

**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. 15-(01)
Joseph Zdrilich,)	
)	
Docket No. CWA-05-2013-0003)	

**COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENTS' NOTICE OF
APPEAL OF COMBINED RESPONDENTS AND MOTION TO FILE NOTICE OF
APPEAL NUNC PRO TUNC**

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' Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal Nunc Pro Tunc, in accordance with Sections 22.16(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(b) and 22.30(e), and pursuant to the Order Extending Deadline for Deciding Whether to Exercise Sua Sponte Review issued by the Environmental Appeals Board (Board) on January 15, 2016.

II. Legal Authority

This administrative proceeding is governed by the Consolidated Rules. Under the Consolidated Rules, 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 Board within thirty days after the initial decision is served. *See* 40 C.F.R. § 22.30(a). Copies

of the initial decision must be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges, or the Regional Hearing Clerk, as appropriate. *See id.* § 22.6. Service of the initial decision is complete upon mailing or when placed in the custody of a reliable commercial delivery service. *See id.* § 22.7(c).

In computing any period of time prescribed or allowed in the Consolidated Rules, such as the deadline for filing a notice of appeal under 40 C.F.R. § 22.30(a), the day of the event from which the designated period begins shall not be included. *See id.* § 22.7(a). If the initial decision is served by first class mail, but not by overnight or same-day delivery, five days shall be added to the time allowed by the Consolidated Rules for the filing of a responsive document. *See id.* § 22.7(c). Therefore, when an initial decision is served by first class mail, but not by overnight or same-day delivery, a party seeking to appeal an adverse order or ruling of the Presiding Officer must file a notice of appeal and accompanying appellate brief with the Board no later than thirty-five days after the date when the initial decision is mailed in order for the filing of these documents to be timely. *See* § 22.7(c) and 22.30(a).

The Board may grant an extension of time for filing any document: (a) upon timely motion of a party to the proceeding; (b) for good cause shown; and (c) after consideration of prejudice to other parties. *See id.* § 22.7(b). The Board also may grant such an extension upon its own initiative. *Id.*

However, the Board typically requires strict adherence to the time limits set forth in the Consolidated Rules governing penalty appeals, and failure to submit a notice of appeal within the time provided will ordinarily result in dismissal of the notice of appeal. *See In re Maralex*

Disposal, LLC, SDWA Appeal No. 13-01, 2013 EPA App. LEXIS 33, at *3-4 (EAB Sept. 3, 2013); *In re Tri-County Builders Supply*, CWA Appeal No. 03-04, 2004 EPA App. LEXIS 14, at *5-6 (EAB May 24, 2004); *In re B & L Plating, Inc.*, 11 E.A.D. 183, 189-91 (EAB 2003); *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996); *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). The Board will not excuse a late-filed appeal unless it finds special circumstances to justify the untimeliness. Special circumstances have been found to exist in cases where the delay in filing the appeal resulted from circumstances outside of the litigant's control, such as when the mail delivery service was unusually delayed, or when the permitting authority caused the delay or gave the litigant incorrect instructions for filing appeals. *See Maralex Disposal, LLC*, 2013 EPA App. LEXIS 33, at *4-5; *Tri-County Builders Supply*, 2004 EPA App. LEXIS 14, at *5-8. But special circumstances have not been found for "insufficient oversight and inattentiveness" to the proceedings at hand, and neither the neglect of a party nor a party's attorney excuses an untimely filing, nor does lack of willfulness, by itself, affect the determination. *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 Maralex Disposal, LLC*, 2013 EPA App. LEXIS 33, at *5-6 (no special circumstances where counsel erroneously assumed that the appeal period ran from receipt of service, and not from service itself). These circumstances do not amount to special circumstances because "[t]he Board has an interest in bringing finality to the Agency's administrative proceedings and will preserve its limited resources for parties who are diligent enough to follow its procedural rules." *B & L Plating*, 11 E.A.D. at 190-91; *see also Tri-County Builders Supply*, 2004 EPA App. LEXIS 14, at *8-9 and *Gary Dev. Co.*, 6 E.A.D. at 533-34.

