

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF:

Warmus Builders, Inc.  
Green, Ohio

Respondent.



DOCKET NO. CWA-05-2019-0004

PROCEEDING UNDER  
SECTION 309(g) OF THE  
CLEAN WATER ACT,  
33 U.S.C. § 1319(g).

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 Water Division, U.S. Environmental Protection Agency (EPA), Region 5.
3. Respondent is Warmus Builders, Inc. (Respondent), a corporation in Green, Ohio.
4. 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). *See* 40 C.F.R. § 22.13(b).
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. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

## JURISDICTION AND WAIVER OF RIGHT TO HEARING

6. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.
7. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO including, but not limited to, its right to request a hearing under 40 C.F.R. § 22.15(c) and Sections 309(g)(2)(B) and (4)(C) of the CWA, 33 U.S.C. § 1319(g)(2)(B) and (4)(C); its right to appellate review under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B); its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CAFO; and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

## REGULATORY BASIS

8. 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.
9. 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.
10. Section 502(12) of the CWA defines “discharge of a pollutant,” as, *inter alia*, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).
11. Section 502(6) of the CWA 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.” 33 U.S.C. § 1362(6).

12. Section 502(14) of the CWA 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.” 33 U.S.C. § 1362(14).

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

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

15. The regulation at 40 C.F.R. § 232.2 defines “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.”

16. 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), when the Administrator finds, on the basis of any information available, that a person has violated Section 301 of the CWA, 33 U.S.C. § 1311, which includes discharges not in compliance with a permit under Section 404 of the CWA, 33 U.S.C. § 1344. 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.

## GENERAL FINDINGS

17. Respondent is a corporation with a place of business at 1531 Boettler Road, Suite C, Green, Ohio, 44685, and is therefore a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. From on or about July 2015 to August 2015, Respondent was the developer of the construction project located at the real property located directly south of the intersection of Kenway Boulevard and Boettler Road, in the City of Green, Summit County, Ohio (“the Site”). As part of the project, Respondent constructed a new road on the Site known as Brier Creek Parkway, which is part of the Site.

### **Count 1**

19. From on or about July 2015 to August 2015, Respondent added rock, sand, cellar dirt material into approximately 0.4 acres of wetlands (Wetland A) at the Site.

20. Respondent added the rock, sand, cellar dirt material into Wetland A at the Site using a bulldozer and tractor pulled scrappers.

21. The 0.4 acres of wetlands (Wetland A) at the Site were inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances did support, a prevalence of vegetation typically adapted for life in saturated soil conditions, which meets the definition of “wetlands” as defined at 40 C.F.R. § 232.2 (See Figure 1).

22. The waters of Wetland A were abutting the waters of an unnamed intermittent tributary (Stream 1) (See Figure 1).

23. The waters of Stream 1 flow into second unnamed perennial tributary (Stream 2) (See Figure 1).

24. The waters of Stream 2 flow into the Portage Lakes.
25. The waters of the Portage Lakes are used in interstate and foreign commerce, which meets the definition of “waters of the United States.”
26. Because the waters of Stream 2 flow into the Portage Lakes, Stream 2 is a tributary to the Portage Lakes.
27. Because the waters of Stream 1 flow into Stream 2, which is a tributary to the Portage Lakes, Stream 1 is also a tributary to the Portage Lakes.
28. Because Wetland A was abutting Stream 1, which is a tributary to Stream 2, and both Stream 1 and Stream 2 are tributaries to the Portage Lakes, Wetland A was a tributary to the Portage Lakes.
29. Wetland A, being a tributary to the Portage Lakes, which are used in interstate and foreign commerce, meets the definition of “waters of the United States.”
30. The waters of Wetland A, the waters of Stream 1, and the waters of Stream 2, all being tributaries to the waters of the Portage Lakes, and the Portage Lakes, which are used in interstate and foreign commerce, meet the definition of “navigable waters,” as that term is defined at section 502(7) of the Act, 33 U.S.C. § 1362(7).
31. The rock, sand, cellar dirt material that Respondent added into Wetland A at the Site meet the definition of “pollutant,” as that term is defined in section 502(6) of the Act, 33 U.S.C. § 1362(6).
32. The addition of the rock, sand, cellar dirt material by Respondent into Wetland A at the Site meets the definition of “discharged,” as defined at section 502(12) of the Act, 33 U.S.C. § 1362(12).
33. The bulldozer and tractor pulled scrappers that Respondent used to add the rock, sand,

cellar dirt material into Wetland A at the Site are discrete conveyances and meet the definition of “point source,” as defined at section 502(14) of the Act, 33 U.S. C. § 1362(14).

