UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON COMPLAINANT'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE, MOTION FOR ACCELERATED DECISION, AND MOTION TO STRIKE RESPONDENTS' DEFENSES

I. Procedural History

This proceeding was initiated by a Complaint filed 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 charges 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 states 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 Zdrilich informed EPA that he would not conduct restoration work in accordance with the plan and would not restore certain areas. The Complaint proposes 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.

Subsequently, Complainant filed a prehearing exchange, and Respondents' deadline to file a prehearing exchange was extended several times. On October 21, 2013, Respondents' counsel moved to withdraw as their legal representative. When Respondents failed to file a prehearing exchange by the extended due date, an Order to Show Cause was issued, requiring Respondents to explain by why they failed to submit a prehearing exchange by the required deadline. Respondents then requested a 60 day extension to file their prehearing exchange, stating that Respondents anticipate completing a wetlands restoration report and resolving "all outstanding wetlands restoration issues" within 60 days. Respondents were granted a 30-day extension of time to March 14, 2014, on which date Respondents' Initial Prehearing Exchange was received by email to the undersigned's staff attorney. Complainant submitted a Motion for

Default Order, and an Order Denying Complainant's Motion for Default was issued on August 6, 2014. Thereafter, an Order Scheduling Hearing was issued, setting the hearing in this case to commence on February 24, 2015 in Youngstown, Ohio.

On October 16, 2014, Complainant filed a Motion to Supplement Complainant's Prehearing Exchange, seeking to add 37 exhibits to its Prehearing Exchange. On October 17, 2014, Complainant filed a Motion for Accelerated Decision [on] Liability and Ability to Pay and Motion to Dismiss Respondents' Affirmative Defenses and Inability to Pay Defense. With regard to liability, Complainant seeks a ruling only with respect to dredging and filling the larger of two areas referenced in the Complaint. To date, no response has been filed to any of these motions. In addition, on February 6, 2015, Complainant filed a Motion to Exclude Testimony and Other Evidence Related to Respondents' Inability to Pay the Proposed Civil Penalty and to Draw an Adverse Inference.

II. Motion to Supplement Prehearing Exchange

The Motion to Supplement Complainant's Prehearing Exchange ("Motion") seeks to add documents marked as Complainant's Exhibits 64 through 100, characterized by Complainant as falling into four general categories: (1) documents for which Respondents, in their Prehearing Exchange, did not provide the full text; (2) documents previously referenced by Complainant in its Prehearing Exchange; (3) documents with newly acquired information related to Respondents' transfers within the last six months of their assets to another corporation controlled by Respondents or to them personally; and (4) publicly available information that may assist at hearing or with rulings on motions.

The procedural rules governing this proceeding are the Rules of Practice at 40 C.F.R. Part 22 ("Rules"). As to supplementing prior exchanges, the Rules specify that:

> A party who has made an information exchange . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party . . .

40 C.F.R. § 22.19(f).

Complainant timely filed the Motion well before the applicable deadline of February 9, 2015 set forth in the Order Scheduling Hearing. Complainant explains that these new exhibits were not submitted earlier either because they were unavailable or because the time and expense to obtain them was not justified when settlement or granting of Complainant's Motion for Default appeared possible. Motion at 5. Complainant states that some of these documents may assist in ruling on its Motion for Accelerated Decision. *Id.* Complainant's Motion for Accelerated Decision references several of these new exhibits for support.

The Rules provide that a response to a motion must be filed within 15 days after service of the motion, and that "[a]ny party who fails to respond within the designated period waives any

objection to the granting of the motion." 40 C.F.R. § 22.16(b). Therefore, by failing to respond to the motion, Respondent has waived any objection to it.

Complainant's supplement to its Prehearing Exchange is timely and appropriate, and Respondents have filed no objections. Accordingly, the Motion to Supplement Complainant's Prehearing Exchange is hereby **GRANTED**.

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 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 "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). "The term 'pollutant' means dredged spoil, solid waste, . . . biological materials, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts have ruled that bulldozers, backhoes and other heavy mechanized earthmoving equipment constitute a "point source" as "rolling stock." *E.g.*, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)(bulldozer and backhoe are point sources); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd* 537 U.S. 99 (2002)(tractor pulling a deep ripper is a point source).

The term "navigable waters" is defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). Regulations codified pursuant to the Clean Water Act define "waters of the United States" as including:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . [or] wetlands, . . . the use, degradation or destruction of which would or could affect interstate or foreign commerce . . .;

* * *

(5) Tributaries of waters identified in paragraphs (g)(1)- (4) of this section;

* * *

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1) - (q)(6) of this section.

* * * *

40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a).[1]

In turn, the term "wetlands" is defined as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. §§ 232.2; 33 C.F.R. § 328.3(b).

The U.S. Supreme Court's seminal decision *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") established two tests to determine whether wetlands are "adjacent to" waters of the United States and thus subject to jurisdiction under the Clean Water Act. Justice Scalia expressed the four-justice plurality opinion that "'waters of the United States' include only relatively permanent, standing or flowing bodies of water" that are "connected to traditional interstate navigable waters" and that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 732, 742. Waters that are merely occasional, intermittent, transitory or ephemeral are non-jurisdictional, as are waters with only a physically remote hydrologic connection to traditional navigable waters, according to the plurality opinion. *Id.*

An alternative standard, the "significant nexus" standard, was articulated by Justice Kennedy in his concurring opinion as follows: "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. 759, 780 (Kennedy, J., concurring). According to Justice Kennedy, wetlands with merely "speculative or insubstantial" effects on water quality are non-jurisdictional. *Id.* Wetlands adjacent to navigable-in-fact waters necessarily satisfy the significant nexus test. *Id.; see also, United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 135, 139 (1985). On the other hand, the government must "establish a significant nexus on a case-by case basis" for wetlands adjacent to non-navigable tributaries. *Rapanos*, 547 U.S. at 782 (Kennedy, J.).

Either the standard set forth in the plurality opinion or the standard set forth by Justice Kennedy in *Rapanos* may be used to determine whether wetlands are subject to federal jurisdiction under the Act. *See, e.g., United States v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011), *cert. denied,* 132 S. Ct. 2409 (2012); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948

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1 Both the U.S. Environmental Protection Agency and the U.S Army Corps of Engineers have authority to promulgate regulations under the Act. 33 U.S.C. §§ 1344(b), 1361(a).

(2007); *Smith Farm Enterprises, LLC*, 15 E.A.D. __ , CWA Appeal No. 08-02, 2011 EPA App. Lexis 10 (EAB 2011) ("*Smith Farm*"); *Henry Stevenson and Parkwood Land Co.*, 16 E.A.D. ___, CWA Appeal No. 13-01, 2013 EPA App. LEXIS 36 (EAB 2013) ("*Parkwood*"); "U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decisions in *Rapanos v. United States & Carabell v. United States,*" at 3 (Dec. 2, 2008) ("EPA/Corps Joint Guidance").

Section 404(a) of the Act authorizes the Secretary of the Army, through the United States Army Corps of Engineers ("Corps" or "USACE"), "to issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. The regulations define "dredged material" as "material excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. "Fill material" is defined as "material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land" and includes "rock, sand, soil, clay, . . . construction debris, . . . overburden from . . . excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." *Id.* "Discharge of dredged material" is defined as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States," which includes "[a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 40 C.F.R. § 232.2. "Discharge of fill material" includes "[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; site development fills for recreational, industrial, commercial, residential, or other uses; [and] causeways or road fills . . . ." *Id.*

IV. Standards for Accelerated Decision

The applicable procedural rules, 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"), provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). The standard for accelerated decision under 40 C.F.R. § 22.20 is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts University School of Medicine,* 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact to be decided with respect to any essential element of the claim, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 4 (1986). The movant who bears the burden of proof at trial must show that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute." FRCP 56(c)(1). It is inappropriate to grant the motion "'unless a reasonable juror would be compelled to find its way on the facts needed to rule in its favor on the law,'" and "'if there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact,' summary judgment is inappropriate." *United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011)(quoting *El v. Southeastern Pa. Transp. Auth.,* 479 F.3d 232, 238 (3d Cir. 2007)(footnote omitted)). Under Rule 56, the use of affidavits is not required to support a motion for summary judgment; reliance on other materials is permissible. 73 Am. Jur. 2d Summary Judgment § 23 (2d ed.); *Celotex Corp. v. Catrett*, 477 U.S. at 323.