III. Factual and Procedural Background

On December 1, 2015, Administrative Law Judge (ALJ) M. Lisa Buschmann, the Presiding Officer in the above-captioned matter, issued the Initial Decision and Order assessing a penalty of \$32,550 against the Respondents for violations of Sections 301(a) and 404 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a) and 1344. In a certificate of service dated December 1, 2015, Sybil Anderson, Headquarters Hearing Clerk for U.S. EPA's Office of Administrative Law Judges, certified that she sent the Initial Decision by regular mail to the Regional Hearing Clerk for U.S. EPA, Region 5, as well as by electronic and regular mail to Richard J. Clarizio, counsel for the Complainant, and Dennis A. DiMartino, counsel for the Respondents. *See In re Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich*, CWA Appeal No. 15-(01), EAB Docket, Filing No. 1, at 27. Ms. Anderson sent the Initial Decision to the same street address for Mr. DiMartino listed in the transcript of the hearing for this matter.¹ *See id.* and Attachment A (excerpts from hearing transcript showing Mr. DiMartino's address).

Later, on December 14, 2015, LaDawn Whitehead, Regional Hearing Clerk for U.S. EPA, Region 5, received and filed a copy of the Initial Decision and sent another copy of the Initial Decision to the same street address for Mr. DiMartino that Ms. Anderson used. *See id.* at 28. However, Ms. Whitehead sent the Initial Decision by certified mail. According to the U.S. Postal Service's tracking service, the copy of the Initial Decision was delivered to Mr. DiMartino's address at 10:15 a.m. on December 17, 2015, and the domestic return receipt shows that someone named "Christine Haluska" accepted the mail for Mr. DiMartino.² *See* Attachment

¹ Respondents filed no post-hearing motion to conform the transcript to the actual testimony under 40 C.F.R. § 22.25, nor did they otherwise indicate that their attorney could not or would not receive service at the address listed in the transcript.

² Mr. DiMartino's affidavit in support of Respondents' Motion to File Notice of Appeal *Nunc Pro Tunc* is notarized by a "Shannan Haluska."

B (Product & Tracking Information for Tracking Number 7011 1150 0000 2641 0018 reproduced from USPS website) *and In re Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich*, CWA Appeal No. 15-(01), EAB Docket, Filing No. 2. Ms. Whitehead received the completed domestic return receipt on December 21, 2015. *See id.* She filed the Initial Decision with the Board on December 23, 2015, and the domestic return receipt on December 28, 2015.

Sixteen days later, Mr. DiMartino filed, by email and overnight courier, Respondents' Motion to File Notice of Appeal *Nunc Pro Tunc* (Respondents' Motion) and the Notice of Appeal of Combined Respondents (Notice of Appeal). The Notice of Appeal did not include an accompanying appellate brief, nor a request for an extension of time to file the brief, nor a summary of the grounds upon which Respondents seek to appeal the Initial Decision. In his affidavit in support of Respondents' Motion, Mr. DiMartino states that he did not see the Initial Decision sent electronically by Ms. Anderson on December 1, 2015 because it went into his email's spam folder, which he typically does not review for months. *See* Respondent's Motion, Ex. D at ¶ 5. He also states that he never received the copy of the Initial Decision that Ms. Anderson mailed on December 1, 2015. *See id.*, Ex. D at ¶ 6. But he makes no mention of the second copy of the Initial Decision sent by Ms. Whitehead on December 14, 2015. Finally, he states that his client, Joseph Zdrilich, was the one who notified him on January 14, 2016, the day after Respondents' Motion and Notice of Appeal were filed, that the Initial Decision had been filed. *See id.*, Ex. D at ¶ 7. But he does not explain how or when Mr. Zdrilich was notified about the Initial Decision.

IV. Argument

A. The Notice of Appeal of Combined Respondents is untimely and incomplete

Respondents do not and cannot dispute that their Notice of Appeal is untimely. First class mail is an appropriate method of service of an initial decision under the Consolidated Rules, and service is complete upon mailing. *See* 40 C.F.R. § 22.6 and 22.7(c). In this case, service of the Initial Decision was completed on December 1, 2015 when the Headquarters Hearing Clerk sent the Initial Decision by first class mail to Mr. DiMartino, counsel for Respondents, at the same address that Mr. DiMartino had provided to the Presiding Officer, the same address that appears in the hearing transcript for this proceeding, and the same address that Mr. DiMartino now provides to the Board in Respondents' Motion and the Notice of Appeal.

