

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**In the Matter of:**

**Polo Development, Inc  
AIM Georgia, LLC  
Joseph Zdrilich**

**Respondents**

) **Docket No. CWA-05-2013-0003**  
)  
) **Proceeding to Assess a Class II Civil Penalty**  
) **Under Section 309(g) of the Clean Water Act,**  
) **33 U.S.C. § 1319(g)**  
)  
)



**JAN - 8 2013**

**REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY**

**COMPLAINT**

**I. General Allegations**

1. This is an administrative action instituted by Region 5 of the United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 309(g) of the Clean Water Act, ("the Act"), 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits at 40 C.F.R. Part 22. The Administrator of U.S. EPA has delegated the authority to take this action to the Regional Administrator of Region 5 who has delegated this authority to the Director of the Water Division. Complainant in this action is the Director of the Water Division, Region 5, U.S. EPA.

2. The Respondents in this matter are: Polo Development, Inc, 8599 Youngstown Pittsburg Road, Poland, Ohio; AIM Georgia, LLC, 2345 Stone Willow Way, Buford, Georgia; and Joseph Zdrilich, 8599 Youngstown Pittsburg Road, Poland, Ohio.

3. The Polo Development Site is located north of Polo Boulevard in Section 11 of Poland Township, Mahoning County, Ohio ("the Polo Development Site" or "Site"). The current owner of record for this approximately 2.7 acre site is AIM Georgia, LLC, (see Exhibit 1 for a map of the Site). The owner of record from November 26, 2003 to September 4, 2007 was Polo

Development, Inc. The Polo Development Site abuts Burgess Run, a perennial relatively permanent water which flows to Yellow Creek and then to the Mahoning River. Both Yellow Creek and the Mahoning River are navigable-in-fact waters of the United States under Section 10 of the Rivers and Harbors Act.

4. At all times relevant to the Complaint, one or more of the Respondents either owned, or otherwise controlled the real property that is the subject of this Complaint, and/or otherwise controlled the activities that occurred on such property.

5. Beginning on or about November 2, 2006, and on subsequent dates, including but not limited to dates in 2008, 2011 and 2012, one or more of the Respondents and/or persons acting on their behalf, or with Respondents' consent and/or knowledge, used mechanized land-clearing and earth-moving equipment to discharge dredge or fill material, including, among other things, dirt, spoil, rock and sand into Burgess Run, adjacent unnamed waters, downstream waters of Burgess Run and wetlands adjacent to and abutting the unnamed tributaries and Burgess Run at the Polo Development Site. See Impact Areas as marked on Exhibit 1.

6. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to Section 404 of the Act, 33 U.S.C. §1344. Respondents did not have a permit pursuant to Section 404, 33 U.S.C. § 1344 for the discharges of dredged or fill material alleged in paragraph 5 above and are in violation of Section 301(a), 33 U.S.C. § 1301(a).

7. Respondent Zdrilich is an individual. The remaining Respondents are a corporation, partnership or association. Therefore, each Respondent is a "person" as defined by Section 502(5) of the Act, 33 U.S.C. §1362(5).

8. Dirt, sand, and rock as as alleged in paragraph 5 above are each a "pollutant" as defined by Section 502(6) of the Act, 33 U.S.C. §1362(6).

9. Respondents' additions of dirt, spoil, rock and sand to the waters and wetlands identified in paragraph 5 above were "discharges" as defined by Section 502(16) of the Act, 33 U.S.C. §1362(16).

10. Therefore, Respondents actions resulted in the "discharge of a pollutant" as defined by Section 502(12) of the Act, 33 U.S.C. §1362(12).

11. The machinery used in the mechanized land clearing and earth moving, described in paragraph 5 above constitutes a "point source" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

12. The Site was inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and the under normal circumstances did support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

13. Therefore, the 2.7 acre Site contained "wetlands" as defined by the regulation at 40 C.F.R. § 232.3.

14. The Site contained approximately 200 feet of an unnamed tributary to Burgess Run. That tributary had relatively permanent flow as evidenced by the USGS topographic map, aerial photography, the USGS national hydrographic dataset, and site inspections.