Once the movant's burden is met, to defeat summary judgment, the nonmoving party must show that a material fact is genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence . . . of a genuine dispute." FRCP 56(c)(1). The non-movant must "set out specific facts showing a genuine issue for trial." *Nolen v. FedEx TechConnect Inc.,* 971 F.Supp. 2d 694, 700 (W.D. Tenn. 2013)(quoting *Viergutz v. Lucent Techs., Inc.,* 375 Fed. App'x 482, 485 (6th Cir. 2010)). It must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-250; *Newell Recycling Company, Inc.*, 8 E.A.D. 598, 624, 1999 EPA App. LEXIS 28, at *59 (EAB 1999)(countervailing evidence must be sufficiently probative to create a genuine issue of material fact). An issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to oppose summary judgment); *Ricker v. Zinser Corp.,* 506 F. Supp. 1, 2 (E.D. Tenn. 1978), *aff'd sub nom. Ricker v. Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980) (affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial); *see*, 73 Am. Jur. 2d Summary Judgment § 34 (A defendant's resistance to a motion for summary judgment must be supported by sworn statements of a person having knowledge of the facts sufficient to sustain a valid defense to the action.)

"In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor." *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011); *Liberty Lobby,*

477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012). A factual dispute is "'genuine' if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 255. In the present proceeding, the evidentiary standard is a preponderance of the evidence. 40 C.F.R. § 22.24(b).

When conflicting inferences may be drawn from the evidence and a choice among them would amount to fact finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Ultimately, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

Rule 56 of the FRCP provides that "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." FRCP 56(e)(3).

When the non-moving party has asserted an affirmative defense, the moving party must show that there is an absence of facts present in the record to support the defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (*quoting BWX Techs. Inc.*, 9 E.A.D. 61, 78 (EAB 2000)). If the moving party does show an absence of facts supporting the defense, the non-moving party must identify "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence in order to preserve its defense. *Id.*

V. <u>Undisputed Facts</u>

The following facts are admitted or not disputed by Respondents:

1. The Polo Development Site ("Site," also referenced as "Lot 1") is a residential housing development site located north of Polo Boulevard in Section 11 of Poland Township, Mahoning County, Ohio. Complaint ¶ 3; Answers of all Respondents ("Answers") ¶ 3; Respondent's Prehearing Exchange ("R PHE") p. 2; R PHE Exhibits ("Exs.") E, G.

2. A water body named Burgess Run flows through the Site. R PHE Exs. B, C; C PHE Attachment 1.

3. Wetlands exist on the Site near Burgess Run. R PHE Exs. A, B, E, F, G.

4. Polo Development, Inc. is a corporation. Answer of Polo Development, Inc. ¶ 7.

5. Donna Zdrilich and Respondent Joseph Zdrilich are husband and wife. Declaration of Melanie Burdick, ¶¶ 65 and 70, Declaration of Sarah Gartland, ¶¶ 15 and 21.

6. On August 18, 1999, the Army Corps of Engineers issued a letter authorizing, under Nationwide Permits 12 and 14, the placement of fill in up to 0.14 acres of wetlands for the purpose of installation of sewer and sewer lines and a concrete box culvert for a bridge crossing Burgess Run. R PHE p. 2; R PHE Exs. A and B; C PHE Exs. 1 and 3.

7. Excavation work was performed on the Site. R PHE p. 6.

8. On or about December 11, 2006, Fred Pozzuto of the USACE inspected the Site and informed Zdrilich that he must restore an area on the Site to wetland condition. R PHE pp. 3; R PHE Ex. B.

9. Allen Surveying prepared a survey map dated August 10, 2009, revised November 3, 2009, of the Site that shows elevations, and an area marked as a fill area on the southeastern portion of the Site. It also shows an area on the Site marked as wetlands, which extends west from the fill area to Burgess Run, and extends north from Polo Boulevard to a tributary to Burgess Run, where the tributary runs along the northern border of the Site. R PHE p. 5; R PHE Exs. E, G; C PHE Ex. 24. Within the area marked as the fill area is a rectangle which appears to be labeled "32' x 80'approx." *Id.*

10. A plat entitled "Polo Development Sanitary Sewer and Waterline Plan and Profile" shows a proposed box culvert of 5 feet by 18 feet at Burgess Run where it intersects Polo Boulevard. R PHE p. 6; R PHE Ex. H.

11. Melanie Burdick (formerly Melanie Haveman), a hydrologist and environmental scientist in the EPA Region 5 Water Division, inspected the Site on or about April 18, 2011, took soil samples, and identified wetlands on the Site. C PHE pp. 1-3, Attachment 1; C PHE Ex. 33, 43; R PHE pp. 3-4.

12. Ms. Burdick provided Respondent with aerial photographs of the Site, entitled "Exhibit 1: Polo Boulevard Poland, OH, Wetland and Stream Impact Areas," showing two impact areas on the Site, one on the east and the other on the west side of Burgess Run. C PHE Attachment 1; C PHE Exs. 35, 43; R PHE pp. 3-4; R PHE Ex. C.

13. On October 26, 2011, EPA issued an administrative order ("Restoration Order" to Respondents under Section 309(a) of the CWA, requiring Respondents to develop and implement a plan to restore to wetlands areas on the Site which had been filled with dredge or fill material. Answers ¶ 20; Complainant's Prehearing Exchange ("C PHE") Exhibit ("Ex.") 1; R PHE Ex. C.

14. Respondent Zdrilich submitted a Wetlands Restoration Plan narrative in January 2012 and updated it in February 2012, which EPA approved. Complaint and Respondent Zdrilich's Answer ¶ 21.

VI. Elements of Liability

The Complaint alleges that beginning on or about November 2, 2006 and including dates in 2008, 2011 and 2012, one or more of the Respondents and/or others 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 into Burgess Run, adjacent unnamed waters, downstream waters of Burgess Run, and wetlands adjacent to and abutting the tributaries and Burgess Run at the Site, without a permit required by Section 404 of the CWA.

To meet its initial burden as to liability on a motion for accelerated decision, Complainant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law with respect to the following elements of liability with respect to each of the Respondents: (1) the Respondent is a "person," (2) who "discharged" a "pollutant," (3) from a "point source," (4) into "waters of the United States," (5) without a permit under Section 404 of the CWA.

VII. Discussion and Conclusions

To date, Respondent has not responded to the Motion. The Rules provide that a response to a motion must be filed within 15 days after service of the motion, and that "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Although Respondent has waived any objection to the Motion, it is appropriate to rule on the Motion upon its merits.

A. Waters of the United States

The Motion states that:

> Complainant specifically limits the liability portion of its Motion for Accelerated Decision to the dredging and filling of Burgess Run, the unnamed tributary and the wetland areas located east of Burgess Run and on Lot 1 of the Polo Development Site ("eastern wetlands").

Mot. at 6. The "eastern wetlands" are the "Filled Wetland Area" delineated on Complainant's Prehearing Exchange Exhibit 67. The western boundary of the Filled Wetland Area abuts Burgess Run, the southern boundary runs parallel to Polo Boulevard just inside the Lot 1 property line, and the northern boundary runs along the northwestern portion of the property line which borders the northern bank of an unnamed tributary to Burgess Run. C PHE Ex. 67; Motion at 6. The eastern boundary appears to run from approximately 30 feet inside the southeast corner of the Lot 1 property line to more than 120 feet inside the northeast corner of the property line. C PHE Ex. 67.

Complainant asserts that Burgess Run, the unnamed tributary and the "Filled Wetland Area" are "waters of the United States" and thus within the jurisdiction of the CWA.

1. Burgess Run and the Unnamed Tributary

In support of the argument that Burgess Run and the unnamed tributary on the Site are "waters of the United States," Complainant presents a Declaration of Melanie Burdick ("Burdick Decl.") and exhibits attached thereto. Ms. Burdick states that she has taken numerous courses related to CWA jurisdictional determinations, wetland delineations and stream assessments, and has participated in numerous delineations of wetland areas and jurisdictional determinations. Burdick Decl. ¶ 1. She asserts that water flows from the unnamed tributary on the Site to Burgess Run, which flows into Yellow Creek and then into the Mahoning River near Struthers, Ohio. Mot. at 11, 22; Burdick Decl. ¶¶ 16, 29, 30, 33). Attached to her Declaration is a map she generated which depicts the flow path of water from the Site to the Mahoning River, and which is based elevation and flow line data from the U.S. Geological Survey ("USGS"). Mot. at 23, Burdick Decl. ¶¶ 29, 30, and attached exhibit 7; C PHE Ex. 70. Burgess Run flows northwest from the Site toward the Mahoning River. C PHE Ex. 70.