34. Therefore, Respondent discharged pollutants from a point source into navigable waters at the Site.

35. At no time relevant to this discharge did Respondent have a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material into Wetland A for the discharge described in paragraph 19.

36. Therefore, Respondent discharged pollutants from a point source into navigable waters without a Dredge and Fill Permit, as required by section 404(b) of the Act, 33 U.S.C. § 1344(b).

37. Therefore, Respondent discharged pollutants from a point source into navigable waters in violation of section 301 of the Act, 33 U.S.C. § 1311.

38. Each day the pollutants remain in navigable waters constitutes a continuing violation of the CWA and an additional day of violation of Sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

### **Count 2**

39. From on or about July 2015, to August 2015, Respondent added rock, sand, cellar dirt material into approximately 25 linear feet of waters (0.004 acres) (Stream 2) at the Site.

40. Respondent added the rock, sand, cellar dirt or fill material into Stream 2, a perennial stream, at the Site using a bulldozer and/or rolling stock.

41. The waters of Stream 2 flow into the Portage Lakes.

42. The waters of the Portage Lakes are used in interstate and foreign commerce, and they are within the definition of “waters of the United States.”

43. Because the waters of Stream 2 flow into the Portage Lakes, Stream 2 is a tributary to

the Portage Lakes.

44. The waters of Stream 2, being a tributary to the Portage Lakes, which are used in interstate and foreign commerce, meet the definition of “waters of the United States.”

45. The waters of Stream 2, being a tributary to the Portage Lakes, and the waters of the Portage Lakes, which are used in interstate and foreign commerce, meet the definition of “navigable waters,” as that term is defined at section 502(7) of the Act, 33 U.S.C. § 1362(7).

46. The rock, sand, cellar dirt material that Respondent added into Stream 2 at the Site meet the definition of “pollutants,” as that term is defined at section 502(6) of the Act, 33 U.S.C. § 1362(6).

47. The addition of the rock, sand, cellar dirt material by Respondent into Stream 2 at the Site meets the definition of “discharged,” as that term is defined at section 502(12) of the Act, 33 U.S.C. § 1362(12).

48. The bulldozer and/or rolling stock that Respondent used to add the rock, sand, cellar dirt material into Stream 2 at the Site are discrete conveyances and meet the definition of “point source,” as is defined at section 502(14) of the Act, 33 U.S.C. § 1362(14).

49. Therefore, Respondent discharged pollutants from a point source into navigable waters at the Site.

50. At no time relevant to this discharge did Respondent have a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material into Stream 2 for the discharge described in paragraph 39.

51. Therefore, Respondent discharged pollutants from a point source into navigable waters at the Site without a Dredge and Fill Permit, as required by section 404(b) of the Act, 33 U.S.C. § 1344(b).

52. Therefore, Respondent discharged pollutants from a point source into navigable waters at the Site in violation of section 301 of the Act, 33 U.S.C. § 1311.

53. Each day the pollutants remain in navigable waters constitutes a continuing violation of the CWA and an additional day of violation of Sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

#### CIVIL PENALTY

54. 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 \$16,000 per day of violation up to a total of \$187,500 for violations of section 301 of the CWA that occurred after December 6, 2013 through November 2, 2015.

55. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondent's ability to pay, prior history of such violations, degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, U.S. EPA has determined that an appropriate civil penalty to settle this action is \$1,000.

