



**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

<b>In the Matter of:</b>	)	
	)	
<b>Polo Development, Inc.,</b>	)	
<b>AIM Georgia, LLC, and</b>	)	<b>Docket No. CWA-05-2013-0003</b>
<b>Joseph Zdrilich,</b>	)	
	)	<b>Dated: February 6, 2015</b>
<b>Respondents.</b>	)	

**ORDER GRANTING COMPLAINANT’S MOTION FOR ISSUANCE OF SUBPOENAS**

**I. Procedural Posture and Motion**

By Order dated September 11, 2014, this matter was scheduled for hearing to begin on February 24, 2015 and continuing, if necessary, until February 27, 2015. The hearing will be located at the Thomas D. Lambros Federal Building and Courthouse in Youngstown, Ohio. An Order dated January 12, 2015, set February 5, 2015, as the deadline for the filing of any non-dispositive motions, and February 12, 2015, as the deadline for any responses to such motions.

On February 5, 2015, the United States Environmental Protection Agency, Region 5 (“Complainant” or “EPA”), filed Complainant’s Motion for Issuance of Subpoenas (“Motion”). Complainant cites authority for issuance of subpoenas in Section 309(g)(10) of the Clean Water Act (“Act”), 33 U.S.C. § 1319(g)(10), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice” or “Rules”), codified at 40 C.F.R. Part 22, specifically sections 22.19(e)(4) and 22.21(b). Complainant seeks the issuance of subpoenas for the appearance and testimony of five witnesses: Nancy Mullen, Sarah Gartland, Sean McGuire, John M. Woolard, and Ed Wilk. These witnesses are employees of other federal, state or municipal agencies. All five witnesses have indicated to Complainant their intent to comply with a subpoena and attend the hearing. Motion at 2. “Certain witnesses have indicated a need for a subpoena either to comply with their regulations or because of a summons to appear for jury duty during the hearing.” *Id.* Complainant states that opposing counsel was notified of EPA’s intent to file this Motion and did not respond. *Id.*

All five witnesses and a summary of their expected testimony were previously identified in Complainant's Initial Prehearing Exchange. Motion at 1. According to Complainant, all five witnesses can provide testimony relevant to liability, the appropriateness of EPA's proposed penalty, and possibly to rebuttal of positions and evidence offered by Respondents. In its Motion, Complainant summarizes the potential testimony of these witnesses as follows:

1. Nancy Mullen is Section Chief of the Northern Section of the Regulatory Branch of the Pittsburgh District, U.S. Army Corps of Engineers ("ACE"). Ms. Mullens can testify on numerous relevant topics, including but not limited to, the ACE dredge and fill program, permits, delineation of wetlands, and the jurisdictional status of the Mahoning River. Ms. Mullens can also testify regarding the ACE permit issued to Respondents for the property site at issue in this case ("Site"), as well as various communications, interactions and Site visits relevant to the allegations in the Complaint. She can authenticate related photographs and documents. Motion at 2.

2. Sarah Gartland was the Mahoning County Floodplain Administrator at the time of the alleged violations. Ms. Gartland can testify regarding the Mahoning Flood Damage Control Regulations, her observations during several Site visits, and various communications with Respondents and other government officials. She can authenticate plats and other documents related to the Site. Motion at 3.

3. Sean McGuire has been Urban Conservationist with Mahoning Soil and Water Conservation District since 2007. Mr. McGuire can testify to multiple Site inspections and communications with Respondents. He can authenticate photographs he took during those inspections. Motion at 3.

4. John M. Woolard has been Environmental Administrator of the Storm Water Management Program at Mahoning County Engineer's Office since August 2006. Mr. Woolard can testify about his periodic Site inspections, and observations and communications with Respondents and others. He can authenticate Site photographs that he took. Motion at 4.

5. Ed Wilk is the Ohio Section 401 Coordinator for Ohio Environmental Protection Agency, Northeast District Office. Mr. Wilk can testify as to Ohio's wetland protection program, his knowledge of the Site, observations during Site visits, and communications with Respondents and other government officials. He can authenticate photographs he made and documents in his possession. Motion at 5.

## **II. Legal Standards**

The Clean Water Act provides that "[t]he Administrator . . . may issue subpoenas for the attendance and testimony of witnesses . . ." 33 U.S.C. § 1319(g)(10). In the event of "contumacy or refusal to obey a subpoena," the Act authorizes United States district courts with jurisdiction "to issue an order requiring such person to appear and give testimony before the administrative law judge . . . and any failure to obey such order of the court may be punished by such court as a contempt thereof." *Id.*

The Rules of Practice provide that the Presiding Officer may require the attendance of witnesses ... by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevance of the evidence to be adduced.” 40 C.F.R. § 22.21(b). Additionally, the Rules provide that the Presiding Officer must find that the discovery request:

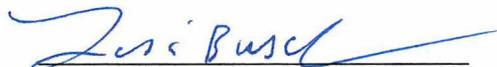
- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party,
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1) and (4).

### **III. Discussion and Conclusion**

Complainant has shown adequate grounds and necessity for the issuance of the requested subpoenas. The identified witnesses have indicated a need to be subpoenaed either to comply with their employer’s regulations or due to a schedule conflict with jury duty. These witnesses can provide testimony relevant to both liability and penalty in this case. These witnesses were all identified in Complainant’s Initial Prehearing Exchange. Thus, given the short amount of time remaining before the hearing and the lack of burden or prejudice to Respondents, Complainant’s Motion for Issuance of Subpoenas is hereby **GRANTED**. The subpoenas will be sent to Richard Clarizio, designated counsel for EPA, for service on the identified witnesses.

**SO ORDERED.**

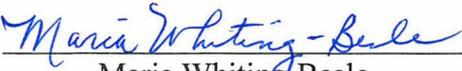


M. Lisa Buschmann  
Administrative Law Judge

In the Matter of Polo Development, Inc., AIM Georgia, LLC and Joseph Zdrilich, Respondents  
Docket No. CWA-05-2013-0003

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **Order Granting Complainant's Motion For Issuance Of Subpoenas**, dated February 6, 2015, was sent this day in the following manner to the addressees listed below:

  
\_\_\_\_\_  
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Staff Assistant

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**Dated: February 6, 2015**  
**Washington, DC**