

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)	
)	CWA-05-2022-0001
Union Square Investments, Ltd.,)	Proceeding to Assess a Class II Civil
DeHoff Development Company,)	Penalty Proceeding to Assess a Class II
Mark Frank, and Daniel DeHoff,)	Civil Penalty under Section 309(g)
North Canton, Ohio,)	of the Clean Water Act,
)	33 U.S.C. § 1319(g)
Respondents.)	

Consent Agreement and Final Order
Preliminary Statement

1. This is an administrative action commenced and concluded under section 309(g) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319(g), and sections 22.13(b) and 22.18(b)(2)-(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2)-(3).

2. The Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, EPA Region 5, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondents are Union Square Investments, Ltd., an Ohio limited liability company, located in North Canton, Ohio, DeHoff Development Company, a corporation located in North Canton, Ohio, Daniel DeHoff, an individual, and Mark Frank, an individual (collectively “Respondents”).

4. According to 40 C.F.R. § 22.13(b), where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondents consent to the terms of this CAFO, including the assessment of the civil penalty specified below.

Jurisdiction and Waiver of Right to Hearing

7. Respondents admit the jurisdictional allegations in this CAFO and neither admit nor deny the factual allegations in this CAFO. Respondents also consent to the issuance of this CAFO without further adjudication.

8. Respondents waive their right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and their right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit for the discharge of dredged or fill material into navigable waters pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

10. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (Corps), to issue permits for the discharge of dredged or fill material into navigable waters.

11. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant,” as, *inter alia*, “any addition of any pollutant to navigable waters from any point source”.

12. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant,” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical

wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.”

13. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”

14. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

15. Section 502(5) of the CWA, 33 U.S.C. § 1362(5) defines a “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”

16. Federal regulations at 40 C.F.R. § 120.2, define the term “waters of the United States,” to include rivers, streams and “wetlands.”

17. Federal regulations at 40 C.F.R. § 232.2 define “wetlands” 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.”

18. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator to assess a Class II civil penalty under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B). EPA may conduct such enforcement consistent with the January 1989

Memorandum between the Department of the Army and the Environmental Protection Agency, Federal Enforcement for the Section 404 Program of the Clean Water Act.

Factual Allegations and Alleged Violations

19. At all times relevant to this Order, Respondents owned or operated 148 acres (approximately), identified by the county as parcel 2815701 and located at east of Massillon Road and west of Interstate 77 South, Green, Summit County, Ohio (“site”). Portions of the site were devoted to row-crop agriculture.

20. Union Square Investments, Ltd., an Ohio limited liability company, located in North Canton, Ohio, is the owner of the site.

21. DeHoff Development Company, a corporation located in North Canton, Ohio, is an operator of the site. DeHoff Development Company is a development company engaged by Union Square Investments, Ltd. to prepare the site for commercial or retail development.

22. Daniel DeHoff, President of DeHoff Development Company, directed the dredging and fill activities alleged in this CAFO and is an operator of the site.

23. Mark Frank conducted some of the dredging and fill activities alleged in this CAFO and is an operator of the site.

24. Respondents are each “persons” under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

25. The site is comprised of 148-acres of rolling hills with crop field, interspersed with shrubs, trees and an herbaceous layer located in areas that are not in crop or cut field. The site borders include residential properties and open land to the south and north and a hospital and commercial properties to the west and Interstate 77 to the east.

26. The site includes 6,993 linear feet of streams and 15.72 acres of wetlands.

27. The wetlands and streams at the site described above are 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. Consequently, they are “wetlands” as that term is described in 40 C.F.R. § 232.2.

28. The wetlands and streams described in the preceding paragraphs are “navigable waters” as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7), and “waters of the United States” as defined at 40 C.F.R. § 232.2.

29. In October 2017, Respondents used bulldozers, excavators, backhoes, and other equipment on the site to fill wetlands and stream beds to prepare the site for additional production of agricultural products.

30. In August 2019, and for approximately 14 days, Respondents again employed bulldozers, excavators, backhoes, and other equipment to install drain tile to further adapt the site for agricultural production.

31. During the site activities occurring in October 2017 and August 2019, Respondents filled a combined 8.6 acres of wetlands and filled approximately 970 feet of streams.

32. At no time relevant to the discharges in October 2017 and August 2019 did Respondents have or had applied for a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material into the wetlands or streams at the site as described in paragraphs 25 and 26.

33. The materials used by Respondents to fill the 8.6 acres of wetlands and 970 feet of streams in October 2017, and August 2019, were comprised of some combination of rock,

sand, soil, clay or organic debris, and are consequently “pollutants” as that term is defined at section 502(6) of the CWA, 33 U.S.C. § 1362(6).

34. The bulldozers, excavators, backhoes, and other equipment to adapt the site for agricultural use in October 2017, and August 2019, were “point sources” as that term is described at section 502(14) of the CWA, 33 U.S.C. § 1362(14).

35. Consequently, Respondents’ activities in October 2017, and August 2019, constituted the discharge of pollutants from a point source to the waters of the United States without a permit issued under section 404 of the CWA, 33 U.S.C. § 1344.

36. Each instance in which Respondents discharged pollutants or dredged or fill material to navigable waters without a permit authorizing such discharges under section 404 of the CWA, 44 U.S.C. § 1344, is a discrete violation of section 301 of the CWA, 33 U.S.C. § 1311.