Ms. Burdick states that the Mahoning River is listed on the USACE's public list of "traditionally navigable waters" ("TNWs") under Section 10 of the 1899 Rivers and Harbors Act and Section 404 of the CWA, that is, "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," as defined in the regulations, 40 C.F.R. § 232.2, 33 C.F.R. § 328.3(a)(1).[2] Burdick Decl. ¶¶ 14, 15 (citing http://www.lrp.usace.army.mil/Missions/Regulatory.aspx; see also C PHE Ex. 5. She asserts that the Mahoning River is approximately 4.25 linear miles and 8.5 riparian miles from the Site. Burdick Decl. ¶ 15.

USGS topographic map data depicts Burgess Run as a perennial stream, in that water flows in it throughout the year, and depicts the unnamed tributary as an intermittent stream, defined as containing water at least three months per year, and that both streams have watersheds which are mapped as shown on the USGS website. Mot. at 23; Burdick Decl. ¶¶ 31, 32 and attached exhibit 19; C PHE Ex. 78. Ms. Burdick reviewed aerial photographs including those taken in March 2004, April 2006, Fall 2009, March 2012 and April 2013, showing the presence of water in Burgess Run and in the unnamed tributary. Mot. at 23; Burdick Decl. ¶ 28; C PHE Exs. 64-69.

Ms. Burdick states that she took photographs at the Site on April 15, 2010 and April 18, 2011, and observed that Burgess Run varied in width from 20 to 75 feet across and the unnamed tributary was approximately six feet wide, with water flowing in both, and that flow was evident by their "shorelines with a well-defined bed and bank" with ordinary high-water marks observed by "changes in the character of soil, matted down vegetation, sediment deposition, and water staining, debris, or scouring." Burdick Decl. ¶¶ 13, 17-22, 25, 26; C PHE Exs. 29 (photos 2, 4,

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2 Both the U.S. Environmental Protection Agency and the U.S Army Corps of Engineers have authority to promulgate regulations under the Act. 33 U.S.C. §§ 1344(b), 1361(a).

7, 8, 18), 35 (photos 8, 21), 76, 77. She states that the unnamed tributary flows from east to west into Burgess Run, and that Burgess Run flows downstream from Polo Boulevard to the unnamed tributary. Burdick Decl. ¶¶ 16, 22.

Based on her observations, Ms. Burdick concluded that both Burgess Run and the unnamed tributary are tributaries of a TNW, the Mahoning River. Burdick Decl. ¶ 33. She referred to an EPA and USACE guidance document entitled "*2008 Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States*" ("Rapanos Guidance"), which "indicates that Clean Water Act jurisdiction extends to non-navigable relatively permanent tributaries (RPWs) of traditionally navigable waters where there is flow . . . at least seasonally (eg., typically three months)." Burdick Decl. ¶ 11. She also determined that Burgess Run and the unnamed tributary are "relatively permanent waters" ("RPWs") of the United States, flowing to the Mahoning River. Burdick Decl. ¶ 33.

Complainant also supports its position that these water bodies are "waters of the United States" with a Declaration of Edward Wilk ("Wilk Decl.") of the Ohio Environmental Protection Agency (OEPA), who states that he observed water flowing in Burgess Run on site visits in November 2006, January 2009, May 2009. April 2010 and April 2012, and that he has seen the unnamed tributary with "at most twelve inches of water flowing toward Burgess Run." Mot. at 23, Wilk Decl. ¶¶ 3, 7.

The applicable regulations define "waters of the United States" as including "[a]ll other waters such as intrastate . . . streams (including intermittent streams) . . . the use, degradation or destruction of which would or could affect interstate or foreign commerce," and tributaries of such waters. 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a). The Supreme Court addressed CWA jurisdiction over intermittent streams in *Rapanos.* The plurality opinion in *Rapanos* held that the CWA confers jurisdiction over "relatively permanent waters" ("RPWs"), noting that jurisdiction would not exclude "seasonal rivers" and streams in which there is an "ordinary presence of water" or "which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 733, 734 and n. 5.

Complainant has supported its Motion with evidence, including photographs, and sworn statements, including detailed descriptions, of Ms. Burdick and Mr. Wilk, sufficient to establish that Burgess Run and the unnamed tributary are RPWs and are tributaries to a TNW, the Mahoning River. As such, they constitute "waters of the United States" within the meaning of 40 C.F.R. § 232.2. Respondents have not presented any argument, sworn statement, or proposed evidence to refute the Complainant's evidence. Thus, there is no genuine issue of material fact that Burgess Run and the unnamed tributary are jurisdictional "waters of the United States" under the CWA.

2. Eastern Wetlands

Complainant points out that EPA and the USACE identify an undisturbed area as a wetland if it contains hydric soils, hydrophytic vegetation, and sufficient hydrology. Mot. at 24; Burdick Decl. ¶ 35. Complainant and Ms. Burdick agree with Respondents' contractors Environmental Services & Consultants, Inc. ("ESC") and Allen Surveying ("Allen") that an area

they identify as "Area 1" is a wetland. Mot. at 24; Burdick Decl. ¶¶ 40 and 41. The western boundary of Area 1 is formed by Burgess Run, the southern border is Polo Boulevard, and the unnamed tributary is its northern boundary. *Id.*; C PHE Ex. 1, 24; R PHE Exs. B, E; Burdick Decl. ¶ 36. The eastern boundary of Area 1 is not delineated by landmarks. Mot. at 24.

During the April 18, 2011 Site inspection, five test pits were dug on and near the Site and Ms. Burdick conducted a formal wetland delineation, filling out Wetland Determination Data Forms, based on the *Corps of Engineers Wetlands Delineation Manual*, January 1987, and the January 2012 Regional Supplement thereto. Mot. at 25; Burdick Decl. ¶¶ 34, 43, 47; C PHE Ex. 35. Ms. Burdick points out that Allen marked on a map the wetland area to include the area between where the unnamed tributary was located before it was filled and disturbed in November 2006, and where it was located afterwards, where a new channel had been dug, approximately 50 feet north from its prior location. Burdick Decl. ¶¶ 7, 8, 41, 42, 44; C PHE Exs. 1, 3, 24, 67; R PHE Exs. E, G. She found from her inspection, and information of soils dug from Test Pit 1, which was in the area around the location of the unnamed tributary before it was filled, that this area had wetland characteristics of hydric soils, hydrophytic vegetation and wetland hydrology. Burdick Decl. ¶ 43; C PHE Exs. 35, 67.

Test Pit 2 was located outside the Site's northern property line upstream of the area where the unnamed tributary was filled and moved, and Test Pit 3 was located just inside the eastern boundary of the Site. C PHE Ex. 67; Burdick Del. ¶ 51. Photographs of soils from Test Pits 2 and 3 showed soil colors indicating they are depleted of oxygen and are thus wetland soils. Burdick Decl. ¶ 52; C PHE Exs. 35-5, 35-15. She photographed an area of standing water on east side of the Site indicating wetland hydrology. *Id.* ¶ 54; C PHE Ex. 29-10. Information from Test Pits 2, 3, and 4 confirmed to Ms. Burdick that the wetland areas extended beyond that shown in ESC's indication of the eastern boundary of Area 1, and included areas where she observed fill material. *Id.* ¶ 47; C PHE Ex. 35.

Test Pit 5 was located in the south central area of the Site in the area where Ms. Burdick found over 18 inches of non-native soils and vegetation. C PHE Ex. 67; Burdick Decl. ¶¶ 48, 53. Test Pit 4 was located near the central eastern boundary of the fill area. C PHE Ex. 67. Because of the fill, evidence of wetland hydrology was not visually evident from Test Pit 5, so she reviewed Test Pit 4 as a reference location, and reviewed aerial photos, county elevation data and other information and determined that the area around Test Pit 5 had been a wetland area before it was filled. *Id.* ¶ 48.

Complainant asserts that the wetland area on the Site is immediately abutting and therefore adjacent to RPWs, namely Burgess Run and the unnamed tributary, which are tributaries to a TNW, the Mahoning River, and are therefore is jurisdictional wetland under the CWA. Mot. at 24. Complainant relies upon Justice Scalia's plurality opinion in *Rapanos*, recognizing as jurisdictional wetlands:

> Only those wetlands with a continuous surface water connection to bodies that are "waters of the United States" in their own right, so there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act.

