UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

December 14, 2015

Dennis A. DiMartino, Esquire
839 Southwestern Run
Youngstown, Ohio 44514

Initial Decision and Order in the Matter of Polo Development, Inc., AIM Georgia, LLC and Joseph Zdrilich
Docket No. CWA-05-2013-0003 (RCRA-HQ-2009-0001)

Dear Mr. DiMartino:

I have enclosed a copy of the Initial Decision and Order in resolution of the above case. I filed this document on December 14, 2015.

The civil penalty in the amount of $32,550 is to be paid in the manner described on page 23. Please be certain that the docket number is written on both the transmittal letter and on the check. Payment is due by January 13, 2016.

Thank you for your cooperation in resolving this matter.

Sincerely,

LaDawn Whitehead
Regional Hearing Clerk

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich,	)	**Docket No. CWA-05-2013-0003**
	)	
	)	**Dated: December 1, 2015**
Respondent.	)	

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

Complaint proposed that Respondents be assessed a civil penalty in the amount of $30,500 for discharging pollutants into navigable waters in violation of Sections 301 and 404 of the CWA. Respondents, through counsel, each filed an answer to the Complaint, denying the alleged violations and asserting affirmative defenses.

Complainant filed a prehearing exchange on May 9, 2013, but Respondents failed to file a prehearing exchange even after their deadline to file was extended several times. Consequently, an order to show cause was issued, in response to which Respondents sought another extension, on the basis that they anticipated completing a wetlands restoration report and resolving "all outstanding wetlands restoration issues" within 60 days. Respondents were granted a one-month extension of time, after which Complainant moved for issuance of a default order against Respondents. An order denying the motion was issued on August 6, 2014.

On October 17, 2014, Complainant filed a motion for accelerated decision as to Respondents' liability for alleged violations and as to their ability to pay the proposed penalty, and a motion to dismiss their affirmative defenses. The motion sought judgment as to liability for discharges into a wetland, referenced as the "eastern wetland," and other water bodies referenced in the Complaint, but not for discharges into another wetland referenced therein. By order dated February 6, 2015 (2015 EPA ALJ LEXIS 4)("Accelerated Decision"), Complainant's motions were granted.

A hearing in this matter was held on February 24 through 26, 2015, in Youngstown, Ohio, on the remaining issues as to the assessment of a civil penalty for the violations found in the Accelerated Decision. Complainant presented the testimony of seven witnesses. Respondents, appearing through counsel, presented testimony of one witness, Respondent Joseph Zdrilich. Complainant's exhibits marked as CX 1-3, 6-14, 16-18, 20-22, 24-32, 34-41, 43, 45, 49 (pages 467, 468), 50, 53, 56-58, 60 (pages 556-567), 61 (pages 571, 572), 64-93, 100-107, 110, 111A-G, and 112-115, were admitted into evidence. Respondents' exhibits marked as RX 1, 1A and 2 were admitted into evidence. The record was held open after the hearing for Respondent to produce copies of RX 1A and submit it to Complainant's counsel. By order issued on April 27, 2015, the evidentiary record was closed. Complainant filed a post-hearing brief with proposed findings of fact on May 7, 2015, but no post-hearing brief was received from Respondents.

II. Findings of Fact

1. Respondent Joseph Zdrilich, the director and manager of the other two Respondents, has been a real estate developer for 20 years, and developed three properties in Mahoning County, Ohio, subdivided into a total of 170 lots, for residential housing. Transcript (Tr.") 48, 470-471, 537-539, 542-543; Complainant's Exhibit ("CX") 59, 114.

2. One of the properties, Polo Development, consists of 30 lots on approximately 26 acres located along Polo Boulevard in Section 11 of Poland Township. CX 105; Respondents' Exhibit ("RX") 1A; ; Tr. 567-568. On the western end of the property and north of Polo Boulevard, is Lot 1 ("the Site"), a 2.66 acre parcel which is bisected by a stream called Burgess

Run, and through which an unnamed tributary flows into Burgess Run. CX 53 (pp. 522, 524); CX 67.

3. Burgess Run flows north into Yellow Creek, which flows into the Mahoning River, which is listed on the USACE's public list of "traditionally navigable waters" under Section 10 of the 1899 Rivers and Harbors Act and Section 404 of the CWA. Tr. 339-340, 431-432; CX 70, CX 101 (¶¶ 14, 15, 30). The Mahoning River is approximately 4.25 linear miles and 8.5 riparian miles from the Site. CX 101 (¶ 15).

4. Burgess Run was designated by the Ohio Environmental Protection Agency ("OEPA") as a warm water habitat, supporting fish and other organisms in the ecosystem. Tr. 106-107. It is a perennial stream that is approximately 20 to 75 feet wide on Lot 1. CX 29, 53 (pp. 535, 536), 64-69, 101 (¶¶ 17, 31). The unnamed tributary was a moderate to high quality headwater stream. Tr. 401.

5. Burgess Run is an impaired resource under CWA 303(d) for siltation and nutrients. Tr. 403, 458-459.

6. East of Burgess Run on Lot 1 is an area referenced as the "eastern wetlands" bounded on the west by Burgess Run, and on the north by the northern property line for Lot 1, and extending south toward the Lot 1 property line which borders the 10 foot wide county road easement along Polo Boulevard. CX 1 (p. 2), 35, 64, 71, 101 (pp. 1192, 1199-1205, 1215, 1260-1277); Tr. 324-325. The eastern wetlands were at least 0.67 acre in size prior to 2006. Tr. 165, 325-326, 436; CX 8, 22, 53 (p. 522), 61 (pp. 570-572), 64.

7. The eastern wetlands generally are located within a 100-year floodplain designated as Zone A by the Federal Emergency Management Agency (FEMA). Tr. 44, 191; CX 22 (p. 112), 102. Mahoning County has had problems with flooding. Tr. 69. Lot 1 also includes a floodway area, adjacent to Burgess Run. Tr. 44; CX 53 (p. 524).

8. Prior to and around 2004, there were hydrophytic trees and saturated soil on the eastern wetlands. CX 61 (pp. 571-572); CX 64; Tr. 325, 329-331, 374-375. The Site contained palustrine forested wetland and scrub-shrub wetlands, which are higher quality than most emergent wetlands. Tr. 112, 374-375; CX 53 (p. 522). The adjacent property north of the Site was forested wetland in its natural state. Tr. 104-105, 145, 325-326, 336-337. There are relatively few wetlands in the area. Tr. 403. The area around the Site contains abundant wildlife. Tr. 67-68, 524, 525; CX 102 (¶ 11).

9. Wetlands provide absorption and filtration functions, by slowing the velocity of runoff, retaining water and thus controlling floods, and by absorbing any contaminants and excess nutrients, which improves the water quality of the adjacent streams. Tr. 109, 402. Wetlands also provide habitat for amphibians and other wildlife. Tr. 109-110, 402. Forested wetlands provide shade and thus cool adjacent waterways, and provide carbon storage. Tr. 402. Riparian wetlands provide spawning areas for fish. *Id.*

10. In 1999, Mr. Zdrilich hired Engineering Services and Consultants, Inc. ("ESC") to design a bridge, road and utilities for the subdivision, and to apply for a permit to do so. Tr. 471-472, 579-580. ESC prepared an application to the U.S. Army Corps of Engineers ("USACE") for a permit to install a concrete box culvert for a bridge crossing Burgess Run, and sanitary sewer and water lines crossing Burgess Run. Tr. 471-473; CX 1, 2, 3.

11. In ESC's application, a wetland area was identified on Lot 1, described as approximately 12,500 square feet, or 0.287 acre, and depicted on a map as covering an area from the southern edge of the unnamed tributary to the northern edge of Polo Boulevard, and east of Burgess Run. CX 1.

12. ESC's application estimated that the maximum wetland area that would be affected by bridge construction was 6,000 square feet, or 0.14 acre, primarily in the wetland areas south of Polo Boulevard, which are not on Lot 1. CX 1.

13. ESC's wetland evaluation report in the permit application recommended that ". . . care should be exercised in developing lots #1, #11 and #12 in order to avoid wetland impacts," that "[i]f possible, lot #1 should remain undeveloped," and that "[i]f lot #1 is removed from the development plan, the wetland area affected by the proposed project would not exceed the limit of 0.33 acres" for which a Section 404 permit would be required. CX 1.

