is simply not pertinent to the Board's interpretation of EPA regulations as requiring a showing under 40 C.F.R. § 22.7(b) of "special circumstances" to allow a late-filed appeal. *See also* 40 C.F.R. § 22.1(c) (granting the Board discretion to resolve questions arising in appeals under 40 C.F.R. part 22 that the regulations do not specifically address).

Indeed, the pre-1999 version of 40 C.F.R. § 22.7(b) had allowed an untimely motion for extension of time if a party could show the delay was the result of "excusable neglect." *See*

40 C.F.R. § 22.07(b) (1998). But EPA amended 40 C.F.R. part 22 in 1999, removing that provision. In doing so, EPA rejected a comment to include language in part 22 allowing a late-filed motion because it "may encourage untimeliness, and thereby adversely affect the Agency's efforts to make administrative proceedings more efficient." 64 Fed. Reg. 40,138, 40,148 (July 23, 1999). This regulatory change to 40 C.F.R. part 22 thus serves to reinforce the Board's precedents to accept late-filed appeals only when special circumstances justify the untimeliness.

For all of these reasons, the Board denies Respondents' Motion for Extension of Time and dismisses this appeal.

So ordered.[1]

ENVIRONMENTAL APPEALS BOARD

Dated: 7/26/2016

By: Mary Beth Ward
Mary Beth Ward
Environmental Appeals Judge

[1] The panel deciding this matter is comprised of Environmental Appeals Judges Mary Beth Ward, Mary Kay Lynch, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Appeal in the matter of *Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich*, CWA Appeal No. 16-02, were sent to the following persons in the manner indicated:

By Facsimile and First Class U.S. Mail:

Mark A. Hanni, Esq.
839 Southwestern Run
Youngstown, Ohio 44514-4688
tel: 330-726-7777
fax: 330-726-7779

By Facsimile and EPA Pouch Mail:

Richard J. Clarizio, Esq.
U.S. Environmental Protection Agency, Region 5
Office of Regional Counsel (C-14J)
77 West Jackson Boulevard
Chicago, Illinois 60604
tel: 312-886-0559
fax: 312-582-5889

Date: JUL 26 2016

Annette Duncan
Secretary