

**BEFORE THE UNITED STATES ENVIRONMENTAL APPEALS BOARD
WASHINGTON, DC**

In The Matter Of:)	APP. CASE NO.
)	
)	
)	
POLO DEVELOPMENT, INC.)	ADMIN. DOCKET NO. CWA-05-2013-003
AIM GEORGIA, INC., and)	
JOSEPH ZDRILICH,)	
)	<u>RESPONDENTS' MOTION TO FILE</u>
Respondents)	<u>NOTICE OF APPEAL NUNC PRO TUNC</u>

NOW come Respondents **POLO DEVELOPMENT, INC.**, **AIM GEORGIA, LLC**, and **JOSEPH ZDRILICH, SR.**, by and through undersigned counsel, pursuant to 40 C.F.R. §§22.30(a)(1) and 22.7, and hereby move this Honorable Board for an Order permitting them to file their Notice of Appeal (Exhibit A) *nunc pro tunc*.

The basic reason for this Motion is that undersigned just learned that the *Initial Decision and Order* was issued on December 1, 2015. Pursuant to 40 C.F.R. §22.30(a)(1), Respondents' *Notice of Appeal* should have been filed by January 2, 2016. As this Motion is being electronically filed on January 13, 2016, it is technically 11 days late. The specific reasons in support of this Motion are set forth in the attached Memorandum.

WHEREFORE, Respondents pray that this Honorable Court will grant their Motion and issue an Order: 1) permitting them to file their *Notice of Appeal nunc pro tunc* and 2) giving them a reasonable time to research, write, and file their *Appellants' Brief*.

Respectfully submitted,



Dennis A. DiMartino (SCR #0039270)

Attorney for Respondents

839 Southwestern Run

Youngstown, OH 44514-4688

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Dennis.DiMartino@gmail.com

MEMORANDUM OF LAW

I. FACTS OF CASE

On January 2, 2013, the United States Environmental Protection Agency (hereafter referred to as "EPA") filed a Complaint against Respondents. The Complaint alleged that Respondents violated Federal law related to watershed and other environmental concerns that took place as early as 2006 based on permits issued in 1999.

On February 24-25, 2015, the matter was tried to Administrative Law Judge M. Lisa Buschmann. The EPA called a number of witnesses, whom were all cross-examined by undersigned. The EPA also produced a number of exhibits which were admitted into the record. Respondent **JOSEPH ZDRILICH, SR.** testified and was cross-examined concerning the construction efforts he undertook on the subject properties.

On December 1, 2015, Judge M. Lisa Buschmann submitted her *Initial Decision and Order* (hereafter referred to as "*Initial Decision.*" The cover page showing the time/date stamp of the *Initial Decision* is attached as Exhibit B)

A copy of the *Initial Decision* was sent to undersigned electronically via e-mail to dennis.dimartino@gmail.com. (Exhibit C). For some reason, however, that decision arrived in counsel's SPAM folder, not the general mailbox of the e-mail system. As a result, undersigned was unaware that the *Initial Decision* had even been filed. (See Affidavit of Atty. Dennis DiMartino, attached as Exhibit D)

The Certificate of Service indicated that a copy of the *Initial Decision* was sent to undersigned by regular mail. Undersigned never received a copy of the *Initial Decision* in such a manner. (See Exhibit E)

On January 14, 2016, undersigned received a telephone call from individual Respondent **JOSEPH ZDRILICH, SR.**, who advised that he believed a decision had been rendered on December 1, 2015 and that the "*45 day time period for filing an appeal ended today.*"

Undersigned immediately searched his general e-mail inbox and then conducted a system-wide search using the search term “POLO,” relating to Respondent **POLO DEVELOPMENT, INC.** It was at that time that counsel first learned that the *Initial Decision* had been filed.

II. APPLICABLE STATUTES, RULES, CONSTITUTIONS, AND CASELAW

40 CFR §22.30 deals directly with this appeals and states:

§ 22.30 Appeal from or review of initial decision.