14. On August 18, 1999, the USACE issued a letter authorizing and setting conditions for the project under Nationwide Permits ("NWP") 12 and 14 for purposes of Section 404 of the CWA. CX 3. One of the conditions is that any discharge of temporary fill material into waters of the U.S. "must be removed in their entirety and the affected areas returned to their preexisting elevation." CX 3 (p. 14). The letter stated that "The proposed bridge would impact a 0.14 acre wetland area in the vicinity." CX 3 (p. 8). The project verification expired on August 18, 2001. CX 3, 104 (¶ 9); Tr. 215.

15. Construction of the box culvert and bridge was completed in 2000 or 2001, and sanitary and sewer lines were completed prior to November 2006. Tr. 475-476, 576; CX 102 (¶ 17).

16. In 2004, Mr. Zdrilich signed a Mahoning County Planning Commission plat of survey for Polo Development, which stipulated that Lot 1 was a non-buildable lot as a FEMA designated Zone A 100 year floodplain. CX 6, 102 (¶ 15); Tr. 43.

17. On or about November 2, 2006, Mr. Zdrilich directed the dredging and filling of the eastern wetlands up to and including the eastern shoreline of Burgess Run. Tr. 101, 103-104, 112-115, 483; CX 8, 9, 64, 65, 66, 101 (¶ 9). He directed the removal of vegetation, dewatering of the soil, and leveling and grading of the eastern wetland area with earth-moving equipment. *Id.* ; Tr. 42, 327-328. As a result, its contours were changed and elevations in areas on the eastern wetland were significantly increased. CX 71, 72; Tr. 341-342, 449-450, 460-461.

18. On or about November 2, 2006, Mr. Zdrilich directed the removal of over 200 linear feet of the unnamed tributary approximately 50 feet away from its original location flowing southwest near the middle of the Site, to a location flowing west along the northern border of the

Site. CX 9 (p. 34), 22 (p. 109), 35 (p. 179), 104 (p. 1399), 65-67, 71, 72, 101 (¶ 7, 8); Tr. 42, 101-103, 114-115, 329, 342, 434. He or persons under his direction filled in the original tributary with soil and dug a new channel, sidecasting the material onto the wetland, with earth-moving equipment. Tr. 104-106, 113-115; CX 9 (p. 34).

19. In its new location, the unnamed tributary was channelized and straightened, which causes it to convey the water faster, providing less habitat and fewer functions to benefit the ecosystem. Tr. 337. It no longer had a sand and gravel substrate necessary to support macro-invertebrates, which are a food source for fish, but instead had a silt or sediment substrate. Tr. 105-109, 435.

20. On or about November 2, 2006, under Mr. Zdrilich's direction, fill material including soil and wood debris was placed in Burgess Run, increasing turbidity, and covering vegetation. Tr. 101, 108, 116; CX 9 (pp. 38, 39).

21. Mr. Zdrilich directed the clearing and filling of the wetland for the purpose of building a house on Lot 1. Tr. 477-478, 486-487; CX 8, 16, 102 (¶ 28). To determine whether he could build a house on Lot 1, Mr. Zdrilich hired Allen Surveying to survey Lot 1. Tr. 477-478.

22. Sarah Gartland, floodplain manager of the Mahoning County Planning Commission ("MCPC") sent Mr. Zdrilich a letter dated November 3, 2006, and had many discussions with him, regarding the floodplain requirements for Lot 1, the possibility of building on the Lot, and requirement for permits, including a Section 404 permit, to place soil on the property. Tr. 34, 48-50, 56; CX 7, 102.

23. In November 2006, Ms. Gartland notified other government agencies that she had observed clearing of vegetation on the Site. Tr. 40, 39, 42, 44-45.

24. On November 21, 2006, Edward Wilk, wetland stream impacts coordinator for OEPA, took photographs at the Site in response to information from Donald Garver of the Soil and Water Conservation District of Mahoning County ("SWCD") of the wetland being filled on Lot 1. Tr. 88, 95-97, 110, 118; CX 8, 9, 74 (p. 661). Mr. Wilk informed Mr. Zdrilich that the disturbance in the wetland requires a permit from the OEPA or the USACE, and Mr. Zdrilich responded that he had a permit. Tr. 121-122.

25. Respondents did not have a permit to place fill into the eastern wetland, the unnamed tributary or Burgess Run. Tr. 134, 194-195; CX 104 (¶¶ 10, 12).

26. On November 28, 2006, Sarah Gartland sent Mr. Zdrilich a letter by certified mail, stating that she found that extensive development occurred on the Site in violation of county flood damage prevention regulations, and requiring him to stop all activities immediately and to contact her office. CX 10; Tr. 56-57.

27. On or about December 11, 2006, Fred Pozzuto and Jeff Cornelius of the USACE inspected the Site and informed Mr. Zdrilich that he must restore an area on Lot 1 to wetland condition. RX 1; CX 11; Tr. 209-210, 552-553, 556. Mr. Pozzuto marked on a map of Lot 1

the words "remove and restore back to wetland condition ([plus or minus] 3')." RX 1; CX 113; Tr. 209-210.

28. Mr. Zdrilich received a cease and desist letter from the USACE, dated January 11, 2007, notifying him that a determination was made that jurisdictional wetlands on the property were disturbed by clearing, filling and excavating activities, in violation of Section 301 of the CWA. Tr. 127, 190, 566-567; CX 11. The letter requested him to restore the one-half acre wetland area within 90 days to its original grade, provide erosion control, reseed it with hydrophytic vegetation, replace trees with wetland tree species, and not to place any fill on Lot 1 until he can demonstrate in writing that it is not in a flood plain. CX 11. The letter stated that immediate legal action would ensue if the area is not restored as requested. *Id.*

29. In early 2008, a realty for-sale sign was posted at Lot 1. CX 12; Tr. 64.

30. On or before August 28, 2008, Mr. Zdrilich directed the placement of a pile of gravel and subsoil, about 64 to 80 square feet in size and four feet high, in the eastern wetland approximately 25 to 30 feet from the curb. CX 79, 82, 83, 103 (¶ 8), 107; Tr. 266-267, 495.

31. John Woolard, the environmental administrator of the Storm Water Management Program of the Mahoning County Engineer's Office, and Sean McGuire, an urban conservationist of the Mahoning County Soil and Water Conservation District ("SWCD") observed the pile in their monthly inspections of the Site. Tr. 220, 259, 278, 281; CX 103 (¶¶ 7, 15), 107. During his inspections, Mr. McGuire instructed Mr. Zdrilich to remove the fill and not to place any more fill in the wetland, and sent a letter dated August 28, 2008 to Mr. Zdrilich advising him that jurisdictional wetlands exist on Lot 1 and that any clearing, placement of fill or excavation activities would violate Section 301 of the CWA. Tr. 261-265CX 84, 103 (¶ 8).

32. The pile remained on the Site, and between November 17 and December 16, 2008, Mr. Zdrilich had three additional piles placed around the other pile, on the southwestern area of the eastern wetlands. CX 79, 85-89, 103 (¶¶ 9-12), 107; Tr. 267-270, 288. One pile was composed of subsoil, gravel and cinder block pieces, and the other two appeared to be topped with sod and top soil. CX 89, 103 (¶ 12); Tr. 268-269.

33. Mr. McGuire notified Ms. Gartland of the additional piles, and she sent a letter by certified mail, dated December 23, 2008, to Respondent AIM Georgia LLC ("AIM") and Mr. Zdrilich, stating that fill was recently placed on Lot 1 in a Special Hazard Flood Area without a permit, and directing that it be removed by February 13, 2009. Tr. 83, 270; CX 13.

34. On January 2, 2009, piles of fill material in the eastern wetlands also included concrete slabs, as observed by Mr. Wilk. CX 106 (¶ 18); Tr. 124-127; CX 14, 75.

35. Mr. Zdrilich told Mr. Wilk that he had a permit from the USACE to place fill in the wetland, and Mr. Wilk responded that the USACE requested in 2007 that the wetland be restored. CX 14 (p. 51); Tr. 125.