15. The water of the wetlands and the unnamed tributary abutted and flowed into Burgess Run.

16. The water of Burgess Run flows approximately 3 river miles to Yellow Creek.

17. Yellow Creek flows approximately 2.5 river miles before it is a “Traditional Navigable Water” as defined by 40 C.F.R. § 230.3(s)(1).

18. Therefore, Respondents discharged pollutants from a point source into “navigable waters” as defined by Section 502(7) of the Act, 33 U.S.C. §1362(7).

19. Therefore, beginning around November 2, 2006, and on subsequent dates, including but not limited to dates in 2008, 2011 and 2012, Respondents were persons who discharged pollutants from point sources into navigable waters in violation of Sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

20. On October 26, 2011, U.S. EPA issued an administrative order to Respondents pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a), requiring them to develop and implement a plan to restore the filled area to wetlands (Restoration Order). On November 7, 2011, Respondents informed U.S. EPA that they would comply with the order and submit a restoration plan for the wetlands.

21. Respondents submitted a Wetlands Restoration Plan Narrative dated January 2012 and updated in February 2012 (Restoration Plan). On March 9, 2012, U.S. EPA approved of Respondents’ restoration plan.

22. On March 23 and May 25, 2012, Respondent Zdrilich informed U.S. EPA that he would not conduct restoration work in accordance with the approved plan and would not restore certain areas.

23. Each day the pollutants remained in navigable waters constituted an additional day of violation of Sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

## II. Notice of Proposed Civil Penalty

Pursuant to Section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(2), the Administrator may assess a Class II civil penalty not to exceed \$11,000.00 per day for each day during which the violation continues, to a maximum amount of \$157,500.00 for violations of Section 301 of the Act, 33 U.S.C. § 1311, up until January 12, 2009. After January 12, 2009, the maximum total penalty for violations of Section 301 of the Act, 33 U.S.C. § 1311, increased to \$177,500.00. Based upon the facts alleged in this Complaint, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondents' ability to pay, prior history of such violations, culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, U.S. EPA proposes a civil penalty of \$30,500.

Respondents shall pay this penalty by certified or cashier's check identifying the case name and docket number on the check and made payable to "Treasurer, the United States of America." The Respondents shall send the check, with a transmittal letter identifying the case name and docket number to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Copies of the transmittal letter and check shall be sent to:

Melanie Haveman (WW-16J)  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604-3590;

and,

Richard J. Clarizio (C-14J)  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604-3590.

### **III. Notice of Opportunity to Request a Hearing**

As provided in Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and Section 22.15 of the Consolidated Rules of Practice, 40 C.F.R. § 22.15, Respondents have the right to request a hearing to contest any material fact alleged in this Complaint and to contest the appropriateness of the amount of the proposed penalty. To request a hearing, a Respondent must specifically make such a request in its Answer, which is discussed below.

Any hearing a Respondent requests regarding this Complaint will be held and conducted in accordance with the Consolidated Rules of Practice, 40 C.F.R. Part 22, a copy of which accompanies this Complaint.

### **IV. Answer**

If a Respondent contests any material fact alleged in this Complaint, contends that the proposed penalty is inappropriate, or contends that it is entitled to judgment as a matter of law, that Respondent must file the original and one copy of a written Answer to this Complaint with the Regional Hearing Clerk (E-19J), Region 5, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, IL, 60604-3590, within 30 days after service of this Complaint. In computing any period of time allowed under this Complaint, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included, except when a time period expires on such, in which case the time period shall be extended to the next business day.

Each Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint or state clearly it has no knowledge of a particular factual allegation. Where a Respondent states it has no knowledge of a particular factual allegation, the allegation is deemed denied.

Each Respondent's Answer must also state:

- a. The circumstances or arguments Respondent alleges constitute grounds of defense;
- b. The facts Respondent disputes;
- c. The basis for opposing the proposed penalty; and,
- d. Whether Respondent requests a hearing.

A Respondent's failure to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation as to that Respondent.

A copy of the Answer and all subsequent documents filed in this action must be sent to Richard J. Clarizio (C-14J), Associate Regional Counsel, (C-14J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, IL, 60604-3590, who may be telephoned at (312) 886-0559.