Mot. at 30 (quoting 547 U.S. 742). Citing to the Rapanos Guidance, Complainant argues that the eastern wetlands satisfy this test, in that an adjacent wetland is one which has a physical connection, a wetland which abuts a RPW tributary of a TNW without being separated by any berms or uplands is "adjacent" and a jurisdictional wetland, and surface water need not be continuously present between the wetland and RPW. Mot. at 30, citing to the Rapanos Guidance at 7. The eastern wetlands have been delineated by Melanie Burdick as abutting both Burgess Run and the unnamed tributary. Mot. at 30, citing C PHE Ex. 67, Burdick Decl. ¶¶ 5, 13, 19-21, 24, 27 and 60. Complainant cites to aerial photographs from the U.S. Geological Survey in its proposed Exhibits 64-69, which display the absence of any berms, barriers or upland areas that would separate the eastern wetlands from Burgess Run and the unnamed tributary. Mot. at 30; C PHE Exs. 64-69; Burdick Decl. ¶ 3. "Consequently, the eastern wetland ... abuts RPWs (Burgess Run and the unnamed tributary) which are tributaries to the TNW (Mahoning River) and is therefore 'adjacent' to them," Complainant concludes, rendering the eastern wetlands jurisdictional "waters of the United States." Mot. at 31.

Complainant has presented Ms. Burdick's sworn statement and cited to particular documents and photographs that it submitted which support its position that the eastern wetlands are "waters of the United States." Included are photographs taken by Ms. Burdick of views of Burgess Run and the unnamed tributary, including their sides and banks. Burdick Decl. ¶¶ 19-22, 27; C PHE Exs. 29-2, 29-4, 29-7, 29-8, 29-18, 35-8, 35-21, 76). While Test Pits 2 and 3 are located beyond the area marked as the Filled Wetland Area or eastern wetlands, information from those test pits shows that the wetlands extended farther east than Area 1 shown on the Allen and ESC maps, and included the fill area on the eastern part of the Site. The documents, maps and photographs show that there is no berm or other clear demarcation between the eastern wetlands and Burgess Run and the unnamed tributary, which are "waters of the United States" as RPWs and tributaries to a TNW. There is no basis for a reasonable factfinder not to accept the facts as presented by Complainant showing that the eastern wetlands are "adjacent to" Burgess Run and the unnamed tributary and thus covered by the CWA.

The next question is whether Respondents have shown that a genuine dispute exists on a fact material to whether the eastern wetlands are subject to jurisdiction under the CWA. Respondents' Prehearing Exchange Exhibits B, E and G show Area 1 as a wetland. Although those exhibits do not indicate that the portion east of Area 1 is a wetland, Respondents' Prehearing Exchange neither expressly asserts that it is not a wetland, nor does it propose to call the authors of those documents to testify about them.

Respondents argue that the wetland on the Site was defined as 0.14 acres, citing to a letter from Albert Rogalla of the USACE. R PHE at 2; R PHE Ex. A. They also assert that Mr. Pozzuto's map shows a half acre of wetlands needing to be restored. R PHE at 3; R PHE Ex. B. They contrast these definitions of the wetlands with the 0.98 acres of wetland alleged by Complainant. R PHE at 2, 4; R PHE Ex. B. Thus, Respondents contest the size or extent of the wetlands on the Site, which may bear on whether fill material was discharged into a wetland area.

In support, they offer their proposed Exhibits A through G, and proposed witnesses Ms. Burdick, Mr. Rogalla to testify as to the wetland being defined as 0.14 acres, Mr. Pozzuto to

testify as to the wetland area to be restored, and Peter Swenson, Chief of the Watersheds and Wetlands Branch of EPA Region 5, to testify regarding his letter.

Respondents' proposed Exhibit A, a letter dated October 7, 1999 from Mr. Rogalla, refers to Nationwide Permits allowing installation of sewer and water lines and a concrete box culvert for a proposed bridge crossing Burgess Run that, according to the letter, "will impact a 0.14 acre wetland in the vicinity." R PHE Ex. A. This statement, taken in light most favorable to the Respondents and making any reasonable inferences in favor of Respondents, does not suggest that there is only one wetland on the Site and that it is 0.14 acres. It only refers to a wetland area that will be impacted by the bridge. No reasonable inference can be drawn that Mr. Rogalla was referring to all wetlands on the entire Site.

Respondents assert that proposed Exhibit B shows "the initially determined wetland" in pink color and shows that the area to be restored is approximately half an acre. R PHE at 3. This exhibit and proposed testimony confirm that there were wetlands on the Site that had been impacted to the extent of requiring restoration, and Exhibit B shows that the wetland area on the Site abuts Burgess Run and the unnamed tributary. Thus it does not raise an issue of material fact as to whether wetlands on the Site were subject to jurisdiction under the CWA. Respondents' proposed Exhibit C is Ms. Burdick's image of the wetland impact areas, which includes the area shown as impacted on Exhibit B, further supporting the conclusion that wetlands on the Site were impacted by Respondents' activities.

Respondents' proposed Exhibit E and G, the Allen survey, show a fill area in the southern area of the Site that appears to be beyond the area marked as wetlands. However, the survey also confirms the existence of a significant area of wetlands on the Site, and that they abut Burgess Run and the unnamed tributary. There is no evidence proposed by Respondents that calls into question Complainant's evidence that the area between the prior location of the unnamed tributary and the post-2006 location of the unnamed tributary was impacted by Respondents' earth-moving activities in 2006. The Allen survey confirms that this area was a wetland abutting the unnamed tributary in its post-2006 location. Therefore, these exhibits do not raise a genuine issue of material fact as to whether wetlands at issue in this case were subject to jurisdiction under the CWA. Moreover, as pointed out by Complainant, Respondents do not propose to offer any testimony of an employee of Allen or ESC regarding the maps in proposed Exhibits B, E or G.

Respondents' proposed Exhibit D, which appears to be an email from Ms. Burdick, refers to a limitation on backfilling not to exceed 12 inches from the curb and not filling any additional wetlands or streams, and does not suggest any limitation on the size of the wetlands on the Site. Mr. Swenson's letter, Respondents' proposed Exhibit F, merely refers to locations beyond the delineation of the eastern wetlands, and as it states, "Fill added within 10 feet from the current curb adjacent to Site 1 north of Polo Boulevard does not require U.S. Environmental Protection Agency approval because it should not fill wetlands or streams on Site 1." R PHE Ex. F; Burdick Decl. ¶ 6; C PE Ex. 71. This letter therefore does not raise any genuine issue of fact material to whether the eastern wetlands were subject to CWA jurisdiction. Respondents' proposed Exhibit H is a plan and profile for construction of the culvert, and does not appear to show wetland areas.

Respondents have not provided sufficient evidence for a reasonable fact finder to rule in their favor. Taking the facts in the light most favorable to the Respondents and making all reasonable inferences in favor of Respondents for purposes of ruling on the Motion, Respondents have not raised a genuine issue of material fact as to whether wetlands on the Site were "waters of the United States." Therefore, it is concluded as a matter of law that the eastern wetlands or "Filled Wetland Area" referenced by Complainant are "waters of the United States" under the CWA.

B. <u>Discharge of a Pollutant from a Point Source</u>

Other elements Complainant must prove are that Respondents "discharged" a "pollutant" from a "point source." 33 U.S.C. § 1311. The Complaint (¶ 5) alleges in pertinent part:

> Beginning on or about November 2, 2006 and on subsequent dates . . . one or more of the Respondents . . . 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.

Respondents in their Answers denied this allegation (with Respondents Polo Development and AIM Georgia asserting they are without sufficient knowledge or information to respond). Answers ¶ 5. Complainant alleges in the Motion that "[r]epeatedly from November of 2006 until at least September 30, 2011, the Respondents purposely and significantly destroyed the eastern wetlands and altered Burgess Run and the unnamed tributary." Mot. at 11. In support, Complainant provides photographs and declarations of Edward Wilk, Sean McGuire, John Woolard, Nancy Mullen and Ms. Burdick. Mot. at 19.

Mr. Wilk, the Ohio Environmental Protection Agency's coordinator for the regulation of discharges of dredge and fill materials, visited the Site in November 2006, January and May 2009, April 2010 and April 2012. Wilk Decl. ¶¶ 1, 3. He took photographs at the Site in November 2006 and January 2009, and marked the locations of the photographs on aerial photographs, all of which are included in Complainant's proposed exhibits. The photographs show dirt, vegetation, tree stumps, and concrete placed in Burgess Run, the unnamed tributary, and the eastern wetlands. *Id.* ¶¶ 9, 10; C PHE Exs. 9, 14, 74, 75. His photographs also show tire tracks, and he states in his Declaration that based on the amount of clearing, damage, and tire tracks, areas around the unnamed tributary and eastern portions of the Site appear to have been cleared and filled with dirt and cut trees by heavy equipment such as a bulldozer. Wilk Decl. ¶¶ 11, 13, 14, 15; C PHE Ex. 9. He states that he observed that the unnamed tributary was filled in with soil, trees and other materials, a new channel was dredged, and dirt and tree roots were moved "up to the shoreline and into Burgess Run." Wilk Decl. ¶¶ 12-16; CX 9. He observed mounds of dirt and concrete slabs placed on the property in January 2009. Wilk Decl. ¶ 18; C PHE Ex. 75.