36. On May 21, 2009, Mr. Wilk, Jeff Cornelius, Sarah Gartland and another representative of the MCPC, an attorney with the Mahoning County prosecutor's office, Sean McGuire, John Woolard, and a representative of Poland Township zoning, met with three representatives of Allen Surveying and Mr. Zdrilich at the Site. Tr. 72, 127-130; CX 16, 17, 104 (¶ 11). Mr. Cornelius explained to Mr. Zdrilch that he is required to have a Section 404 permit for placing fill material in a wetland. *Id.* In response, Mr. Zdrilich stated that he had a permit. Tr. 130; CX 16.

37. Between May 19 and June 16, 2009, the four piles observed by Mr. McGuire and Mr. Woolard were leveled under Respondents' direction, and additional fill and gravel was spread by heavy mechanized equipment about one foot to two feet deep extending at least 100 feet from the Polo Boulevard curb into the eastern wetlands. CX 18, 80, 81, 103 (¶ 16), 107 (¶ 12); Tr. 274-275.

38. Between June 16, 2009 and July 13, 2009, Mr. Zdrilich directed the spreading of fill material by heavy equipment in the eastern wetlands in an area extending to Burgess Run, about one to two feet deep and extending approximately 130 to 150 feet from the curb of Polo Boulevard into the eastern wetlands. CX 20, 90, 91, 103 (¶ 17), 107 (¶ 13); Tr. 275-278.

39. A for-sale sign was posted on Lot 1 in July 2009. Tr. 276; CX 90 (p. 702), CX 103 (¶ 17).

40. Ms. Gartland sent Respondents AIM and Zdrilich a letter dated July 29, 2009, notifying them of the failure to resolve the fill placed on Lot 1 without a permit for development on a flood hazard area and referring the matter to the county prosecutor's office. CX 21; Tr. 60.

41. On September 18, 2009, Nancy Mullen, supervisor of Mr. Cornelius and Section Chief of the Northern Section of the Regulatory Branch of the USACE for the Pittsburgh District, referred to the EPA through her supervisor the matter of unauthorized fill of wetlands at the Site, on the basis that Respondents were repeat and flagrant violators. Tr. 175-176, 179-181, 187-194, 212; CX 22, 104.

42. On or about November 3, 2009, Mr. Zdrilich applied for a floodplain permit to build a house and fill a building area on Lot 1, but it was denied by letter dated November 17, 2009 from Ms. Gartland, on grounds that the application was incomplete, and did not include proof of all required permits. Tr. 51-54, 61; CX 24, 25.

43. Melanie Burdick (formerly Melanie Haveman), a hydrologist, enforcement agent and environmental scientist in the EPA Region 5 Water Division, sent Request for Information letters to Respondents by certified mail on or about December 10, 2009 and February 23, 2011. Tr. 298-299, 308-312; CX 27, 50. Respondents received them but did not answer the questions in the letters. Tr. 310-317, 431, 604-605; CX 30-32.

44. Further pursuing the floodplain permit, Mr. Zdrilich provided Ms. Gartland another copy of maps, a lot survey by Allen Surveying, and the 1999 letter authorizing bridge culvert work under the NWP Permit 14, and in response she sent him letter dated February 23, 2010,

confirming that such documents had been previously reviewed with the incomplete application. CX 28; Tr. 63.

45. Ms. Burdick inspected the Site on April 15, 2010, and photographed the fill, grading and stream relocation on Lot 1. Tr. 331-338; CX 29, 101 (¶¶ 1, 17). Ms. Mullen, Mr. Wilk, Mr. McGuire, Ms. Gartland and Mr. Zdrilich were present during the inspection. CX 29. Thereafter, Ms. Burdick notified Mr. Zdrilich in a telephone discussion that EPA would issue him a letter instructing him to restore the wetlands on the Site. CX 29.

46. In early 2011, Mr. Zdrilich denied Ms. Burdick access to the Site when she telephoned him to obtain his permission, and only granted it after she sent him a letter explaining EPA's authority under Section 308 of the CWA to access the Site. Tr. 343, 450-451; CX 34. Mr. Zdrilich did not allow Mr. Wilk to enter the Site. Tr. 148-149, 173, 343.

47. On April 18, 2011, Ms. Burdick took soil samples, identified vegetation and hydrology indicators, and delineated the areas of the wetlands on Lot 1 that were impacted by fill material on the Site and the extent of the fill. Tr. 345-347, 351, 437-438; CX 35. She determined that the depth of the fill varied from 6 inches to three feet throughout the eastern wetlands. Tr. 357-358; CX 67.

48. Mr. Zdrilich telephoned Ms. Burdick on September 30, 2011, informing her that he had added fill within 50 feet of the road, and that he needs to backfill behind the curb, and she responded that he could fill by hand within 12 inches of the curb, and would need a permit for any additional fill. CX 36.

49. After April 18 and on or before September 30, 2011, Mr. Zdrilich directed the placement of fill material consisting of dirt and asphalt along areas extending several feet beyond the north and south curbs of Polo Boulevard, either in or near wetlands. Tr. 185-186; CX 36, 37 (pp. 313, 316-319), 38, 53 (p. 525), 73, 104 (¶ 16, pp. 1418-1421, 1438). On November 16, 2011, Mr. Zdrilich was granted permission by EPA to add fill within 10 feet from the curb of Polo Boulevard to comply with Mahoning County Planning Commission standards. Tr. 379-381, 446; CX 92.

50. On October 17, 2011, Mr. Zdrilich received a Notice of Intent to File Civil Administrative Complaint ("pre-filing notice letter") against Respondents for the discharges into wetlands and the unnamed tributary, in violation of Section 301(a) of the CWA, informing him that EPA plans to propose a penalty of $30,500 for the violations, and providing an opportunity to submit information prior to EPA filing a complaint. CX 39, 40; Tr. 367. No response to the Notice was received from Respondents. Tr. 367.

51. On October 26, 2011, EPA issued an administrative compliance order ("Restoration Order") to Respondents, finding them in violation of Section 301 of the CWA and requiring them to develop and implement a plan to restore to wetlands the areas on the Site which had been filled with dredge or fill material. CX 43; Tr. 372-373. The Restoration Order required respondents to commence restoration activities in accordance with the plan within 30 days of its approval by EPA, and to submit to EPA written certification of the restoration, with an as-built drawing,

within 30 days of completing restoration activities. CX 43. The Restoration Order stated that violation of its terms may result in civil penalties and/or criminal sanctions. *Id.*

52. On November 7, 2011, Respondents certified that they would comply with the Restoration Order and hired a consultant, Wallace and Pancher, in 2011 to develop a Wetlands Restoration Plan for compliance with the Restoration Order. Tr. 136, 493; CX 49, 53.

53. Wallace and Pancher prepared and submitted in January 2012 a Wetlands Restoration Plan, and revised it in February 2012 ("Restoration Plan"), and Ms. Burdick approved the revised plan. Tr. 381-382; CX 53.

54. A total of 0.67 acre of the eastern wetlands had been cleared, filled and graded by Respondents. CX 53 (pp. 522-523).

55. During rain events, sediment-laden water ran off the disturbed areas and entered Burgess Run. Tr. 279, 284.

56. Wetland restorations require the area to be rough graded and planted with wetland plants, to facilitate wetland function, and for the area to be monitored afterward. Tr. 373-375; CX 53. The Restoration Plan provided that the eastern wetlands would be rough graded, and planted with wetland trees and shrubs in a certain number and density, and monitored thereafter for three years. CX 53; Tr. 383-386, 456.

57. Mr. Zdrilich did not allow Wallace and Pancher to implement the Restoration Plan. Tr. 494. However, he told Ms. Burdick in a telephone discussion on April 25, 2012 that the grading and planting was done based on the new blueprints. Tr. 389, 463; CX 57.

58. Ms. Burdick informed Mr. Wilk of her discussion, so he visited the Site on April 26, 2012 to review any restoration, and met Mr. Zdrilich. Tr. 136-139. The Site had not been restored, the fill material had not been removed, the eastern wetlands contained exposed soils, some sparsely planted trees and scattered seed, and it had not been rough graded but instead, under Mr. Zdrilich's direction, it was evenly graded to a slope so water runs off the Site. Tr. 136-146, 391-392, 496-499, 594-595; CX 60, 106, 110 (pp. 1718-1723). Mr. Zdrilich and a laborer had planted the trees. Tr. 596. No wetland vegetation was planted. Tr. 498.