If a Respondent fails to file a written Answer within 30 days after service of this Complaint, the Presiding Officer may issue a Default Order, after motion, pursuant to 40 C.F.R. § 22.17. Default by a Respondent constitutes an admission of all factual allegations made in the Complaint and a waiver of that Respondent's right to contest the factual allegations made in the Complaint. The Defaulting Respondent must pay any penalty assessed in a Default Order without further proceedings 30 days after the Order becomes a Final Order of the Administrator of U.S. EPA under 40 C.F.R. § 22.27(c). A Respondent's failure to pay the entire proposed

penalty assessed by the Default Order by its due date may result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs of collection proceedings, and an additional quarterly nonpayment penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9).

If a Respondent requests a hearing on the Complaint, members of the public who have exercised their right to comment will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to present evidence on the appropriateness of the penalty assessment. If a hearing is not held, U.S. EPA may issue a Final Order assessing penalties and only members of the public who commented on the proposed penalty assessment during the 30 day period following issuance of the public notice will have an additional 30 days to petition U.S. EPA to set aside the Final Order assessing penalties and to hold a hearing thereon. U.S. EPA will grant the petition and hold the hearing only if the petitioner's evidence is material and was not considered by U.S. EPA in the issuance of the Final Order assessing penalties.

#### **V. Settlement Conference**

Whether or not a Respondent requests a hearing, a Respondent may request an informal conference to discuss the facts of this case and to arrive at a settlement. To request a settlement conference, please write to Melanie Haveman, Enforcement Officer, Water Division, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (WW-16J), Chicago, IL, 60604-3590, or telephone her at (312) 886-2255.

A Respondent's request for an informal settlement conference will not extend the 30 day period for a Respondent to submit a written Answer and Request for Hearing. A Respondent may pursue the informal conference procedure simultaneously with the adjudicatory hearing procedure. U.S. EPA encourages all parties against whom a penalty is proposed to pursue



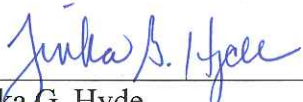
settlement through an informal conference. U.S. EPA will not reduce the penalty simply because such a conference is held. Any settlement that may be reached as a result of such conference will be embodied in a Consent Agreement and Final Order. A Respondent's consent to a Consent Agreement and Final Order shall constitute a waiver of the right to request a hearing on any matter stipulated to therein.

#### VI. Notice to the State and Public

U.S. EPA has consulted with the State of Ohio regarding this action by mailing a copy of this Complaint to Thomas Harcarik, 401 Section Chief, Division of Surface Water, Ohio Environmental Protection Agency, 50 West Town Street, Suite 70, Columbus, Ohio 43215, and by offering the State of Ohio an opportunity to comment on the proposed penalty. U.S. EPA, contemporaneously with the issuance of this Complaint, caused a public notice to be published on the U.S. EPA website regarding this action.

#### VII. Continuing Obligation to Comply

Neither assessment nor payment of a penalty pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), shall affect a Respondent's continuing obligation to comply with the Act, with any other Federal, State or local law or regulation and with any Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a).

  
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Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection Agency  
Region 5

1-2-2013  
Date

  
JAN - 8 2013  
REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

**Exhibit 1: Polo Boulevard, Poland, OH  
Wetland and Stream Impact Areas**



Image: 2006 OSIP Orthophotography  
Mahoning County

Legend	
	Impact Areas
	The Site

CERTIFICATE OF SERVICE

I, Melanie Haveman, hereby certify that an original of the Consent Agreement and Final Order (Docket No. **CWA-05-2013-0003** ) was filed with the Regional Hearing Clerk on January 8th, 2013 and that a copy was served by United States Mail, Certified and Postage Prepaid, on the 8th day of January 2013, upon the following:

Polo Development,  
AIM Georgia, LLC,  
and Joseph Zdrilich



Melanie Haveman  
U.S. Environmental Protection  
Agency - Region 5 (WW-16J)  
77 W. Jackson Blvd.  
Chicago, IL 60604

  
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