Because the Initial Decision was served by first class mail, Respondents were required to file their Notice of Appeal and accompanying appellate brief with the Board no later than January 5, 2016, which was thirty-five days after the initial decision was mailed on December 1, 2015. *See id.* § 22.7 and 22.30(a) (date of service not included in computing length of time to file notice of appeal under 40 C.F.R. § 22.30(a); and if initial decision is served by first class mail, five days are added to the time allowed to file a notice of appeal). Case law has repeatedly shown that the Board requires strict adherence to the time limits set forth in the Consolidated Rules governing penalty appeals, and that failure to submit a notice of appeal within the time provided will ordinarily result in dismissal of the notice of appeal. *See Maralex Disposal, LLC*, 2013 EPA App. LEXIS 33, at *3-4; *Tri-County Builders Supply*, 2004 EPA App. LEXIS 14, at *5-6; *B & L Plating, Inc.*, 11 E.A.D. at 189-91; *Gary Dev. Co.*, 6 E.A.D. at 529; *Outboard Marine Corp.*, 6 E.A.D. at 196. In *Maralex Disposal, LLC*, the Board dismissed as untimely the Respondent's notice of appeal and accompanying brief even though they arrived just three days after the due

date. *See Maralex Disposal, LLC*, 2013 EPA App. LEXIS 33, at *3-4; *see also Outboard Marine Corp.*, 6 E.A.D. at 197-98 (notice of appeal and motion for extension of time dismissed as untimely when filed one day after deadline to file notice of appeal). In this case, Respondents' Notice of Appeal arrived one week after the filing deadline. Consequently this Notice of Appeal should similarly be dismissed as untimely.

It should also be noted that, in addition to being untimely, the Notice of Appeal is incomplete. The Notice of Appeal did not include an accompanying appellate brief, nor a summary of the grounds upon which Respondents seek to appeal the Initial Decision. The Consolidated Rules require that the notice summarize the order or ruling, or part thereof, appealed from. *See* 40 C.F.R. § 22.30(a). The Consolidated Rules also require that an appellate brief accompany the notice of appeal. *Id.* Without a summary of the grounds for appeal or an appellate brief, there is little in the way of "analysis or argument which might suggest a basis for reviewing any of the ALJ's rulings." *Reabe Spraying Serv.*, 1 E.A.D. 754, 755 (EAB 1983). The same is true here: the Board has no way of knowing the bases upon which the Respondents are seeking to appeal the Initial Decision.

B. There are no special circumstances to justify the untimeliness of the Notice of Appeal

While Respondents acknowledge that the Board typically strictly construes requirements such as the filing deadline for a notice of appeal, they cite to *B & L Plating, Inc.*, 11 E.A.D. 183, and *Outboard Marine Corp.*, 6 E.A.D. 194, to contend that the Board can excuse the lateness of an appeal if it finds special circumstances to justify the untimeliness. Respondents further argue that special circumstances exist here to justify the untimeliness of their Notice of Appeal – namely, that the Initial Decision was routed to the email spam folder of Respondents' counsel, and that counsel failed to inquire more with the Board or the online docket. *See* Respondents'

Motion at 4. Neither one of these reasons is a special circumstance under the Board's case law. Respondents correctly cite to *B & L Plating, Inc.* and *Outboard Marine Corp.* but miss the qualification in numerous other cases that the Board has found special circumstances to exist only in cases in which delays resulted from circumstances outside of the litigant's control. See *Maralex Disposal, LLC*, 2013 EPA App. LEXIS 33 at *4-5; *Tri-County Builders Supply*, 2004 EPA App. LEXIS 14, at *5-8. In fact, Respondents' excuses cut the other way. For instance, the Board has previously concluded that failure by counsel to properly monitor a case is a reason to find that special circumstances do not exist. See, e.g., *Tri-County Builders Supply*, 2004 EPA App. LEXIS 25, at *8; *In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, 2004 EPA App. LEXIS 56, at *20-25 (EAB Sept. 16, 2004) ("the neglect of a party or a party's attorney does not excuse an untimely filing"); see also *In re Jiffy Builders*, 8 E.A.D. 315, 317-21 (EAB 1999) and *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990). One of the Respondents, Mr. Zdrilich, apparently knew in advance of January 13, 2016 that the Initial Decision had been issued, because he informed his counsel about the issuance. In addition, email routed to a spam folder is not a circumstance outside of Respondent's control.³ This circumstance is instead more akin to the "variations in parties' internal operations" that the Board has repeatedly held is "not an appropriate basis for waiving the requirements for perfecting an appeal." *Outboard Marine Corp.*, 6 E.A.D. at 197 n. 6 (rejecting the argument that the appeal period is triggered upon receipt of an initial decision via interoffice mail); see also *In re Georgetown Steel Corp.*, 3 E.A.D. 607, 609-10 (EAB 1991) (late-filed appeal of permit not