59. A month later at the Site, there was mowed grass, bare earth and upland vegetation, and no plantings. CX 60; Tr. 393-396. On May 26, 2012, Ms. Burdick gave Mr. Zdrilich a checklist of basic requirements of the Restoration Plan, and explained the requirements to him. The requirements included certain restoration activities to be completed by June 30, 2012, providing EPA with as-built survey plans documenting the newly created topography by July 31, 2012, and placing a deed restriction or conservation easement on the property. Tr. 396-398; CX 60 (pp. 567)

60. The Site had not been restored to wetlands. Tr. 71, 197, 403, 417-418, 425-427. As of the dates of hearing, EPA did not receive any as-built survey documentation to show that any restoration was completed. Tr. 455.

III. Relevant Law under the Clean Water Act

In 1972 Congress substantially amended the Federal Water Pollution Control Act, now commonly known as the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the Act provides that, except as in compliance with a permit under Section 404 of the Act, and certain other permits, limitations and standards not applicable in this case, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). A "discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12), (16). Rock, sand, and dredged or other fill material are each a "pollutant" when discharged into navigable waters. 33 U.S.C. § 1362(6); *United States v. Akers,* 785 F.2d 814, 818 (9th Cir. 1986), *cert. denied,* 479 U.S. 828 (1986). A "point source" includes bulldozers, backhoes and other heavy mechanized earthmoving equipment. 33 U.S.C. § 1362(14); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). "Navigable waters," or "waters of the United States," include tributaries, and wetlands adjacent to tributaries, of "waters such as intrastate lakes, rivers [and] streams (including intermittent streams) . . . the use, degradation or destruction of which would or could affect interstate or foreign commerce . . . . " 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a). Wetlands are a vital natural resource, as they "play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation." 16 U.S.C. § 3901(a)(1). In order to protect such waters, the Act authorizes the Secretary of the Army, through the United States Corps of Engineers, to issue permits under Section 404 of the Act, regulating discharges of dredge or fill material into waters of the United States. 33 U.S.C. § 1344.

The U.S. Supreme Court's seminal decision *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") established standards to determine whether wetlands are "adjacent to" waters of the United States and thus subject to jurisdiction under the Clean Water Act.

IV. Accelerated Decision

In the Accelerated Decision, I concluded that Complainant was entitled to judgment as a matter of law with respect to liability of the three Respondents for the dredging and filling of Burgess Run, the unnamed tributary and the eastern wetlands, in violation of Section 301(a) of the Clean Water Act. Specifically, I found that Respondent Polo Development, Inc. ("Polo") and Respondent AIM were owners of the property during relevant periods of time and were in control of the property and activities on-site. Mr. Zdrilich and his wife Donna Zdrilich were the only officers, representatives and/or employees of these two companies, and controlled the activities, including directing the dredging and filling activities, on the Site. I concluded that materials that were placed as fill in the eastern wetlands, Burgess Run and the unnamed tributary were "pollutants," and that the heavy equipment, such as backhoes, dump trucks and bulldozers, used for land-clearing and moving these materials in the Site, were "point sources." 33 U.S.C. § 1362(6), (14). I also concluded that the eastern wetlands, Burgess Run and the unnamed

tributary were "waters of the United States," and therefore are "navigable waters" under the CWA, in accordance with standards set forth in *Rapanos*. 33 U.S.C. § 1362(7). Therefore, I concluded that Complainant demonstrated that the placement of the materials into the eastern wetlands, Burgess Run and the unnamed tributary from the heavy equipment constituted the "addition of any pollutant to navigable waters from any point source" and thus was a "discharge of a pollutant" within the meaning of the CWA. 33 U.S.C. § 1362(12), (16). I further concluded that the discharges referenced in the Complaint were not authorized by the USACE under Nationwide Permits issued on August 18, 1999.

Finally, I dismissed the Respondents' defense of inability to pay for having waived or abandoned the defense, and granted Complainant's request for judgment as a matter of law that Respondents have the ability to pay the proposed penalty.

V. Legal Principles and Guidance for Penalty Assessment

Section 309(g)(1)(A) of the CWA authorizes EPA, upon a finding that a person has violated Section 301 of the Act, to assess a civil administrative penalty. Section 309(g)(2)(B) sets the maximum penalty amounts "per day for each day during which the violation continues," and a total maximum penalty, for Class II civil administrative penalties. The Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, adjusts these maximum levels as follows: for violations occurring from March 15, 2004 to January 12, 2009, the maximum penalty is $11,000 per day per violation, up to a total of $157,500. For violations occurring after January 12, 2009, the maximum penalty is $16,000 per day per violation, up to a total maximum penalty of $177,500. 40 C.F.R. §§ 19.2, 19.4.

Section 309(g)(3) of the Act specifies the following factors that must be taken into account in determining the amount of any penalty assessed:

> the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).

The Rules of Practice require that the civil penalty be determined based on the evidence in the record and in accordance with any penalty criteria set forth in the applicable statute, and that any civil penalty guidelines issued under the statute be considered in such determination. 40 C.F.R. § 22.27(b). The Rules provide that if the administrative law judge decides to assess a penalty different in amount from the proposed penalty, she shall set forth in the decision the specific reasons for the increase or decrease. *Id.* Complainant has the burdens of presentation and persuasion that the relief sought, that is, the proposed penalty, is appropriate, and matters of controversy are decided by the presiding administrative law judge upon a preponderance of the evidence. 40 C.F.R. § 22.24; see, *New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994)(complainant

must show it has taken into account each statutory penalty factor and that the proposed penalty is supported by its analysis, but there is no specific burden of proof as to any particular factor).

EPA has not developed any penalty policy or guidelines for cases litigated under the CWA. In such circumstances, it is appropriate to calculate a penalty examining each of the statutory factors directly. *Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 395 (EAB 2004). In addition, two general enforcement penalty policy documents have been accepted as appropriate guidance: EPA General Enforcement Policy # GM-21, Policy on Civil Penalties ("GM-21"), and EPA General Enforcement Policy # GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties ("GM-22"); both documents are dated February 16, 1984. Two main goals of penalty assessment as set out in GM-21 (at 3) are, first, deterrence, ensuring the penalties are large enough to deter noncompliance by the violator and by others similarly situated; and second, fair and equitable treatment of the regulated community. These policies instruct that a preliminary deterrence figure should first be calculated based upon any economic benefit of the noncompliance and the gravity of the violation, and then that figure is increased or decreased based upon the other statutory factors.

EPA has developed a "Clean Water Act Section 404 Settlement Penalty Policy" ("Settlement Penalty Policy" or "SPP"), dated December 21, 2001, which states that it "is not intended for use . . . in determining penalties at hearing or trial." SPP at 4. The Environmental Appeals Board ("EAB" or "Board") has opined that "[a]lthough settlement policies as a general rule should not be used outside the settlement context, . . . there is nothing to prevent [judges from] looking to relevant portions thereof when logic and common sense so indicate." *Britton Constr. Co.*, 8 E.A.D. 261, 287 n.16 (EAB 1999). Nevertheless, the Board has strongly cautioned that reliance on the Settlement Penalty Policy in the litigation context may detract from the requisite consideration of the statutorily mandated penalty factors and the Agency's general litigation penalty policies. *Henry Stevenson and Parkwood Land Co.*, CWA Appeal No. 13-01, 2013 EPA App. LEXIS 36, *46-47, *58-59, *68 (EAB, Oct. 24, 2013). The Board also has cautioned against using penalties assessed in other similar cases as guidance, maintaining that "penalty assessments are sufficiently fact- and circumstance- dependent that the resolution of one case cannot determine the fate of another." *Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001); *accord, Phoenix Construction Services, Inc.*, 11 E.A.D. at 420 (penalty assessment under the CWA).