56. Within 30 days after the effective date of this CAFO, Respondent must pay the \$1,000 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

57. The check must note the case caption and the docket number of this CAFO.

58. A transmittal letter, stating Respondent's names and complete addresses, and the case docket number must accompany the payment. Respondent 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 (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd., E-19J  
Chicago, IL 60604

Andrea Schaller (WN-15J)  
Watersheds and Wetlands Branch  
U.S. EPA, Region 5  
77 West Jackson Blvd., WW-16J  
Chicago, IL 60604

Jacqueline Clark (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd., C-14J  
Chicago, IL 60604

59. This civil penalty is not deductible for federal tax purposes.
60. If Respondent does not timely pay the civil penalty, EPA 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. Respondent acknowledges that the validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.
61. Respondent 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, Respondent must pay the United States attorney's fees and costs for collection proceedings, and Respondent 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

62. Pursuant to 40 C.F.R. § 22.5, the parties consent to service of this CAFO by email at the following email addresses: clark.jacqueline@epa.gov (for Complainant) and kbraig@slk-law.com (for Respondents). *See* 40 C.F.R. §§ 22.5-6.
63. Full payment of the penalty as described in paragraphs 55 and 56 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 violations of law.
64. Full payment of the penalty as described in paragraphs 55 and 56 and full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in this CAFO.
65. This CAFO does not affect Respondent's responsibility to comply with the CWA and other applicable federal, state and local laws and permits.
66. Respondent certifies that it is complying with Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344.
67. 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).
68. The terms of this CAFO bind Respondent and its successors and assigns.
69. 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.
70. Each party agrees to bear its own costs and attorney's fees in this action.
71. This CAFO constitutes the entire agreement between the parties.
72. 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:  
Warmus Builders, Inc.  
Docket No. CWA-05-2019-0004

**Warmus Builders, Inc., Respondent**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**United States Environmental Protection Agency, Complainant**

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Michael D. Harris,  
Acting Division Director  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency  
Region 5  
Chicago, Illinois

Date

In the Matter of:  
Warmus Builders, Inc.  
Docket No. CWA-05-2019-0004

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: \_\_\_\_\_ Date: \_\_\_\_\_  
Ann L. Coyle  
Regional Judicial Officer  
U.S. Environmental Protection Agency  
Region 5

In The Matter Of: Warmus Builders, Inc.,

CERTIFICATE OF SERVICE

I certify that today I filed with the Regional Hearing Clerk, Region 5, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (Mail Code (C-19J)), Chicago, Illinois, 60604-3590, the original and one copy of this Clean Water Act Section 309(g) Consent and Final Order and served the following parties in the following manners at the following addresses a true and correct copy.

Warmus Builders, Inc.  
1531 Boettler Road, Suite C  
Green, Ohio, 44685

Copy by U.S. Certified Mail  
Return Receipt Requested No.

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Kevin Braig  
Counsel to Respondents

Copy by Electronic Mail to  
kbraig@slk-law.com

Jacqueline Clark  
Counsel to Complainant

Copy by Electronic Mail to  
clark.jacqueline@epa.gov

Ann Coyle  
Regional Judicial Officer

Copy by Electronic Mail to  
coyle.ann@epa.gov

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LaDawn Whitehead  
Regional Hearing Clerk