37. Each day the discharged material remains in the wetland or stream without a permit authorizing such discharges under section 404 of the CWA, 44 U.S.C. § 1344, constitutes a discrete violation of section 301 of the CWA, 33 U.S.C. § 1311.

Civil Penalty

38. Under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. part 19, the Administrator may assess a Class II civil penalty of up to \$22,320 per day of violation up to a total of \$278,995, for violations of the CWA that occurred after November 2, 2015 and for which penalties are assessed on or after January 13, 2020, or other amounts as penalty levels may be later adjusted at 40 C.F.R. Part 19.

39. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violation alleged, as well as each Respondents’ ability to pay, prior history of such violation, degree of culpability, economic benefit or savings (if any) resulting

from the violations, and such other matters as justice may require, EPA has determined that an appropriate civil penalty to settle this action is \$65,000.

40. Within 30 days after the effective date of this CAFO, Respondents must pay the civil penalty by sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

41. A transmittal letter, stating Respondents' name, complete address, and the case docket number must accompany the payment. Respondents must write the case docket number on the face of the check and send copies of the check and transmittal letter to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (E-19J)
Chicago, Illinois 60604-3590

Greg Carlson (ECW-15J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

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

42. This civil penalty is not deductible for federal tax purposes.

43. If Respondents do not timely pay the civil penalty, Complainant may request the United States Department of Justice bring a civil action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States'

enforcement expenses for the collection action. Respondents acknowledge that the validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

44. Respondents must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established pursuant to 26 U.S.C. § 6621(a)(2); 31 U.S.C. § 3717. In addition to the assessed penalty and interest, Respondents must pay the United States' attorneys fees and costs for collection proceedings related to nonpayment, and Respondents must pay a nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 20 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. *See* 33 U.S.C. § 1319(g)(9).

General Provisions

45. The parties consent to service of this CAFO by email at the following valid email addresses: guenther.robert@epa.gov (for Complainant) and fmerrill@bricker.com (for Respondents).

46. Full payment of the penalty as described in paragraphs 40 and 41 and full compliance with this CAFO shall not in any case affect the right of the EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any future or subsequent violations of law related to the site described in paragraphs 25 and 26.

47. As provided under 40 C.F.R. § 22.18(c), full payment of the penalty as described in paragraphs 40 and 41 and full compliance with this CAFO shall only resolve Respondents' liability for federal civil penalties under section 309(g) of the CWA, 33 U.S.C. § 1319(g), for the particular violations alleged in this CAFO.

48. This CAFO does not affect Respondents' responsibility to comply with the CWA and other applicable federal, state, or local laws, regulations, or permits.

49. Respondents certify that they are in the process of complying with sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344, related to the site.

50. This CAFO is a “final order” for purposes of 40 C.F.R. § 22.31 and the EPA’s Clean Water Act section 404 Settlement Penalty Policy (Dec. 2001).

51. The execution of and compliance with the terms of this CAFO satisfies the requirements set forth in 33 C.F.R. 326.3(e)(1) for the completion of initial corrective measures.

52. The terms of this CAFO bind Respondents and their successors and assigns.

53. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to the terms of this CAFO.


54. Each party agrees to bear its own costs and attorneys fees in this action.

55. This CAFO constitutes the entire agreement between the parties.

56. The effective date for this CAFO is the date it is filed with the Regional Hearing Clerk, which is after completion of the notice and comment requirements of sections 309(g)(4)(C) and 309(g)(5) of the CWA, 33 U.S.C. §§ 1319(g)(4)(C), (5) and 40 C.F.R. §§ 22.38, 22.45, and which shall be at least 30 days after the CAFO has been signed by the Regional Judicial Officer or Regional Administrator.

In the Matter of:
Union Square Investments, Ltd.,
DeHoff Development Company, Mark Frank and Daniel DeHoff
Docket No. CWA-05-2022-0001

Union Square Investments, Ltd., Respondent



Robert J. DeHoff
Manager
Union Square Investments, Ltd.

10/27/2021

Date

In the Matter of:
Union Square Investments, Ltd.,
DeHoff Development Company, Mark Frank and Daniel DeHoff
Docket No. CWA-05-2022-0001

DeHoff Development Company, Respondent




Daniel DeHoff
President
DeHoff Development Company



Date

In the Matter of:
Union Square Investments, Ltd.,
DeHoff Development Company, Mark Frank and Daniel DeHoff
Docket No. CWA-05-2022-0001

Daniel DeHoff, Respondent



Daniel DeHoff



Date


In the Matter of:
Union Square Investments, Ltd.,
DeHoff Development Company, Mark Frank and Daniel DeHoff

Docket No. CWA-05-2022-0001

Mark Frank, Respondent



Mark Frank




Date

In the Matter of:
Union Square Investments, Ltd.,
DeHoff Development Company, Mark Frank and Daniel DeHoff
Docket No. CWA-05-2022-0001

United States Environmental Protection Agency, Complainant

Harris,
Michael



Digitally signed by Harris,
Michael
Date: 2021.11.03
11:51:57 -05'00'

Michael D. Harris Date
Division Director
Enforcement and Compliance Assurance Division
U.S. EPA Region 5

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Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

By: _____
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

Date: _____