Absent a penalty policy for cases litigated under the CWA, guidance from the Federal courts is instructive. The Supreme Court has stated that "highly discretionary calculations that take into account multiple factors are necessary" to determine CWA penalties. *Tull v. United States*, 481, 427 (1987). In calculating civil penalties under CWA section 309(d), which identifies penalty calculation factors similar to those for administrative penalties listed in section 309(g), Federal courts have generally used either a "bottom up" or "top down" method. The "bottom up" method starts with the economic benefit of noncompliance and then adjusts upwards based on the other statutory factors, whereas the "top down" approach starts with the statutory maximum and subtracts for any mitigating statutory factors.

VI. Complainant's Proposed Penalty

Ms. Burdick calculated the $30,500 proposed penalty based on the Settlement Penalty Policy, and notified Mr. Zdrilich of the proposed penalty in a Notice of Intent to File Civil Administrative Complaint, dated October 14, 2011, sent to Mr. Zdrilich. Finding of Fact 50; CX 39; Tr. 362-366, 399-400. According to the Settlement Penalty Policy,[1] the "minimum penalty amount that the government will accept in settlement of the case" is calculated by the formula of adding an "economic benefit of noncompliance" figure to a "preliminary gravity amount," adjusted for various "gravity adjustment factors," and then subtracting "litigation considerations" and other factors not relevant to a penalty assessment in this case. SPP at 8. The Settlement Penalty Policy explains that this formula is also used for calculating a proposed penalty for an administrative complaint, except that the adjustment factors are not applied to reduce the penalty. SPP at 7. The "preliminary gravity amount" is composed of "environmental significance" factors and "compliance significance" factors, each of which are assigned a value up to 20, and then the sum of the values is multiplied by $500, $ 1,500, or $3,000 to $10,000 to account for violations with minor, moderate and major overall environmental and compliance significance, respectively. *Id.* at 10.

Ms. Burdick calculated a figure of $15,500 to represent the environmental significance of Respondents' violations, considering factors of potential for human harm, severity of the impacts, significance of the impacts, the extent or size of the impact on waters of the United States, the sensitivity of the resource impacted, and the duration of the violation. Tr. 400, 404. These factors generally reflect those in the Settlement Penalty Policy (SPP at 10-12). She gave a low weight to potential for human harm, gave about medium weight to severity of the impact and sensitivity of the resource, and gave slightly less weight to the extent or size of impact, on the basis of the relatively smaller size of the wetland but 200 linear feet of stream impact. Tr. 454, 456-457.

Complainant asserts that the duration of the violation can be assessed using either of two methods in accordance with court precedent. The first method counts the number of discrete fill events, under which Complainant points to evidence of six dredge and fill events: on or about August 2008, December 2008, June 2009, July 2009, September 2011, and April 2012, considering only the events occurring within the five-year statute of limitations period under 28 U.S.C. § 2862. Brief at 40. The second method considers the number of days pollutants remain in a wetland without a permit, under which Complainant points to the duration of over six years that pollutants remained in the wetland from August 2008 through the last day of the hearing, February 2015. Brief at 41.

Next, Ms. Burdick calculated a figure of $15,000 to represent the compliance significance of the violations, considering factors of: (1) culpability, which accounted for about half of that figure, (2) the absence of prior violations of section 404 of the CWA, and (3) deterrence, all of which reflect the factors in the Settlement Penalty Policy. Tr. 405, 410-411, 443; SPP at 13-14. She considered the level of compliance significance to be in the mid-range.

[1] Official notice is hereby taken of the Settlement Penalty Policy, available on EPA's public website at http://www2.epa.gov/sites/production/files/documents/404pen.pdf.

Tr. 457. The sum of the environmental significance and compliance significance figures yields the total proposed penalty of $30,500.

Although Ms. Burdick at some point had prepared a written penalty calculation, Complainant did not offer it into evidence. Tr. 416-417. She explained at the hearing that in developing the proposed penalty, she also considered the statutory factors of the nature, circumstances, extent and gravity of the violation, prior history of such violations, and degree of culpability. Tr. 366-367, 399-400, 405, 410.

Complainant states in its post-hearing brief that the proposed penalty "is the appropriate penalty for Respondents' failure to comply and is consistent with section 309(g) of the Act," yet also states that that the preponderance of the evidence supports Ms. Burdick's testimony that it is "a low amount" and that if she had considered all of the available facts, the penalty "could be much higher." Complainant's Post-Hearing Brief ("Brief") at 9, 34 and n. 13. Ms. Burdick testified that at the time she calculated the penalty, she was intending to promote restoration of the site, but that by the time of the hearing, restoration was not possible. Tr. 413. Complainant points to her testimony that she did not increase the penalty to reflect a prior stormwater CWA violation at the Site, and prior attempts by county, state and USACE to get Respondents to comply and restore the Site. Brief n. 13 (citing Tr. 408-409, 443). Complainant also points out that she did not increase the penalty to account for Respondents' failure to respond to requests for information and for Mr. Zdrilich's denial of Site access to EPA and OEPA on April 13, 2011. *Id.*; Tr. 409-410. Complainant argues that the penalty could be increased for Respondents' history of noncompliance on grounds of their failure to comply with the Corps' January 11, 2007 cease and desist order, EPA's October 26, 2011 Restoration Order and Wallace and Pancher's Restoration Plan, failure to provide information and propose a restoration plan in response to EPA's October 2011 pre-filing notice letter, and failure to respond to citations and warnings of county, state and federal officials concerning the wetland in 2006 through 2009. Brief at 55-57. Further, Complainant urges that the penalty should be increased for Respondents' recalcitrance. *Id.* at 60-61.

No reduction should be made for any activities claimed by Respondents as restoration, Complainant argues, because they failed to prove that the eastern wetlands were restored and failed to prove payment for any restoration attempts, and moreover, they occurred after Respondents were notified of the violations and directed to restore the wetlands. Brief at 24-25, 28-29, 58-59. Complainant urges that the penalty should be increased for such activities because Mr. Zdrilich increased the damage to the eastern wetlands in 2007 and 2012 by merely backfilling and grading the wetlands flat. Brief at 25-28, 59. Complainant argues that Respondents could afford proper restoration of the wetland, as evidenced by the $162,000 generated from sales of property in Polo Development from January 1, 2012 until October 30, 2012. Brief at 59; Tr. 652; CX 115.

VII. Analysis and Conclusions

A. Methodology

Given that there is no formula in the CWA for weighing the statutory penalty factors and no penalty policy applicable to litigated CWA cases, the first consideration is an appropriate methodology for calculating a penalty. Complainant did not calculate or present evidence of an economic benefit of noncompliance, so the "bottom up" method will not be used to begin a penalty analysis. Brief n. 17. The "top down" method of calculating a penalty is a more useful approach in the circumstances of this case.

The GM-21 penalty policy and GM-22 penalty framework also are instructive in calculating the penalty.[2] Under this framework, absent an economic benefit component, the penalty analysis begins with a gravity component to reflect the seriousness of the violation, reflecting CWA penalty factors of the nature, circumstances, extent and gravity of the violation. GM-22 at 13-16. The gravity component is then increased or decreased to account for degree of the violator's culpability, phrased in terms of degree of willfulness or negligence and degree of cooperation or noncooperation, and for the history of noncompliance, ability to pay, and other unique factors. GM-22 at 16-24.

In this case, given that there is no evidence of economic benefit or savings resulting from the violation, and that I previously concluded as a matter of law that Respondents have the ability to pay the proposed penalty, the relevant statutory factors to consider are the nature, circumstances, extent and gravity of the violation, any prior history of such violations, the degree of culpability, and such other matters as justice may require.

The proposed penalty, while calculated using the Settlement Penalty Policy, was presented by Complainant as a reasoned quantification of an appropriate penalty considering the statutory penalty factors. Ms. Burdick has had significant training and experience in the subjects of wetlands, jurisdictional waters of the United States, and calculating penalties under Section 404 of the CWA. Tr. 299-302; CX 101 ¶ 1. Her experience and training promotes consistency in quantifying penalties in various CWA cases relative to the statutory penalty factors. As the Board recognizes, "consistency in enforcement is a goal of EPA's administrative penalty policy." *Ronald H. Hunt,* 12 E.A.D. 774, 796 (EAB 2006) (quoting GM-21 at 4). Therefore, I take into account the proposed penalty, considering the context and time in which it was calculated, as explained by Complainant.