Sean McGuire, the Urban Conservationist for the Mahoning Soil and Water Conservation

District, states in his Declaration that he conducted monthly inspections of the Site starting in March 2008. McGuire Decl. ¶¶ 1, 7. He states that in August 2008 and subsequent months, he photographed a large pile of gravel and subsoil about 20 to 30 feet north of Polo Boulevard on the eastern portion of the Site. McGuire Decl. ¶ 8; C PHE Exs. 82, 83, 85-88. In December 2008, he observed three more piles of subsoils, sod, gravel and cinder blocks, in the same area. McGuire Decl. ¶ 12; C PHE Ex. 89. In June 2009, he observed that "gravelly subsoil had been spread throughout" the Site, from one to two feet deep, at least 100 feet from the curb of Polo Boulevard into the Site. McGuire Decl. ¶ 16. He observed vehicle tracks all over the subsoil and therefore concluded that it had been placed by mechanized equipment. *Id.* Photographs of his observations of the spread subsoil in July 2009 are included as Complainant's proposed Exhibits 90 and 91. These piles and their spreading were also observed and photographed by John Woolard, Environmental Administrator of the Storm Water Management Program at the Mahoning County Engineer's Office, as stated in his Declaration. Mot. at 20, Woolard Decl. ¶¶ 1, 8-9, C PHE Exs. 18, 79-81.

Ms. Burdick states in her Declaration that she took photographs at the Site on April 10, 2010 and April 18, 2011, showing a filled in portion of the unnamed tributary, the dredged channel, and spoil piles along the bank of the channel. Burdick Decl. ¶¶ 17, 18, 22, 24, 27, 38 and 42; C PHE Exs. 29-4, 29-8, 35-21, 76, 77. During these site visits, she observed 12 to 18 inches of non-native soils had been placed in the eastern wetlands, that the unnamed tributary had been dredged with evidence of spoil piles of dirt along its bank; that there was dirt and cut vegetation that had been moved into Burgess Run and the unnamed tributary; and that there was evidence in the eastern wetlands of moved dirt, cut vegetation, cut tree stumps, construction debris and non-native soils that had been moved around and added to the eastern wetlands. Mot. at 20, citing Burdick Decl. ¶¶ 40, 45, 46, 48, 53, 56; C PHE Exs. 29, 35, 67, 76, 77. She reviewed an aerial photograph from 2009 and Lidar Topographic maps from 2004 and 2008 and observed that the 2008 elevation is "significantly different from the 2004 elevation in many parts of the site" which "indicates that the land was disturbed either by removing, adding or grading the site." Burdick Decl. ¶¶ 9, 10; C PHE Exs. 66, 71, 72. Based on her observations and review of information, Ms. Burdick determined that the eastern wetlands had been filled with materials such as dirt, tree stumps, cut vegetation, construction debris and concrete, and that dirt, tree stumps and cut vegetation were placed into the waters of Burgess Run and the unnamed tributary. Burdick Decl. ¶¶ 56-60; C PHE Exs. 29-5, 29-6, 29-9, 29-10. She states that, given the amount of dredging, heavy equipment such as a backhoe was used to dredge the wetlands and create the channel, and given the area and amount of activity, the clearing and filling activities were done by heavy equipment such as backhoes and dump trucks. Burdick Decl. ¶¶ 24, 56. Nancy Mullen of the USACE visited the Site on September 30, 2011, and took photographs of the addition of dirt and asphalt in the eastern wetlands, according to her Declaration. Mot. at 20, Mullen Decl. ¶¶ 6, 16, C PHE Exs. 37, 73

The materials observed by the declarants to have been filled in the eastern wetlands, Burgess Run and the unnamed tributary are "pollutants," which include "dredged spoil, solid waste, . . . biological materials, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The heavy equipment, such as backhoes, dump trucks and bulldozers, used for land-clearing and moving these materials, are within the definition of "rolling stock" and thus constitute a "point source." 33 U.S.C. S

1362(14); *Avoyelles Sportsman's League*, 715 F.2d at 922. As concluded above, the eastern wetlands, Burgess Run and the unnamed tributary are "waters of the United States," and therefore are "navigable waters" under the CWA. 33 U.S.C. § 1362(7). Therefore, Complainant has demonstrated that the placement of the materials into the eastern wetlands, Burgess Run and the unnamed tributary from the heavy equipment constitutes "addition of any pollutant to navigable waters from any point source" and is thus a "discharge of a pollutant" within the meaning of the CWA. 33 U.S.C. § 1362(12), (16).

While Respondent Zdrilich denies the allegations as to a discharge of pollutants, Respondents' Prehearing Exchange provides no evidence that addresses the issue.

C. **Permit Authorization**

1. Arguments and Supporting Documents

Complainant alleges that Respondents did not have a dredge and fill permit issued by the Army Corps of Engineers, as required by Section 404(a) of the Act for any discharge of dredge and fill material into waters of the United States. 33 U.S.C. § 1344(a). Respondents deny they lacked a legally mandated permit. Answers ¶ 6. Respondents state that their activity was "previously permitted and allowed under the permit limit as shown in Exhibit 'A.'" R PHE at 2. Exhibit A is a letter dated October 7, 1999, from Albert H. Rogalla, Chief of the Regulatory Branch, U.S. Army Corps of Engineers, which "refer[s] to Nationwide Permits issued to [Respondents] by this office on August 18, 1999." R PHE Ex. A. Respondents' Prehearing Exchange identifies Mr. Rogalla as a potential witness. R PHE ¶ 1.

Complainant presents the letter dated August 18, 1999 from Mr. Rogalla, which refers to the proposed installation of sewer and water lines and a 5' x 18' concrete box culvert for a bridge crossing Burgess Run, and states, "this project is authorized by Nationwide Permits Nos. 12 and 14, previously issued by the Corps of Engineers . . . ." C PHE Ex. 3. The letter encloses "a list of conditions which must be followed for the Nationwide Permits to be valid" and states that verification of the Nationwide Permits is valid until August 18, 2001. *Id.* At the top of the letter appears the number 199901234, and Complainant refers to the authorization as Permit 199901234.

Complainant argues that Respondents' activities at issue in this case occurred after the expiration date and were outside the scope of Permit 199901234, in that they exceed the authorized scope of construction activities and geographic location. Mot. at 31, 33-34. Complainant points out that the permit authorization was limited to installation of "a 5 foot x 18 foot wide box culvert to replace the existing pipe and the installation of a sanitary sewer and water main to be installed 4 feet below the creek bed," and that the project was located at and near the bridge crossing Burgess Run at Polo Boulevard," and that it did not authorize the dredging, filling or channelizing of the unnamed tributary, the placement of pollutants into Burgess Run, or filling the eastern wetlands. Mot. at 33-34, citing C PHE Ex. 1, Map 1; and R PHE Ex. H; Burdick Decl. ¶ 61. The eastern wetlands at issue in this case do not include the subject area of Permit 199901234. Ms. Burdick states that in mapping the boundaries of alleged

illegal fill areas in the eastern wetlands, she "excluded ... the portion of the site that was previously filled as part of the installation of the box culvert, sewer and sewer line covered by Nationwide Permits #12 and #14." Burdick Decl. ¶ 6; Mot. at 34.

Complainant asserts that Respondents completed the specific project work that was actually authorized by Permit 199901234 "well before 2006." Mot. at 33. In support, Complainant presents a Declaration of Sarah Gartland, who explains that the county regulations require plats of survey to be filed for approval by the Mahoning County Planning Commission and require all improvements such as roads, sewers and utilities related to a subdivision to be completed prior to the filing of a plat of survey. Gartland Decl. ¶¶ 15, 16. As Respondents filed relevant plats with the Mahoning County Planning Commission in 2001 and 2004, Ms. Gartland concludes that the road improvements and sewer lines covered by the USACE nationwide permits were installed before November of 2006. *Id.* ¶¶ 15, 17; C PHE Ex. 6.