³ Mr. DiMartino uses Google's Gmail client (Dennis.DiMartino@gmail.com). Gmail offers a simple method of keeping incoming emails out of the spam folder, whereby the user activates a filter that screens for certain words (e.g. "Polo," "Zdrilich") and directs emails with those words into the user's inbox. See *Using Filters*, GMAIL HELP, <https://support.google.com/mail/answer/6579?hl=en> (last visited Jan. 28, 2016).

excused when temporary secretary is served with permit but does not apprise management of receipt).

Whether Mr. DiMartino ever received the Initial Decision by email is immaterial given that email is not an authorized method of service under the Consolidated Rules at 40 C.F.R. § 22.6, and the Initial Decision was undoubtedly provided in this manner as a courtesy. Moreover, Respondents make no mention of the second copy of the Initial Decision that the Regional Hearing Clerk for U.S. EPA, Region 5 served on Respondents' counsel by certified mail on December 14, 2015 and that was shown to be received at counsel's given address on December 17, 2015 and accepted by "Christine Haluska". Since service of the second copy of the Initial Decision was not addressed, there is no basis to believe at this time that Ms. Haluska was not authorized to accept the mail on counsel's behalf. *See Georgetown Steel Corp.*, 3 E.A.D. at 609-10; *cf. In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218, 220 (EAB 1999) (Respondent had "opportunity to pick up [Initial Decision] in a timely way and chose not to do so," when Respondent's brother and business partner signed return receipt).

This is by no means the first time that Respondents have missed a filing deadline in this proceeding. The Board has long emphasized how time limits like the appeal deadline in 40 C.F.R. § 22.30 "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 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 repeatedly failed to meet the deadlines to file their prehearing exchange, and they submitted no post-hearing brief. *See* Initial Decision at 2. There are no special circumstances to excuse yet another late filing in Respondents' Notice of Appeal.

C. Respondents' Motion to File Notice of Appeal Nunc Pro Tunc does not justify an extension of time for filing a notice of appeal and appellate brief

As an apparent alternative to the untimely Notice of Appeal, Respondents argue that the Board should grant an extension of time for Respondents to file the appeal. They claim that there is good cause shown for the extension for essentially the same reasons as their claim for special circumstances to excuse the untimely Notice of Appeal – that the Initial Decision was routed to Mr. DiMartino's spam folder, and that Mr. DiMartino failed to inquire more with the Board or online docket. *See* Respondents' Motion at 4. Respondent's motion is not timely because the deadline for filing an appeal has already passed. *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"). Although Respondents claim that there is no prejudice, they are incorrect. The Consolidated Rules and the Board's case law make it clear that service by mail is complete when the document is placed into first class mail. *See* 40 C.F.R. § 22.6; *Maralex Disposal, LLC*, 2013 EPA App. LEXIS 33, at *3. Respondents' excuses do not address this critical fact. To allow for an extension of time to file an appeal in this situation would effectively negate service by mail under the Consolidated Rules. Respondents' attempt to rely on the equitable powers of the Board, however, are strained when they clearly received the Initial Decision by December 17, 2015, and Mr. Zdrilich knew of the Initial Decision before the deadline to file an appeal. Respondents' Motion does not mention either of these facts.