B. Nature, circumstances, extent and gravity of the violations

GM-22 lists as factors for the gravity component the importance to the regulatory scheme and the actual or possible harm from the violation, which in turn includes considerations of the amount of pollutant, toxicity of the pollutant, sensitivity of the environment, and length of time a violation continues. GM-22 at 14-15. GM-22 instructs that the size of the violator is a basis to

2 Official notice is hereby taken of GM-21 and GM-22, available to the public on EPA's website at www2.epa.gov/enforcement/policy-guidance-publications.

increase the penalty if the gravity figure would otherwise have little impact on the violator in light of the risk of harm posed by the violation. The Settlement Penalty Policy tailors the gravity factors to dredging and filling violations of the CWA, listing them as: harm to human health or welfare, extent of aquatic environment impacted, severity of impacts to the aquatic environment, uniqueness or sensitivity of the affected resource, secondary or off-site impacts, and duration of violation. SPP at 10-12. It also provides that the preliminary gravity component may be reduced where the wetland is restored. SPP at 12-13.

As to the general nature of the violations, a significant penalty is appropriate for violations that disrupt the important absorption and filtration functions that wetlands provide for improving water quality. Finding of Fact 9. The Board has maintained that failure to obtain necessary permits before filling jurisdictional wetlands may cause significant harm to the CWA Section 404 regulatory program. *Phoenix Construction Services, Inc.*, 11 E.A.D. at 400; *Stevenson,* 2013 EPA App. LEXIS 36 *50; *see, Buxton v. United States,* 961 F. Supp. 6, 10 (D.D.C. 1997)("run-of-the-mill nature" of the act and only 0.89 acres of filled wetland does not lessen the seriousness of the violation and need for deterrence, as "the accumulation of similar CWA violations, taken as a whole, point to a serious environmental problem in need of attention"). Wetlands clearly constitute a material part of the waters the CWA is intended to protect, and permits are critical to the program's basic purpose, as it is through the permit process that USACE prohibits or restricts discharges, or mandates certain management practices, to protect wetlands and others waters of the United States. *Phoenix,* 11 E.A.D. at 396-399. The Board points out that the poor example to others when a landowner flaunts the environmental requirements by filling wetlands encourages other similar violations. *Id.* at 399.

As to circumstances of the violation, with regard to the sensitivity of the watershed, the evidence shows that the eastern wetland was a relatively high quality forested riparian wetland, providing habitat for wildlife, and the unnamed tributary was a moderate to high quality head water stream. Findings of Fact 4, 8, 9. The fact that there are relatively few wetlands in the area increases the impact and the significance of the violations. Finding of Fact 8; Tr. 403. In addition, the fact that Burgess Run is an impaired resource water is a basis to increase the penalty, because an impaired water is more sensitive to impacts than a non-impaired water. Finding of Fact 5; Tr. 440, 458-459. Furthermore, the Site is a relatively short distance to the TNW, the Mahoning River. Finding of Fact 3. These facts weigh in favor of a higher penalty.

The circumstances of the violations may include consideration of whether the discharge of dredged or fill material is expected to result in flooding. SPP at 10. While there is no direct evidence of flooding resulting from the violations, the evidence suggests that Respondents' channelizing and straightening of the unnamed tributary and grading of the eastern wetland increased the likelihood of flooding, given that they are located in a floodplain and floodway and Mahoning County has had problems with flooding. Findings of Fact 7, 19, 55, 58.

The evidence shows that the extent of aquatic environment impacted by Respondents' violations is 200 linear feet of stream and 0.67 acre of wetland being impacted -- with fill material up to three feet deep -- and not restored. Findings of Fact 17, 18, 47, 54, 58, 60. This is a relatively small area of impact, warranting a significant reduction from the maximum penalties allowed under the CWA. The extent of the violations, and the actual or potential harm,

is also reflected in the number of instances that the jurisdictional waters were disturbed, and the duration of time that fill remained in the wetlands. *See*, GM-22 at 14; SPP at 12. The evidence shows six separate disturbances of the eastern wetlands by Respondents: November 2006; on or before August 28, 2008; on or before December 16, 2008; on or before June 16, 2009; on or before July 13, 2009; and in or before April 2012. Findings of Fact 28, 30, 32, 37, 38, 58. In addition, between April and September 30, 2011, Respondents directed the placement of dirt and asphalt along Polo Boulevard on Lot 1, but the evidence is not clear that it was placed in a wetland area, as it was not within the area that Ms. Burdick evaluated. Finding of Fact 49; CX 36, 37 (pp. 313, 316-319); 38, 73, 101. Ms. Mullen stated in her October 14, 2014 Declaration that "dirt and asphalt are placed in an area that is a wetland portion of Lot 1," yet her attached October 3, 2011 email admits, "There is also fill in the northeast side of the road. I am not sure where the wetland boundary lies . . . ." CX 104 (¶ 16, p. 1417). At hearing, her testimony was ambiguous as to whether the fill was placed in wetlands on Lot 1 in September 2011, when she testified, "[w]e saw additional fill into wetlands on the south side of the road, in addition to Lot 1, which was still filled, was never restored." Tr. 185. Indeed, she acknowledged that EPA was responsible for delineation of wetlands, and suggested that she was not familiar with the details of such delineation. Tr. 215-216. Considering the number of discrete discharge events that occurred within the five-year statute of limitations, and that the CWA authorizes a separate penalty for each day of violation, five separate penalties may be assessed for the five events that occurred from August 2008 through April 2012.

The extent of violation, or length of time a violation continues, is also reflected in the number of days that the fill remained in the eastern wetlands over several years, and the fact that restoration at the Site was not completed. Findings of Fact 28, 30, 32, 37, 38, 58, 60. The CWA allows assessment of a separate penalty for each day of violation, and courts have maintained that each day that unpermitted fill remains in a wetland may be assessed a separate penalty. *Sasser v. Adm'r*, 990 F.2d. 127, 129 (4th Cir. 1993). This would result in a disproportionally large penalty for the violations in this case. Instead, each of the five proven illegal discharge events will be considered a separate day of violation of the CWA. Under the "top down" method, the maximum allowable penalty under the CWA for each of the two violations in 2008 would be $11,000, and the maximum allowable penalty for each of the three violations in or around June and July 2009, and April 2012, would be $16,000. For five separate days of discharges in violation of Section 301 of the CWA, the total maximum allowable penalty under the CWA is $70,000.

C. Degree of culpability

The penalty must be adjusted to consider the degree of Respondents' culpability, which generally means "blameworthiness." *Phoenix*, 11 E.A.D. n. 87. Culpability is analogous to GM-22's factor or the degree of willfulness or negligence of the violator, which includes consideration of how much control the violator had over events constituting the violation, the foreseeability of the events, whether the violator took reasonable precautions against the events, whether the violator knew or should have known of the hazards associated with the conduct, the level of sophistication within the industry in dealing with compliance issues, and whether the violator in fact knew of the legal requirement which was violated. GM-22 at 18; *Stevenson,*

2013 EPA App. LEXIS 36 * 61. In the context of culpability, the Board has also considered the violator's attitude, cooperativeness, and good faith and diligence in reporting violations or fixing problems. *Phoenix*, 11 E.A.D. at 418.

Mr. Zdrilich was solely responsible for the activities on Lot 1, and as director and manager of the other Respondents. Findings of Fact 1, 17, 18, 20, 21, 30, 32, 36, 37, 38, 49, 58; Tr. 542-543. He was an experienced real estate developer, responsible for hiring engineers, surveyors, and attorneys. Findings of Fact 1, 10, 21; Tr. 539-541.