To the extent Respondents assert that there are any other authorizations or approvals for the filling activities, Complainant addresses Respondents' Prehearing Exchange Exhibits D and F, which are correspondence of Respondents' proposed witnesses Ms. Burdick and Peter Swenson, Chief of the Watershed and Wetlands Branch in EPA's Region 5 Office. C PHE Ex. 92. Complainant points out that "[a]s a legal matter only USACE can issue permits for dredging or filling of 'waters of the United States.'" Mot. at 34. Complainant states that the communications from both Ms. Burdick and Mr. Swenson responded to a request to fill an area that is limited to 10 feet north of Polo Boulevard, which "would not fill wetlands or streams" on the property, and therefore did not require a permit. Mot. at 34-35, quoting Swenson Letter, R PHE Ex. F, C PHE Ex. 92. Thus, Respondents' proposed exhibits and witness testimony are irrelevant here, Complainant argues. Mot. at 35. Furthermore, Complainant avers, the alleged violations occurred prior to the date of these communications, which "are not retroactive in application." Mot. at 35.

Respondents propose to have Mr. Rogalla testify that "after the disturbance permit was issued, none of the regulatory agencies, including Ohio EPA and federal EPA . . . . raise[d] any objection at the time." R PHE p. 2. Complainant argues that this contention ignores an extensive record of meetings and letters where various agencies, including EPA and USACE, informed Respondents of their non-compliance and "clearly indicate[d] that Permit No. 199901234 did not cover those activities." Mot. at 35. According to Complainant, "State, local and federal officials have consistently over time told Respondents that they were not authorized to place fill material in either Burgess Run, the unnamed tributary or the wetland portion of Lot 1." *Id.* citing C PHE Exs. 7-9, 13, 14, 16-17, 21, 26, 27, 30, 36-38 and 84. Furthermore, Complainant points out, Respondents were aware of development restrictions on Lot 1, because they signed and filed a Plat of Survey which states on Lot 1 "Non-Buildable Lot – FEMA Designated Zone A, 100 YR Flood Plain." Mot. at 35-36, C PHE Ex. 6.

As to Respondents' maps identified in their Prehearing Exchange, Exhibits E and G are duplicates of a flood elevation map for the Site containing the seal of James Allen, Surveyor. R PHE Exs. E and G. Respondents state that Exhibit E is a plat approved by Mahoning County, which "shows that elevation of up to 1 ft is allowed for every 4 ft of distance from the curb. (Ex. 12.5 ft of backfill will allow 3.125 ft of elevation.)" R PHE ¶ 5. Exhibit H is an undated map

entitled "Polo Development, Sanitary Sewer & Waterline - Plan and Profile." R PHE Ex. H. Respondents state that Exhibit H reflects "pre-excavation and post-excavation elevation and show[s] that said work was compliant with the parameters set forth both by the U.S.E.P.A. and the Army Corps of Engineers." R PHE ¶ 8. Complainant points out that Respondents did not identify any witnesses who would testify about these exhibits, and that only the USACE can issue a permit for dredging or filling. Mot. at 36.

2. Discussion and Conclusions

The USACE regulations for individual permits to discharge dredge and fill materials into waters of the United States under Section 404 of the CWA are codified in 33 C.F.R. Part 323. Those regulations provide, in 33 C.F.R. Section 323.3(a), that certain discharges are permitted under the USACE's Nationwide Permit Program regulations, codified in 33 C.F.R. Part 330. C PHE Ex. 98. "Nationwide permits (NWP) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). Nationwide Permit No. 12 involves discharges related to utility lines and Nationwide Permit No. 14 involves discharges related to road crossings. Mullen Decl. ¶ 8, Burdick Decl. ¶ 63. The regulations provide for permittees to obtain from the Corps verification that their activities are covered by a Nationwide Permit. 33 C.F.R. § 330.6. To be authorized under a Nationwide Permit, the activities and permittee must satisfy all the terms and conditions of the Nationwide Permit as well as any additional terms and conditions imposed by the Corps District Engineer who issues the verification. 33 C.F.R. §§ 330.1(c), 330.2(c), 330.4(a), 330.6(a)(3)(i). The regulations also provide that the USACE's response shall state that the verification of coverage by a Nationwide Permit is valid for a specific period of time, generally no more than two years. 33 C.F.R. § 330.6(a)(3)(ii). Consistent with the latter regulatory dictate, as Complainant has asserted, the August 18, 1999 verification letter clearly stated that it was only "valid until August 18, 2001." C PHE Ex. 3.

The documents presented in the parties' prehearing exchanges establish that the USACE authorized only the proposed project of installation of water and sewer lines and the concrete box culvert for the bridge crossing Burgess Run. C PHE Exs. 1, 3; R PHE Exs. A, H. Mr. Rogalla's letter dated August 18, 1999 refers to a letter dated July 12, 1999 from ESC, which encloses ESC's Wetland Evaluation Report, which states that the "maximum wetland area that could be affected by bridge construction is estimated at about 6,000 square feet (0.14 acre)," yet it acknowledges that other wetland areas existed on the Site. C PHE Exs. 1, 3. Mr. Rogalla's letter also reflects that "the proposed bridge will impact a 0.14 wetland area . . . ." R PHE Ex. A. However, enclosed with Mr. Rogalla's letter is a list of conditions for the Nationwide Permits to be valid, which allows "Discharges of dredged or fill material associated with excavation, backfill or bedding for utility lines," defined as including any pipe or pipeline for the transportation of any liquid substance but not drainage of a water of the United States. C PHE Ex. 3. The conditions also state, in pertinent part:

> This [nationwide permit] authorizes mechanized landclearing necessary for the installation of utility lines . . . provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained. . . . . Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United

> States . . . . The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. . . . Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line. (See 33 CFR Part 322).

C PHE Ex. 3.

Respondent has not presented any evidence that the discharges into Burgess Run, the unnamed tributary and the eastern wetlands met these conditions. Maps in the prehearing exchanges show the proposed project located around the bridge and within the ten foot utility easement along Polo Boulevard, which is not included within the eastern wetlands area. C PHE Ex. 1, 67; R PHE Ex. H; Burdick Decl. ¶ 4. Complainant has presented numerous sworn statements, documentation and photographs which show that preconstruction contours were not maintained in the eastern wetland, that dredge and fill material was discharged and remained in the eastern wetland for much longer than three months, and that the unnamed tributary was filled, disturbed and moved in the far northern area of the Site, far away from the water and sewer lines. Burdick Decl. ¶¶ 9, 10, 16, 22, 27, 40- 42, 46, 48, 56-59; Mullen Decl. ¶ 16; McGuire Decl. ¶¶ 8-18; Wilk Decl. ¶¶6, 10, 12-22; Woolard Decl. ¶¶ 8, 9, 12, 13; C PHE Exs. 9, 14, 18, 20, 29-4, 29-5, 29-8, 35-21, 37, 64, 66-69, 71-76, 79, 80, 86-91. Thus, no reasonable inference can be drawn that the USACE authorized the Respondents' discharges into Burgess Run, the unnamed tributary or the eastern wetland area as referenced in the Complaint. Furthermore, Ms. Mullen of the USACE states in her Declaration that the verification for the project expired on August 18, 2001, and that as of the date of her Declaration, Respondents had not applied to USACE for any other permits. Mullen Decl. ¶¶ 9, 10. As demonstrated by Complainant, the road improvements and sewer lines covered by the USACE nationwide permits were completed before the discharges at issue in the Complaint began. Gartland Decl. ¶¶ 15, 17; McGuire Decl. ¶ 8; Wilk Decl. ¶¶ 9-22. Respondents have not pointed to any evidence in the case file, nor has any such evidence been otherwise found, linking the discharges at issue in the Complaint with activities required for the concrete box culvert or water and sewer lines. In sum, Complainant has cited to specific evidence demonstrating that the discharges referenced in the Complaint were not authorized by the USACE under Nationwide Permits issued on August 18, 1999, and Respondents have not raised any genuine issue of material fact as to whether the discharges were authorized under a permit.

The communications of Ms. Burdick and Mr. Swenson presented by Respondent also do not raise any genuine issue of fact material to whether the discharges were authorized under a permit. They refer to filling an area within 10 feet north the curb of Polo Boulevard, which is not part of the eastern wetlands at issue in the Complaint. C PHE Ex. 64; R PHE Ex. F. Secondly, only the USACE, not EPA, is authorized to issue CWA Section 404 dredge and fill permits. 33 U.S.C. § 1344; *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 557 U.S. 261 (2009).