Furthermore, Respondents have not shown good cause for the motion. “Good cause” under 40 C.F.R. § 22.7(b) is rarely found, but it is usually reserved for extreme circumstances such as when counsel is physically incapacitated (*Farmers Union Oil Co.*, 2000 EPA ALJ LEXIS 74 (E.P.A. Nov. 3, 2000)) or when counsel has a hip replacement while managing an extraordinarily busy schedule (*Aylin, Inc.*, 2015 EPA ALJ LEXIS 16 (E.P.A. Dec. 10, 2015)). There are no such circumstances claimed in Respondents’ motion, and they have therefore not shown good cause for the extension.

Respondents also invoke Rule 6 of the Federal Rules of Civil Procedure to justify their request for additional time to appeal the Initial Decision. *See* FED. R. CIV. P. 6(b) (allowing courts, for good cause, to extend filing deadlines on motion made after the time has expired if the party failed to act because of excusable neglect). Respondents claim that it was “excusable neglect” that the Initial Decision went into Mr. DiMartino’s spam folder and that he did not monitor the case more closely. As a threshold matter, the Board may consider other courts’ applications of a federal rule to develop policies to guide application of the Consolidated Rules. *See Detroit Plastic Molding Co.*, 3 E.A.D. at 107 (noting that the Board is “not bound by the standards of the Federal Rules of Civil Procedure”). But in this case, as in *Detroit Plastic Molding Co.*, Respondents give no explanation why the policies guiding application of FED. R. CIV. P. 6(b) are the policies that should guide the application of the Consolidated Rules’ standard for requesting extensions of time at 40 C.F.R. § 22.7(b). Even if the “excusable neglect” standard could apply in this case, the excuses Respondents provide do not qualify as excusable neglect to justify extending the time for filing an appeal. Parties in the D.C. and Sixth Circuits have an affirmative duty to monitor case dockets to keep apprised of the entry of orders that they may wish to appeal, and a failure to do so is not “excusable neglect”. *See D.A. v. District of*

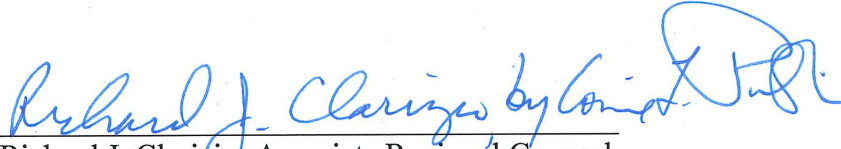
Columbia, 2007 U.S. Dist. LEXIS 90640 (D.D.C. Dec. 6, 2007) (citing *Fox v. American Airlines*, 389 F.3d 1291, 1294 (D.C. Cir. 2004)); *Kuhn v. Sulzer Orthopedics, Inc.*, 498 F.3d 365, 370-71 (6th. Cir. 2007). Since parties have an affirmative duty to monitor the docket, courts have also found that it is not “excusable neglect” for law office failures such as the diversion of a procedural filing into a spam folder. *See, e.g., Kaufmann v. United States*, 2014 U.S. Dist. LEXIS 107047 (N.D.N.Y Aug. 5, 2014).

V. Conclusion

For the reasons stated above, service of the Initial Decision was perfected on December 1, 2015, when the Headquarters Hearing Clerk sent it to counsel for Respondents by first class mail. Starting with December 2, 2015 as the first day of the appeal period, Respondents had thirty-five days after December 1, 2015 until January 5, 2016 to timely file a notice of appeal and accompanying brief before the Board. However, they did not file their Notice of Appeal until January 13, 2016 and have not shown any special circumstances to justify their untimeliness. Additionally, Respondents’ Motion to File Notice of Appeal Nunc Pro Tunc is untimely and does not establish good cause for granting an extension of time for submitting a notice of appeal and accompanying brief. Thus the Notice of Appeal should be dismissed, and the Respondents’ Motion should be denied.

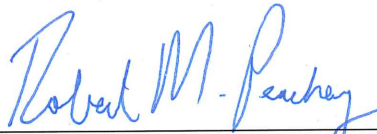
Respectfully submitted,

1129116
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
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Polo Development, Inc.,)	
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Complainant's Response in Opposition to Respondents' Notice of Appeal of Combined Respondents and Motion to File Notice of Appeal Nunc Pro Tunc," CWA Appeal No. 15-(01), was sent this day in the following manner to the addressed listed below:

An electronic filing was made to:

Eurika Durr
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1200 Pennsylvania Avenue, NW
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Copy by USPS Certified Mail to:

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