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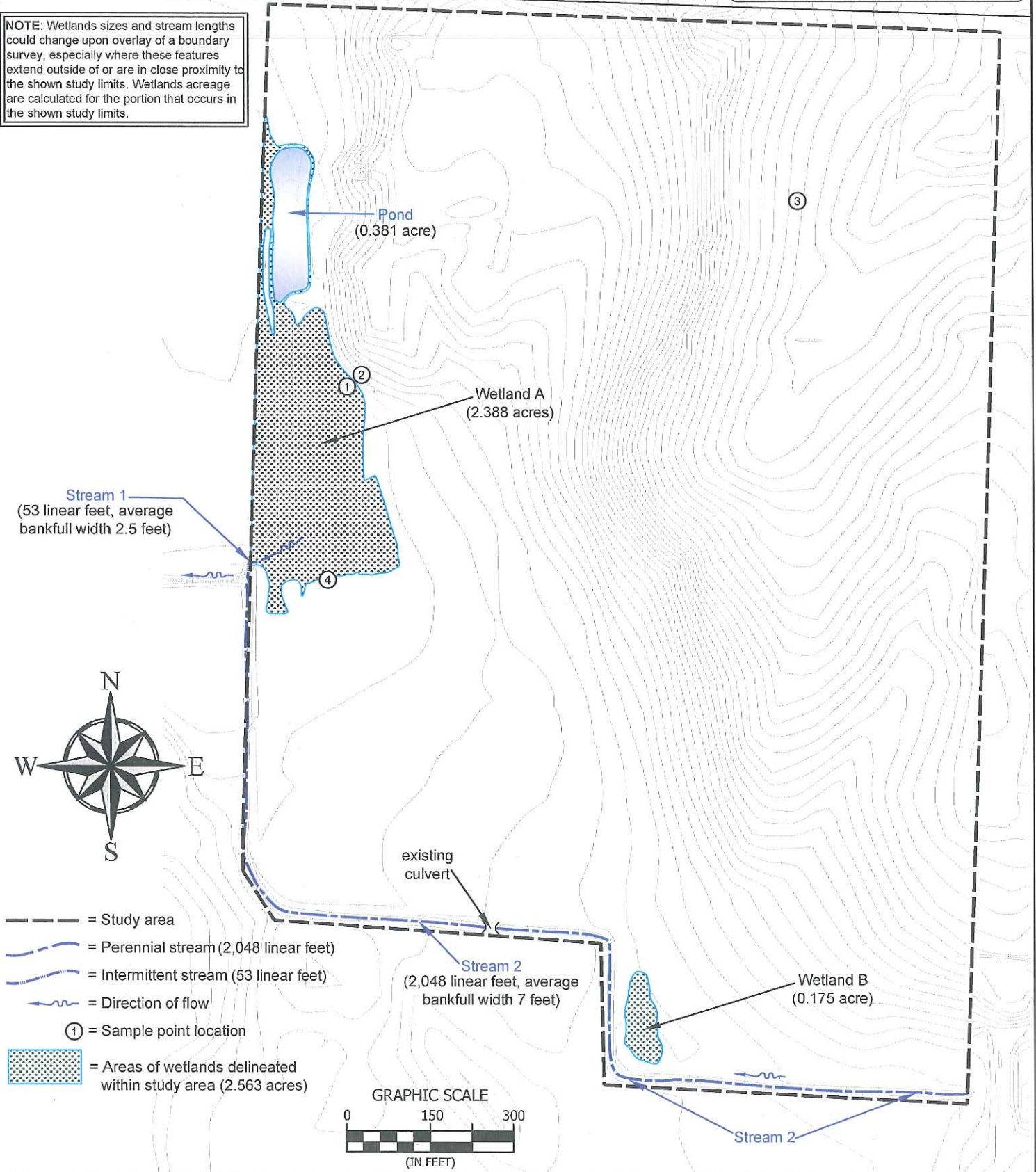
Dated

# Figure 1

## Appendix A Water Resources Map

Prepared for:	<b>Warmus Builders</b>
53.6 Acres, Boettler Road Green, Ohio	
Prepared by:	<b>DAVEY RESOURCE GROUP</b> <small>A Division of The Davey Tree Expert Company</small>
Data used to produce this map were collected on June 3, 2013 and September 23, 2014 and May 13, and August 27, 2015	

NOTE: Wetlands sizes and stream lengths could change upon overlay of a boundary survey, especially where these features extend outside of or are in close proximity to the shown study limits. Wetlands acreage are calculated for the portion that occurs in the shown study limits.