Respondents' summary of proposed testimony of Mr. Rogalla that the agencies failed to raise any objection does not raise a genuine issue of material fact. First, an issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries,*

Inc., 512 F.2d at 33-34; *Ricker v. Zinser Corp.*, 506 F. Supp. at 2. Second, Respondents have not established the elements for any argument under the doctrine of equitable estoppel. Third, Complainant has presented documentation of communications that various government representatives had with Mr. Zdrilich, putting him on notice that his dredge and fill activities were not authorized by any existing permit. C PHE Ex. 8 (email from Don Garver), C PHE Ex. 7, 11, 13, 14, 36, 37, 38, 84. Mullen Decl. ¶ 13; Woolard Decl. ¶ 11; R PHE ¶ 2.

D. <u>Liable Persons</u>

To conclude that the three Respondents are liable, they must each meet the definition of a "person" under Section 502(5) of the CWA, which provides that "'person' means an individual, corporation, partnership, [or] association . . . ." 33 U.S.C. § 1362(5) is established with respect to Joseph Zdrilich and Polo Development, Inc., by Undisputed Facts 4 and 5 and the statutory and regulatory definitions of "person" which includes "an individual, association, partnership, [and] corporation, . . . or Federal agency, or an agent or employee thereof." 40 C.F.R. § 232.2.

Respondent AIM Georgia, LLC ("AIM") is a limited liability company created and registered in the State of Georgia. C PHE Ex. 15. In its Answer (at ¶ 7), AIM denies that it is a corporation, partnership, association or person within the meaning of the statutory definition at 33 U.S.C. § 1362(5). A limited liability company is not a corporation, but rather is an "unincorporated association." *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 705 (4th Cir. 2010) (to establish diversity jurisdiction within the meaning of 28 U.S.C. § 1332(d)(10)). As such, a limited liability company is a business entity that falls within the meaning of the CWA definition of "person." *U.S. v. Acquest Transit LLC,* 2009 U.S. Dist. LEXIS 60337, at *10 (D.N.Y. 2009) ("no basis on the record here to conclude that Acquest Transit LLC falls outside this definition" of "person" in CWA); *Graham v. Dynacorp. Int'l., Inc., and Dynacorp Int'l., LLC*, 973 F. Supp. 2d 698 (S.D. Tex. 2013) (for purposes of venue under 28 U.S.C. §1391(d), statutory term "corporation" interpreted to also include unincorporated associations such as limited liability companies); *Denver & R. G. W. R. Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 562 (1967) ("most nearly approximates the intent of Congress" to permit suit against unincorporated association "like the analogous corporate entity," for venue under 28 U.S.C. §1391).

Further, to find each Respondent liable, each must have "discharged" a pollutant within the meaning of Section 301(a) of the CWA. Complainant argues that Respondents were responsible for, or had control over, the work which caused the alleged discharges. Mot. at 16. Complainant states that "[t]he liability of all three defendants in this case is based on the actions of Joseph and Donna Zdrilich and their control or responsibility over the property and the dredge and filling activities." Mot. at 16. Complainant asserts that Respondents Polo Development, Inc. (Polo) and AIM were owners of the property during the relevant periods of time and were in control of the property and activities on-site. Respondent Joseph Zdrilich and his wife Donna Zdrilich were the only officers, representatives and/or employees of these two companies and controlled activities on and directed the dredging and filling activities on the Site. Mot. at 7. As proof thereof, Complainant cites to the declarations of Maureen E. O'Neill, Sarah

Gartland, Melanie Burdick, Nancy Mullen, Edward Wilk and Sean McGuire. Maureen O'Neill is employed by EPA as a civil investigator (O'Neil Decl. ¶ 1), and Sarah Gartland has held several positions with the Mahoning County Planning Commission (Gartland Decl. ¶¶ 1-3). According to Complainant, the property at issue was owned by Respondent Polo Development from November 26, 2003 until September 4, 2007, when it was transferred to AIM Georgia, LLC, and then transferred to Donna Zdrilich on October 1, 2014. Mot. at 17, citing O'Neil Decl. ¶ 3. Ms. O'Neill's determinations regarding ownership of the property are based on examination of various relevant property deeds, attached to her declaration as Exhibits 100A – 100E. *Id.*

Complainant asserts that "Joseph Zdrilich directly and through his wife controlled Polo and AIM and activities on Lot 1 related to the dredging and filling violations alleged in the complaint." Mot. at 17. Complainant states that Joseph and Donna Zdrilich "represented to the County and USEPA that they were officers of AIM and/or Polo" and "they signed plats of survey as officers of Polo." *Id.* citing Gartland Decl. ¶¶ 15 and 18, Burdick Decl. ¶ 68, C PHE Ex. 49. Further, Complainant maintains, Mr. Zdrilich was the person who responded to letters and conversations addressed to Polo and AIM regarding permits and compliance from the County, EPA, and the Army Corps of Engineers. Mot. at 17, citing Gartland Decl. ¶¶ 19-27, Burdick Decl. ¶¶ 65-70, Mullen Decl. ¶¶ 11, 13, 14 and 16. Additionally, says Complainant, "Mr. Zdrilich was the only person on-site and would frequently arrive within minutes of the arrival of representatives for the government." Mot. at 17-18, citing Gartland Decl. ¶ 7, Burdick Decl. ¶ 67, Wilk Decl. ¶¶ 19 and 23, McGuire Decl. ¶ 6. Mrs. Burdick states that on her two site visits in April 2010 and 2011, it was Mr. Zdrilich who controlled access to the site. Mot, at 18, citing Burdick Decl. ¶ 66. Mr. McGuire also states that during his many sites visits, Mr. Zdrilich was the person in charge of access and activities concerning Lot 1 and the person with whom Mr. McGuire would always discuss dredge and fill issues. McGuire Decl. ¶ 6.

In their respective Answers to the Complaint, all three Respondents deny the assertion that "[a]t 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." Compl. ¶ 4, Answers ¶ 4. However, Respondents' Prehearing Exchange contains nothing whatsoever to support this denial.

Property owners and corporate land developers may be liable under Section 301(a) of the CWA for a discharge of pollutants based on the acts of their agents or officers. *United States v. Ciampitti* 583 F.Supp. 483 (D.N.J. 1984)(preliminary injunction issued against corporate developer of site and landowner for actions of construction company acting under their direction discharging fill material in jurisdictional wetland); *United States v. Frezzo Brothers, Inc.,* 461 F. Supp. 266 (E.D. Pa. 1976)(family controlled corporation held criminally liable as person who willfully of negligently discharged a pollutant on its property without a permit, based on actions of president and secretary, in violation of Section 301(a) of the CWA).

Respondents have not presented any exhibits or even any proposed witness testimony relevant to Respondents' ownership or control of the property. It is concluded that there are no genuine issues of fact and Complainant has established the liability of each of the Respondents for the discharges into Burgess Run, the unnamed tributary and the eastern wetlands.

E. Respondent's Affirmative Defenses

Complainants request dismissal of Respondents' affirmative defenses stated in their Answers to the Complaint, namely:

1. U.S. EPA has failed to state a claim against Respondent . . . . for which relief can be granted.
2. Initial work performed at the Site was performed after receiving authorization from the U.S. Army Corps of Engineers, Pittsburgh District, pursuant to a nationwide permit.
3. Work performed at the Site in 2008, 2011, and 2012 was performed in good faith to comply with the directives of governmental officials.
4. U.S. EPA's institution of this administrative action and the imposition of a civil penalty are barred by the statute of limitations.
5. U.S. EPA's institution of this administrative action and the imposition of a civil penalty are barred by the equitable principles and doctrines of estoppel, waiver, clean hands, laches, and other equitable considerations.

Answers at 4, ¶¶ 25-29.

The Rules of Practice provide that "[R]espondent has the burdens of presentation and persuasion for any affirmative defenses" and require Respondents to include in their prehearing exchange a narrative summary of expected witness testimony and copies of documents and exhibits they intend to introduce into evidence at the hearing. 40 C.F.R. §§ 22.19(a)(2), 22.24(a). The Prehearing Order issued March 22, 2013, reiterates these requirements and explicitly requires Respondents to include in their prehearing exchange, with respect to each affirmative defense, "a narrative statement explaining in detail the legal and/or factual bases for such affirmative defense, and a copy of any documents in support." Prehearing Order at 3. Respondents failed to do so. Thus, the Order Denying Complainant's Motion for Default in this proceeding, issued August 6, 2014, expressly noted that Respondents appeared to be abandoning these defenses. Order at 6. Yet Respondents still filed no motion to supplement their Prehearing Exchange nor any response to Complainant's Motion for Accelerated Decision. Respondents therefore have abandoned their affirmative defenses. *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1352 (Fed. Cir. 1999) ("an affirmative defense must be raised in response to a summary judgment motion, or it is waived").