(a) Notice of appeal.

(1) Within 30 days after the initial decision is served, any party may appeal 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 Environmental Appeals Board. Appeals sent by U.S. mail (except by U.S. Postal Express Mail) shall be addressed to the Environmental Appeals Board at its official mailing address: Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Appeals delivered by hand or courier (including deliveries by U.S. Postal Express Mail or by a commercial delivery service) shall be delivered to Suite 600, 1341 G Street, NW., Washington, DC 20005. One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

In situations such as the matter sub judice, however, 40 C.F.R. § 22.7 also provides:

The [EAB] * * * may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the * * * Environmental Appeals Board reasonable opportunity to issue an order. 40 C.F.R. § 22.7(b)

Finally, Federal Civ. R. 6 also provides for unusual circumstances where permission to file or move is sought beyond a designated date.

Rule 6. Computing and Extending Time; Time for Motion Papers

(b) EXTENDING TIME.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

The EAB can excuse a late-filed Appeal if it finds “special circumstances” to justify the untimeliness. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 190 (EAB 2003); see also *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). The EAB may also extend the deadline for filing the appellate Brief if good cause is shown and there is no prejudice to opposing parties. See *In re B & B Wrecking and Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992); 26 see also *In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, at 4

III. ARGUMENT IN SUPPORT OF MOTION

a. **Counsel has demonstrated that the Notice of Appeal was not filed due to “excusable neglect” under the Rule.**

This Motion is brought to simply permit Respondents **POLO DEVELOPMENT, INC.**, **AIM GEORGIA, LLC**, and **JOSEPH ZDRILICH, SR.**, the legal opportunity to appeal the *Initial Decision*. The error here occurred as a result of a technical problem whereby the *Initial Decision* was routed to the SPAM folder of counsel’s e-mail and as the result of undersigned’s failure to inquire more with the Court or online docket. It had absolutely nothing to do with Respondents **POLO DEVELOPMENT, INC.**, **AIM GEORGIA, LLC**, and **JOSEPH**

ZDRILICH, SR., who hired undersigned for full, zealous, and competent representation. Suffice to say that given the mistakes that prevented the timely filing of the *Notice of Appeal*, none of the Respondents received that level of representation due in Federal Court. Counsel submits that his error and the technical mis-routing of the e-mail to the SPAM file should constitute both “special circumstances” and “good cause” under *B&L Plating, Outboard Marine Corp.*, and *B & B Wrecking and Excavating, Inc.*, supra.

B. Given the legal battle that has been fought for at least the past 10 years, it would be unfair to punish Respondents for a simple mistake by their lawyer.

The Court is aware that the EPA has been engaged in a dispute with Respondents since 2006, after the latter lawfully took out construction permits concerning the wetlands in 1999. Undersigned tried the case for two days before Hon. M. Lisa Buschmann, cross-examining multiple witnesses and reviewing substantial documentary exhibits. To not have filed an Appeal here is to have “ran a marathon and collapsed upon entering the stadium.” Suffice to say that both undersigned and Respondents were shocked at the fact that the *Initial Decision* had been filed on December 1, 2015. The reason for that shock is that counsel has diligently represented Respondents on the other major points of this case.

C. Respondents have no other realistic option if the Court denies the *Motion to File Notice of Appeal and Appellate Brief Nunc Pro Tunc*.

If Respondents get the opportunity to appeal, they will feel that they were treated fairly in this legal system. If the Court denies the Motion to File, etc., however, they will not have a realistic option available, as the terms of the Initial Decision will become final and binding,

D. Petitioner will not suffer any prejudice by allowing a late Appeal.

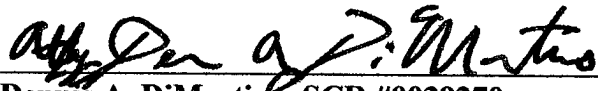
If Respondents get the opportunity to appeal, the most that can legally occur is that the \$32,550 fine plus interest can be reduced. Judgment was previously entered against Respondents by the Presiding Officer prior to the February 24-25, 2015 Hearing. The EPA cannot “lose” this

case on Appeal. As such, Respondents should be able to file the Notice of Appeal which is technically 11 days late and then pursue the Appeal to the Board.