Mr. Zdrilich could have foreseen that he was required to have a Section 404 permit before conducting the clearing, dredging and filling activities on Lot 1, from the time in 1999 that he hired his contractor, ESC, to apply for a permit under Section 404 of the CWA. Finding of Fact 10. His testimony that he hired ESC, an environmental engineering firm, "not to have any complaints from EPA" indicates that he was aware of potential environmental issues at the Site and a permit requirement. Tr. 473. Indeed, in the permit application, ESC identified the wetland areas on Lot 1, and advised that it should remain undeveloped and may require a Section 404 permit. Findings of Fact 11, 13. Mr. Zdrilich should have known from the text of the 1999 permit that it was limited by the conditions set forth therein, and that he was not authorized to conduct any dredging or filling activities beyond the 0.14 acre area of wetland impact specified, or beyond the installations authorized by the permit, which were completed prior to November 2006. Findings of Fact 14, 15. He also was warned in 2004 of potential floodplain violations for construction activities on Lot 1, when he signed the MCPC plat of survey for Polo Development. Finding of Fact 16. He was warned by Ms. Gartland specifically of the requirement for a Section 404 permit to fill in wetlands on Lot 1 in November 2006. Finding of Fact 22.

There is no evidence that Mr. Zdrilich took any precaution of consulting with ESC, the engineers he hired, or with a lawyer or other environmental engineer, before directing the clearing, dredging and filling activities on Lot 1. He suggested that he relied on representations from Mr. Pozzuto of the USACE in December 2006. Referring to the stormwater map with Mr. Pozzuto's notes on it, Mr. Zdrilich maintained that Mr. Pozzuto allowed him to grade a half acre of land on Lot 1 to within plus or minus three feet from the curb. Tr. 482. It is not reasonable, however, to interpret from the notes, which clearly state, "Remove and restore back to wetland condition ([plus or minus] 3')" that the wetland could be filled and graded. Finding of Fact 27. Mr. Zdrilich apparently attempts to bolster his understanding of Mr. Pozzuto's instructions by claiming that that Mr. Pozzuto was more lenient with him, that Mr. Pozzuto told him that the OEPA is harassing him, and that Mr. Pozzuto said "whatever I tell you just do that, and nobody is going to bother you as long as I'm alive." Tr. 480-482, 522-523, 587, 597-598, 603. This testimony is not credible, particularly considering that Mr. Pozzuto met with Mr. Zdrilich only one time, and in the presence of Mr. Cornelius. Finding of Fact 27; Tr. 480.

Mr. Zdrilich was notified repeatedly and consistently of the requirements for a Section 404 permit and for restoration of the Site. Specifically, he was required in late November 2006 by Ms. Gartland to stop activities on the Site; was notified in January 2007 of the CWA violation and ordered by the USACE not to place fill on the Site and to restore the wetlands; was notified in August 2008 by the Mahoning County SWCD that clearing, filling or excavating wetlands

violates the CWA; was directed in 2008 by Ms. Gartland and Mr. McGuire to remove fill; was advised in a May 2009 meeting with county, state and federal authorities that a Section 404 permit was required; was notified by Ms. Gartland in July 2009 of failure to remove the fill; was notified by EPA in 2010 that he would be required to restore the wetlands; was warned by EPA that he needed a permit to fill wetlands along the road; was ordered by EPA to restore the wetlands according to the Restoration Order issued in October 2011; was advised in Wallace and Pancher's Restoration Plan what was required for restoration; and was advised by EPA in May 2012 what was required for restoration. Findings of Fact 26, 28, 31, 33, 36, 40, 45, 48, 51, 53, 59. Nevertheless, Mr. Zdrilich continued his grading, dredging and filling activities in the eastern wetlands, and refused to restore it as required, repeatedly claiming to representatives of EPA, USACE, OEPA, and MCPC that he had a permit.

The evidence shows that Mr. Zdrilich did not take the precaution of reading the 1999 permit. The evidence also shows that his assertions that he had a permit authorizing him to clear, dredge and fill the eastern wetlands were not based on any good faith belief, simple negligence or misunderstanding on his part. He testified at the hearing that he recognized the permit application for building the culvert, but "not much" about the attached wetland evaluation report. Tr. 579. He testified that he was familiar only with the first page of the permit, which stated "[e]nclosed is a list of conditions which must be followed for the Nationwide Permits to be valid," but that he was not familiar with the following pages listing the conditions of his permit to build the bridge culvert and sewer and water lines. Tr. 130, 582-587, 602; CX 3. He testified that he did not remember whether he had read the permit, and that he did not know whether the pages of the permit setting the conditions were part of the permit. Tr. 585-587. He recalled that the permit specified 0.14 acre of wetland, but it referred to 0.14 acre area of wetland impact from the project and required removal of temporary fill in wetlands. Findings of Fact 14; Tr. 473-474, 585-587; CX 3. It does not support any reasonable belief that the wetlands on Lot 1 only encompassed 0.14 acre.

Mr. Zdrilich pointed to the blueprint of the storm water pollution prevention plan as a basis for believing that he was allowed to clear the land 100 to 200 feet into Lot 1:

> A: If you take a look at it [RX 1A], it shows you where retention pond is. It shows you how on the side, left side, of the lot 1 – on lot 1, how far I can work.
>
> Q: Okay. And how far does that blueprint say?
>
> A: Approximately 100 feet from between lot 1 and 2. It has to be clear, clear from the trees, clear from everything, silt fence, and it probably 40 feet from the curb approximately.
>
> Q: Okay. So you say that because of that blueprint, you have the right to go 100 feet into the property.
>
> A: Right.
>
> Q: Okay.

A: About 100, probably 200 feet, in lot 1.

Tr. 519-520. He explained that OEPA and Mahoning County Planning Commission approved the blueprint, and that he was required to follow the blueprints. Tr. 520, 525-526. The blueprint shows the stormwater control plan in connection with the installation of the culvert, utilities and storm, water and sewage line. RX 1A. It includes a delineation of a "Const. limit" around the sediment basin (retention pond) to be constructed on the adjacent Lot 2, which delineation appears to extend into Lot 1 approximately 150 feet from its eastern boundary, and encloses silt fencing. *Id.* The sediment basin was for the purpose of controlling water runoff during the installation projects listed on the blueprint, which were completed prior to 2006. Finding of Fact 15; RX 1A. There is no basis for Respondents to infer that the delineation of the construction limit on the blueprint was an authorization to conduct any other construction, clearing, grading, dredging or filling activities on Lot 1. Furthermore, his dredging and filling activities extended over the southwestern portion of the eastern wetlands as far as Burgess Run and included moving the unnamed tributary, which are far beyond the construction limit shown in the blueprint. Findings of Fact 17, 18, 20, 30, 32, 37, 38, 58; RX 1A. Therefore, Mr. Zdrilich's assertions to representatives of the USACE, EPA, and state and local authorities that he was allowed or required to conduct the clearing, dredging, filling and grading activities on Lot 1 were deliberately false, or made with contempt or conscious disregard for legal authority.

Mr. Zdrilich asserted at the hearing that he could grade and fill land within 22.5 feet of the road, on the basis that an easement measuring 12.5 feet wide exists beyond the curb along Polo Boulevard, and an additional easement for utility lines extends out an additional 10 feet along each side of Polo Boulevard. Tr. 474-475, 487-493, 500-501. His assertion is contrary to the evidence, which shows that from Polo Boulevard, including its curbing, the utility easement extended out 10 feet, forming the boundary of Lot 1. CX 101 (p. 1192), 103 (pp. 1358, 1364, 1368, 1386, 1387), 113; RX 1, 1A; Tr. 487-488. Respondents' evidence does not support any claim that they could grade or fill land any farther than the 10 foot wide easement from the curb of Polo Boulevard, and therefore Mr. Zdrilich's assertion is not credible.

Mr. Zdrilich's credibility was diminished further in his testimony that the tributary moved naturally when trees fell due to a lot of rain, and in his testimony that "for last three years . . . I cannot read," yet was able to read documents during his testimony. Tr. 505, 550-551, 564-566. The posting of for-sale signs in 2008 and 2009 is consistent with the Respondents' knowledge of the illegality of their activities and their disregard for legal authority. Findings of Fact 29, 39.