As asserted by Complainant in its Motion, even if the defenses were not deemed abandoned, Respondent's affirmative defenses fail for other reasons. Respondents' first affirmative defense that the Complaint fails to state a claim upon which relief can be granted, is rejected on the basis that Complainant's prima facie case has been found factually and legally sufficient, as discussed above. Respondents' second affirmative defense, that their initial work at the site was authorized by USACE pursuant to a nationwide permit, also has been resolved as discussed above. Respondents' third affirmative defense, that work in 2008, 2011 and 2012 was performed in good faith to comply with directives of governmental officials, is rejected for two reasons. First, Respondents have not explained the legal basis nor provided factual evidence to support this allegation. Second, the CWA is a strict liability statute, so "a defendant's intention to comply or good faith attempt to do so does not excuse a violation." *Connecticut Fund for*

Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987); *see also, Sultan Chemists, Inc.*, 9 E.A.D. 323, 349 (EAB 2000). "Considerations such as a defendant's good faith efforts to comply are therefore only relevant in considering what penalty must be imposed after liability has been established . . ." *United States v. Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. 1414, 1419 (D.N.D. 1996); *Sultan Chemists, Inc.*, 9 E.A.D. at 349 (Respondent's "alleged good faith is relevant for purposes of penalty mitigation only"). As to Respondents' fourth and fifth affirmative defenses -- which include a typical litany of boilerplate defenses such as statute of limitations, estoppel, waiver, clean hands, laches, "and other equitable considerations" – Complainant has pointed out the absence of facts in the record to support the affirmative defenses, and Respondents have provided no clear legal explanation nor factual support for these alleged defenses in any document filed in this proceeding.

It is concluded that Complainant has met the standards for accelerated decision with respect to liability and Respondents have failed to carry their burden with respect to the affirmative defenses asserted in their Answers to the Complaint. Therefore Complainant is entitled to judgment as a matter of law as requested in the Motion, with respect to Respondents' liability for the dredging and filling of Burgess Run, the unnamed tributary and the eastern wetlands.

F. Ability to Pay

Complainant requests accelerated decision on Respondents' ability to pay the penalty and moves to dismiss Respondents' alleged defense of inability to pay the penalty. Mot. at 38. The penalty amount proposed by Complainant in this case is $30,500. *Id.*, Compl. at 5. Complainant asserts there is no genuine issue as to Respondents' ability to pay, because Respondents have failed to provide any factual support, despite being required to do so by the Prehearing Order, and have thus abandoned this defense. Mot. at 38.

Complainant asserts it has met its burden of proof on this issue under Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and the Environmental Appeals Board opinion in *New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994). Mot. at 38-39. Complainant points to the proposed testimony of Ms. O'Neill and the extensive supporting documentation in the Prehearing Exchange, filed May 10, 2013. Mot. at 39, C PHE at 6-18; C PHE Ex. 59. Complainant states that Ms. O'Neill conducted an extensive examination of property records, court filings, and corporate information related to Respondents. Mot. at 39. Based on Respondent Zdrilich's ownership of 14 properties, minus the value of recorded mortgages and potential judgments against Respondents, Ms. O'Neill estimated Respondents' net worth to be $1,782,185. *Id.,* C PHE p. 8. She also considered the addition of an undetermined amount received as rent of commercial properties and $267,000 from recent property sales. *Id.*

The Motion also provided an updated financial analysis conducted by Mrs. O'Neill covering the period from May 2013 to October 2014. Mot. at 40, O'Neill Decl. Considering Respondents' various properties, sales revenues, and potential liabilities, Mrs. O'Neill estimated that Respondents still owned or controlled property with assessed values of $1,169,857. Mot. at 40. This amount does not include an undetermined amount received as rent of commercial

properties and $153,000 from recent property sales. *Id.* Complainant therefore asserts that it has met its prima facie burden under *New Waterbury* of producing evidence that Respondents are able to pay the proposed penalty. Mot. at 40-41.

The Answers of all three Respondents in this matter assert that they have "no ability to pay the proposed civil penalty." Answers ¶ 24.g. The Prehearing Order issued March 22, 2013, required Respondents to include in their Prehearing Exchange the following:

> If Respondent believes that it is unable to pay the proposed penalty or that payment would have an adverse effect on its ability to continue to do business, a brief statement to that effect, and a copy of documents in support, such as tax returns and/or certified copies of financial statements.

Prehearing Order at 3. However, Respondents' Prehearing Exchange contained no such information. The Order Denying Complainant's Motion for Default, issued August 6, 2014, suggested that Respondents appeared to be abandoning this argument. Order at 6. Nevertheless, Respondents have not filed any motion to supplement Respondents' Prehearing Exchange nor any response to Complainant's Motion for Accelerated Decision.

The Act requires EPA, in determining the amount of any penalty, to "take into account," among other factors, Respondents' "ability to pay." 33 U.S.C. § 1319(g)(3). In the case of *New Waterbury, LTD*, 5 E.A.D. 529, 540 (EAB 1994), the Environmental Appeals Board ("EAB") discussed in detail the issue of a respondent's ability to pay the proposed penalty, making several points relevant to the situation presented here. The EAB noted that, under the Rules of Practice at 40 C.F.R. § 22.24(a), EPA has the burden of proof, including both the burden of production (producing evidence) and the ultimate burden of persuasion, on the issue of whether a proposed penalty is "appropriate." 5 E.A.D. at 536-38, 543. EPA need not prove that Respondents can actually pay the penalty. *Id.* at 539-41. Rather, EPA must produce evidence that it "considered" Respondents' ability to pay, and thereafter the burden of presentation transfers to Respondents. *Id.* at 538. Because EPA's "ability to obtain much information about a respondent's ability to pay is likely to be limited when a complaint is filed, . . . a respondent's ability to pay may be *presumed* until it is put at issue by a respondent." *Id.* at 541 (emphasis in original). Additionally, the EAB held that

> where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the pre-hearing process, [EPA] may properly argue and the presiding officer [ALJ] may properly conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty.

Id., at 542 (footnote omitted). Furthermore, the EAB stated that EPA need not introduce specific evidence to prove respondent's ability to pay. Rather EPA must produce some evidence regarding respondent's general financial status from which it can be inferred that the penalty need not be reduced based on respondent's ability to pay it. *Id.* at 541-542.

In the instant case, Complainant has produced substantial information regarding Respondents' general financial status, demonstrating that the penalty need not be reduced based on Respondents' ability to pay it. On the other hand, Respondents have presented nothing to support their alleged inability to pay. It is thus concluded that Respondents have waived or abandoned their assertion of inability to pay the penalty, that there are no genuine issues of material fact on the issue of ability to pay, that Complainant is entitled to judgment as a matter of law that Respondents have the ability to pay the proposed penalty, and that it is therefore appropriate to dismiss the defense of inability to pay.

Consequently, Complainant's Motion to Exclude Testimony and Other Evidence Related to Respondents' Inability to Pay the Proposed Civil Penalty and to Draw an Adverse Inference is moot.

ORDER

1. Complainant's Motion for Accelerated Decision with respect to Respondents' liability for discharges into Burgess Run, the unnamed tributary and the eastern wetlands is **GRANTED**.

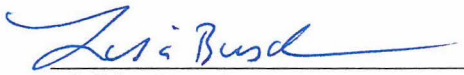
2. Complainant's Motion to Dismiss Respondents' Affirmative Defenses is **GRANTED**.

3. Complainant's Motion for Accelerated Decision on Respondents' Ability To Pay and Complainant's Motion to Dismiss Respondents' Inability To Pay Defense are **GRANTED**.

4. Complainant's Motion to Exclude Testimony and Other Evidence Related to Respondents' Inability to Pay the Proposed Civil Penalty and to Draw an Adverse Inference is **DENIED AS MOOT**.

5. Issues remain controverted as to the appropriate penalty to assess for the violations found herein. Unless the parties achieve a settlement and file a fully executed Consent Agreement and Final Order resolving this matter beforehand, a hearing on the controverted issues in this matter will be commence on **February 24, 2015**.

6. The parties shall continue in good faith to settle this matter. Complainant shall file a Status Report as to the status of any settlement efforts on or before **February 13, 2015**.



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 On Complainant's Motion To Supplement Prehearing Exchange, Motion For Accelerated Decision, And Motion To Strike Respondent's Defenses,** dated February 6, 2015, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale

Maria Whiting-Beale
Staff Assistant

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Dated: February 6, 2015
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