IV. CONCLUSION

WHEREFORE, Respondents **POLO DEVELOPMENT, INC., AIM GEORGIA, LLC, and JOSEPH ZDRILICH, SR.** pray that this Honorable Court will grant their Motion and issue an Order: 1) permitting them to file their *Notice of Appeal nunc pro tunc* and 2) giving them a reasonable time to research, write, and file their *Appellants' Brief*.

Respectfully submitted,



Dennis A. DiMartino, SCR #0039270

Attorney for Respondents

839 Southwestern Run

Youngstown, OH 44514-4688

Phone 330.726.7777 Ext. 4

FAX 330.726.7779

Dennis.DiMartino@gmail.com

CERTIFICATION

I certify that copies of this pleading were served upon:

- 1) **Hon. M. Lisa Buschmann, U.S. E.P.A.**, 1099 14th Street, NW, Suite 350W, Franklin Court, Washington, DC 20005
- 2) **Ms. Sybil Anderson, Hearing HQ Clerk, U.S. E.P.A.**, 1099 14th Street, NW, Suite 350W, Franklin Court, Washington, DC 20005
- 3) **Richard Clarizio, Associate Regional Counsel, U.S. E.P.A.**, 77 West Jackson Blvd., Suite C-14J, Chicago, IL 60604-3590 and via e-mail to **Clarizio.Richard@epa.gov**.
- 4) **Ms. Eurika Durr, Clerk, Environmental Appeals Board**, 1201 Constitution Avenue, NW, WJC East, Room 3332, Washington, DC 20004 and via e-mail to **Durr.Eurika@epa.gov**.

by overnight mail and electronic mail on January 13, 2016.



Dennis A. DiMartino, SCR #0039270
Attorney for Respondents
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Youngstown, OH 44514-4688
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Dennis.DiMartino@gmail.com

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION FIVE (CHICAGO, ILLINOIS)**

In The Matter Of:)	DOCKET NO. CWA-05-2013-003
)	
POLO DEVELOPMENT, INC.)	HON. M. LISA BUSCHMANN
AIM GEORGIA, INC.)	
JOSEPH ZDRILICH)	
)	<u>NOTICE OF APPEAL OF</u>
Respondents)	<u>COMBINED RESPONDENTS</u>

NOW come Respondents **POLO DEVELOPMENT, INC.**, **AIM GEORGIA, LLC**, and **JOSEPH ZDRILICH**, by and through undersigned counsel, pursuant to 40 C.F.R. §22.30(a)(1), and hereby give notice to this Honorable Court and all interested parties that they are appealing the *Initial Decision and Order* filed on December 1, 2015 to the Environmental Protection Agency Environmental Appeals Board.

Respectfully submitted,

Dennis A. DiMartino, SCR #0039270
Attorney for Respondents
839 Southwestern Run
Youngstown, OH 44514-4688
Phone 330.726.7777 Ext. 4
FAX 330.726.7779
Dennis.DiMartino@gmail.com

CERTIFICATION

I certify that copies of this pleading were served by overnight courier upon:

- 1) **Hon. M. Lisa Buschmann, U.S. E.P.A.**, 1099 14th Street, NW, Suite 350W, Franklin Court, Washington, DC 20005
- 2) **Ms. Sybil Anderson, Hearing HQ Clerk, U.S. E.P.A.**, 1099 14th Street, NW, Suite 350W, Franklin Court, Washington, DC 20005
- 3) **Richard Clarizio, Associate Regional Counsel, U.S. E.P.A.**, 77 West Jackson Blvd., Suite C-14J, Chicago, IL 60604-3590 and via e-mail to Clarizio.Richard@epa.gov.
- 4) **Ms. Eurika Durr, Clerk, Environmental Appeals Board**, 1201 Constitution Avenue, NW, WJC East, Room 3332, Washington, DC 20004 and via e-mail to Durr.Eurika@epa.gov.

by overnight mail and electronic mail on January 13, 2016.