Despite the many instructions, meetings, conversations, notices and letters from EPA, USACE, OEPA, county representatives, and Respondents' own contractors, warning him repeatedly over the years of the violations and CWA Section 404 permit requirements regarding Lot 1, Mr. Zdrilich took the position that he was not in violation of the CWA, testifying that he did nothing that he did not have a permit for, and that "if I felt that I was guilty, that I did something wrong, it would be completely different." Tr. 474, 528; Findings of Fact 13, 22, 24, 27, 28, 31, 35, 36, 48-50. Nothing in the record supports such a position or any good faith belief that he was not in violation of the CWA. Considering his testimony and overall lack of

credibility, it is concluded that Mr. Zdrilich intentionally disregarded the Section 404 permit requirements, willfully violated Section 301(a) of the CWA from 2006 through April 2012, and acted in defiance of USACE and EPA orders in grading, dredging and filling the wetland in 2008, 2009 and 2012.

Mr. Zdrilich testified that he "tried to cooperate with them [EPA] as much as humanly possible," but that Wallace and Pancher would charge him over $50,000 for the implementation of the Restoration Plan, and that he could not afford that fee. Tr. 493-494, 526-528, 592-593. His degree of cooperation goes only as far as meeting and speaking with government representatives while they were visiting the Site, but he simply insisted that he had a permit for his activities. Findings of Fact 22, 24, 27, 35, 36, 45, 48. He also tried to prevent representatives of EPA and OEPA from entering the Site. Finding of Fact 46. These communications were in his interest to prevent or delay enforcement action, and do not merit any decrease in the penalty. He also refused to cooperate with EPA's requests for information. Finding of Fact 43. The fact that Respondents certified that they would comply with the Restoration Order and hired Wallace and Pancher for a site restoration plan also do not merit any decrease in the penalty where Mr. Zdrilich was merely responding to EPA's warnings of civil and criminal sanctions for any failure comply. Findings of Fact 50, 51, 52. His claim that he could not afford the restoration by Wallace and Pancher are addressed below, in the discussion of "other factors as justice may require."

Respondents have a very high level of culpability for the violations, weighing in favor of a high penalty. A Federal court even many years ago noted that it would "bring the full weight of the law to bear to punish" -- where the violation involves knowingly failing to stop grading and filling a wetland in defiance of a cease and desist order issued by the USACE. *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1185 n. 12 (D. Mass. 1986).

D. Prior history of violations

The statute requires consideration of "any prior history of such violations." CWA 309(g)(3). This phrase means that any prior violations of the same or similar kind must be taken into account. The evidence does not show that Respondents had any prior violations of Section 404 the CWA other than the violations at issue in this proceeding. Tr. 410-411. The record does include evidence of a settlement with State of Ohio for alleged stormwater discharges in violation of state water pollution control laws at another subdivision Mr. Zdrilich developed. Complainant does not argue that this evidence should be considered as history of non-compliance. CX 114, Tr. 610-614; Brief at 55-57. In any event, it does not warrant any increase in the penalty in the circumstances of this case. Increasing a penalty for history of noncompliance reflects the increased need for deterrence and that the violator was alerted to a particular type of compliance problem, where there was a prior similar violation. GM-22 at 21. Both the fact that prior to dredging and filling the eastern wetlands, Mr. Zdrilich was aware of the Section 404 permit requirements and wetlands on Lot 1, and the fact that he was repeatedly warned he was in violation and directed to remove the fill from the wetland, have been taken into account in assessing the penalty as discussed above. Therefore there is no need to increase the penalty further for a prior history of violations.

E. Such other matters as justice may require

The final question is whether there are any reasons that the penalty should be adjusted to achieve justice. Mr. Zdrilich testified that almost two years before the hearing, he paid Ecological Construction Services ("ECS") to perform restoration work, including planting trees and shrubs and grass seeds, and placing fencing around the trees to prevent beavers from destroying them. Tr. 503-504, 521, 608. However, efforts to attain compliance after the complaint is filed does not merit any decrease in the penalty. *Phoenix,* 11 E.A.D. at 415 (post-complaint compliance was a case of "too little too late" warranting if anything an increase rather than a decrease in penalty). Furthermore, Respondents did not provide any evidence of wetland restoration work done or that the eastern wetlands were ever restored. *See*, Finding of Fact 60.

As to efforts prior to the Complaint, Mr. Zdrilich claimed that he "tried to work with" Mr. Wilk, and "would do whatever they tell me to do," including "backfill or take some dirt off or put the grass seeds or put trees . . . many times over," spending "thousands of dollars." Tr. 522-523. The evidence shows that he merely backfilled and evenly graded soil on Lot 1 and planted some trees and seed, but did not remove the fill material from the wetland. Findings of Fact 58-60. He did not rough-grade the area or plant it with wetland shrubs and trees as required for wetland restoration. Findings of Fact 56, 58-60. Moreover, any attempts he made for site restoration were only in response to orders from the USACE and EPA, to delay or avoid enforcement action. While he claimed at the hearing that Wallace and Pancher would charge him over $50,000 for the implementation of the Restoration Plan, and that he could not afford that fee, he was not a credible witness and no evidence was presented to corroborate his testimony as to the amount of the fee. Tr. 493-494, 526-528, 592-593. During the course of this proceeding, Respondents have refused to submit financial information as to any inability to pay. *See*, Accelerated Decision. Moreover, the evidence of record shows that Respondents generated total revenue of $420,500 in property sales between July 2011 and October 2014, including $162,000 from sales of property in Polo Development from January 1, 2012 until October 30, 2012, and $153,500 from sale of property in that development from January 1, 2013 to October 31, 2014. Brief at 59; Tr. 650-652; CX 93, 115. I conclude that there is no evidence to support an adjustment of the penalty "as justice may require."

F. Penalty Calculation and Ultimate Conclusion

As noted above, for five separate days of discharges in violation of Section 301 of the CWA, the total maximum allowable penalty under the CWA is $70,000. Considering the nature, circumstances, extent and gravity of the violations in this case as discussed above, a reduction of 70 percent from the statutory maximum reflects, on balance, the appropriate level for a gravity component, yielding a gravity-based penalty of $21,000.

This figure must be adjusted upward by a significant amount to reflect the high level of Respondents' culpability, including intentional disregard for legal authority over several years, willful violations, and defiance of the EPA Restoration Order and USACE's cease and desist letter, as noted above. Guidance in GM-22 provides for an increase of up to 30 percent of the gravity based penalty for unusual circumstances of willfulness, plus an increase of up to 20 percent for unusual circumstances of noncooperation. GM-22 at 18, 19. The level of

Respondents' culpability, willfulness, and noncooperation, and their attitude and lack of diligence in fixing problems warrant an increase of more than 50 percent of the gravity-based penalty. An increase of 55 percent of the gravity based penalty, or $11,550, is appropriate. This adjustment results in a total penalty of $32,550 for the Respondents' violations. No other adjustments are warranted. This penalty is comparable to the penalty proposed by Complainant, and is the appropriate penalty to assess against Respondents for using mechanized clearing and earth-moving equipment to discharge dredged or fill material into waters of the United States, including the eastern wetlands, without a permit required by Section 404 of the CWA, in violation of Section 301(a) of the CWA.

ORDER

1. Respondents Joseph Zdrilich, Polo Development, Inc., and AIM Georgia, LLC, are jointly and severally liable for the violations found herein, and are ordered to pay a civil penalty in the amount of **$32,550** in the manner directed below.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

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

3. A transmittal letter identifying the subject case and EPA docket number, Docket No. CWA-05-2013-0003, as well as the Respondents' name(s) and address, must accompany the check.

4. If Respondents fail to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

`In the Matter of Polo Development, Inc., AIM Georgia, LLC and Joseph Zdrilich, Respondents
Docket No. RCRA-HQ-2009-0001

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:

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In the Matter of Polo Development, Inc., AIM Georgia, LLC and Joseph Zdrilich
Docket No. CWA-05-2013-0003 (RCRA-HQ-2009-0001)

Certificate of Service

I hereby certify that the foregoing ***Initial Decision and Order*** filed December 14, 2015, was sent this day in the following manner to the addresses listed below.

Copy by Certified Mail Return-receipt:	Dennis A. DiMartino, Esquire 839 Southwestern Run Youngstown, Ohio 44514
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Copy by e-mail to Regional Judicial Officer:	Ann Coyle **coyle.ann@epa.gov**

Dated: December 14, 2015

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5

CERTIFIED MAIL RECEIPT NUMBER(S): 7011 1150 0000 2641 0018