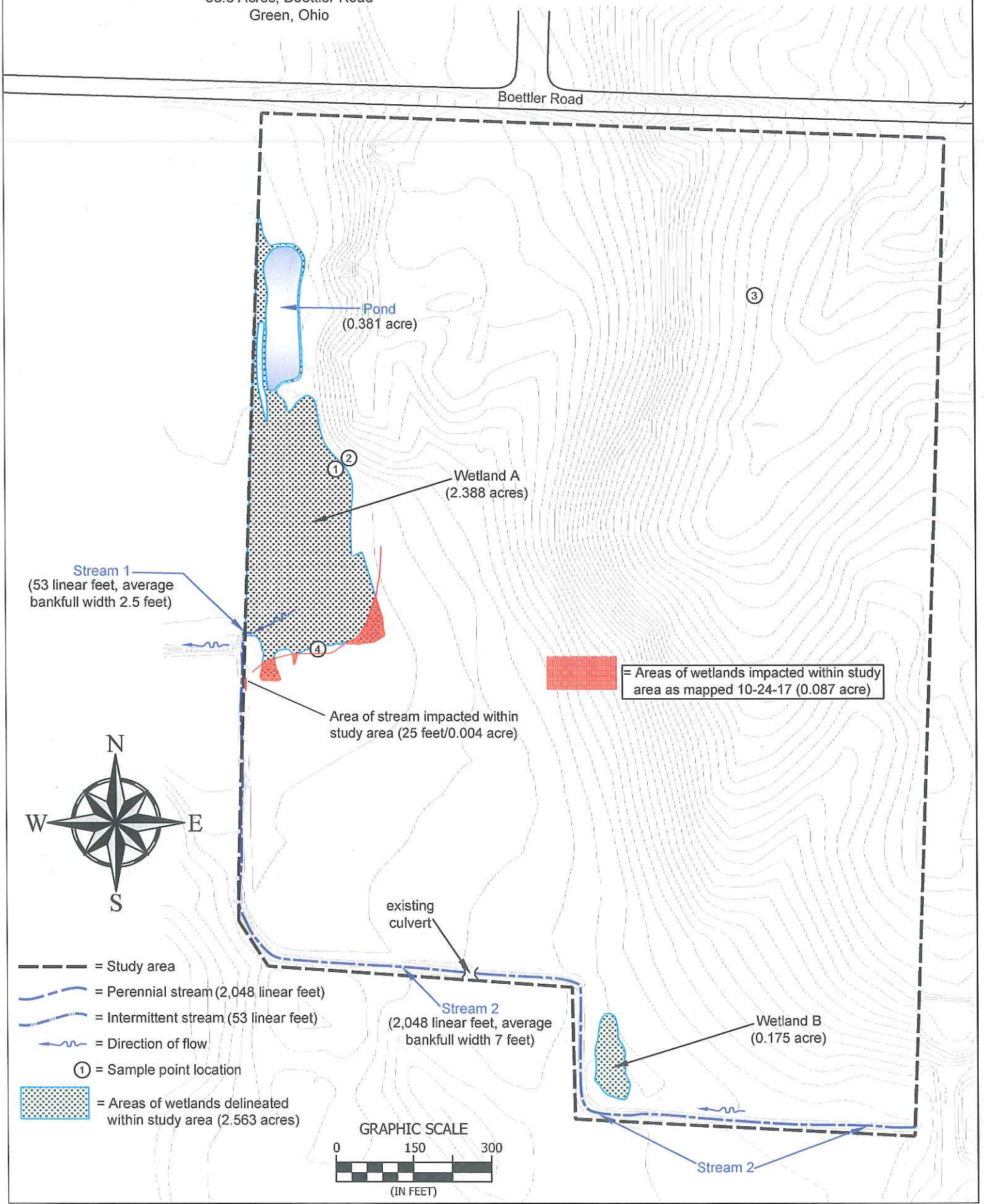




# Figure 2

## Warmus Builders

53.6 Acres, Boettler Road  
Green, Ohio



Pond  
(0.381 acre)

Wetland A  
(2.388 acres)

Stream 1  
(53 linear feet, average  
bankfull width 2.5 feet)

Area of stream impacted within  
study area (25 feet/0.004 acre)

= Areas of wetlands impacted within study  
area as mapped 10-24-17 (0.087 acre)

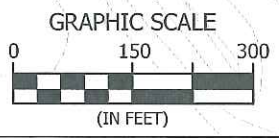


existing  
culvert

Stream 2  
(2,048 linear feet, average  
bankfull width 7 feet)

Wetland B  
(0.175 acre)

- = Study area
- = Perennial stream (2,048 linear feet)
- - - = Intermittent stream (53 linear feet)
- ~ = Direction of flow
- ① = Sample point location
- [Stippled Box] = Areas of wetlands delineated within study area (2.563 acres)



Stream 2