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FAX 330.726.7779
Dennis.DiMartino@gmail.com



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:

Polo Development, Inc.,
AIM Georgia, LLC, and
Joseph Zdrilich,

Respondent.

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Docket No. CWA-05-2013-0003

Dated: December 1, 2015

SEARCHED
SERIALIZED
INDEXED

INITIAL DECISION AND ORDER

PRESIDING OFFICER: M. Lisa Buschmann, Administrative Law Judge

APPEARANCES:

For Complainant:

Richard J. Clarizio, Esq.
Robert M. Peachey, Esq.
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

For Respondents:

Dennis A. DiMartino
839 Southwestern Run
Youngstown, Ohio 44514

I. Procedural History

This proceeding was initiated by a Complaint filed on January 2, 2013, by the United States Environmental Protection Agency ("EPA") Director of the Water Division, Region 5 ("Complainant"), pursuant to Section 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g). The Complaint charged Respondents with using mechanized clearing and earth-moving equipment to discharge dredged or fill material into waters of the United States, including wetlands, without a permit required by Section 404 of the CWA. The Complaint stated that EPA issued an administrative order requiring Respondents to develop and implement a plan to restore the filled area to wetlands, and Respondents submitted a wetlands restoration plan, but after EPA approved it, Respondent Joseph Zdrilich informed EPA that he would not conduct restoration work in accordance with the plan and would not restore certain areas. The

Resp. X-B



Dennis DiMartino <dennis.dimartino@gmail.com>

Polo Development - CWA-05-2013-0003

Anderson, Sybil <Anderson.Sybil@epa.gov>

Tue, Dec 1, 2015 at 5:08 PM

To: "Dennis.DiMartino@gmail.com" <Dennis.DiMartino@gmail.com>

Good Afternoon,

Please see the attached "Initial Decision and Order".

Best regards,

Sybil Anderson, Headquarters Hearing Clerk

Office of Administrative Law Judges

U.S. EPA

Mail Code 1900R

1200 Pennsylvania Ave., NW

Washington, DC 20460

(Overnight / Courier)

U.S. EPA

Office of Administrative Law Judges

Ronald Reagan Building, Rm. M1200

1300 Pennsylvania Ave., NW

Washington, D.C. 20460

Email: anderson.sybil@epa.gov

-

Phone: 202-564-6261

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Resp. X-C

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State of Ohio)
County of Mahoning)

AFFIDAVIT OF ATTY. DENNIS A. DIMARTINO

NOW comes Attorney Dennis A. DiMartino, after being placed under oath, who hereby swears and says the following:

1. I am counsel of record for the Respondents in a Federal administrative proceeding known as *In the Matter of Polo Development, Inc.*, et al, U.S. EPA Docket No. CWA-05-2013-0003 before the Honorable M. Lisa Buschmann.
2. I have personal knowledge of the administrative Complaint filed on January 2, 2013, the bulk of which alleged that Respondents violated Federal law related to watershed and other environmental concerns that took place as early as 2006 based on permits issued in 1999. I was retained in 2015 to represent the Respondents after they had been served with a Complaint by the EPA and several years had passed in litigation.
3. On February 24-25, 2015, the matter was tried to Administrative Law Judge M. Lisa Buschmann. The EPA called a number of witnesses, whom I cross-examined. The EPA also produced a number of exhibits which were admitted into the record. Respondent JOSEPH ZDRILICH, SR. testified and was cross-examined concerning the construction efforts he undertook on the subject properties.
4. On December 1, 2015, Judge M. Lisa Buschmann submitted her *Initial Decision and Order*(hereafter referred to as "*Initial Decision*."
5. A copy of the *Initial Decision* was sent to me electronically via e-mail to dennis.dimartino@gmail.com. For some reason, however, that decision arrived in my e-mail's SPAM folder, not my general mailbox. I typically don't empty my SPAM folder for several months, as the messages are mostly useless advertisements.
6. As a result, I was unaware that the *Initial Decision* had even been filed. Although the Certificate of Service indicated that a copy of the *Initial Decision* was sent to me by regular mail, I never received a copy of it in such a manner.
7. On January 14, 2016, my client JOSEPH ZDRILICH, SR called and advised me that he just learned a decision had been rendered back in December, 2015. He told me that he thought there was a "45 day time period for filing an appeal" which "ended today." I immediately searched my general e-mail inbox and then conducted a system-wide search using the search term "POLO," relating to Respondent POLO DEVELOPMENT, INC. This was the first time that I learned that the *Initial Decision* had ever been filed.
8. I immediately began researching the Federal statutes and administrative laws related to an Appeal from an EPA case, as this was the first administrative Federal proceeding I had ever been involved in. There are a myriad of rules, statutes, etc. that are foreign to me.

Resp. X-D

9. I also telephoned EPA AJA Office Director Bruce Franklin, Paralegal to Judge Buschmann's Paralegal Chronnia Warren, and Staff Atty. Matt Barnwell. Based on a conversation, I also called EPA Environmental Appeals Board representative Ms. Eurika Durr and left a telephone message concerning these matters.
10. Clearly, had I been checking my entire e-mail system before today, I would have discovered that t that the *Initial Decision* was filed on December 1, 2015 and made appropriate arrangements to file the Notice of Appeal before January 1, 2016.
11. I believe that while a portion of the error occurred due to a technical problem, I still accept responsibility for not following this case more closely. I received several filings from opposing counsel and the Court during the case by overnight courier. I actually expected to be served with a copy of the *Initial Decision* either by overnight courier or by certified mail, neither of which happened here.
12. I was shocked, stunned, embarrassed, and horrified that I had let this mistake happen. I have been actively practicing law for over 28 years and something this catastrophic was out of character for me to do. Moreover, my clients would absolutely be punished financially, legally, morally, and socially as a result of my error.
13. The failure to file the Notice of Appeal was solely mine and I feel it qualifies as "excusable neglect" under Fed. Civ. R. 6.
14. Unless the Court permits me to file the Notice of Appeal 12 days late, my clients will be punished excessively and unnecessarily given that the mistake was mine, not theirs. They have been diligently contesting these allegations since 2006 and wanted to pursue an Appeal if the ruling was excessive. As the *Initial Report* calls for a monetary fine of more than \$32,000, the punishment is substantial.
15. I prepared this Affidavit and declare the statements are honest, accurate, and true.

FURTHER AFFIANT SAYETH NAUGHT.

Jan 13, 2016
Date


Dennis A. DiMartino
Attorney Dennis A. DiMartino

NOTARY PUBLIC

Sworn to and subscribed in my presence on January 13, 2016 in Youngstown, Ohio.


Shannan Haluska
SHANNAN HALUSKA
Notary Public, State of Ohio

SHANNAN HALUSKA
NOTARY PUBLIC
FOR THE
STATE OF OHIO
My Commission Expires
February 24, 2020



CERTIFICATE OF SERVICE

I hereby certify that the foregoing Initial Decision and Order dated December 1, 2015, was sent this day in following manner to the addresses listed below:


Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
(202)564-6261

Dated: **December 1, 2015**

Original by Regular Mail to:

LaDawn Whitehead
Management Analyst
Office of Enforcement and Compliance Assurance U.S. EPA - Region 5
77 West Jackson Blvd
Chicago, IL 60604

One Copy by Electronic and Regular Mail to:

Richard J. Clarizio
Associate Regional Counsel
U.S.EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590
clarizio.richard@epa.gov

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Resp. X-E