

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

<p>In the Matter of:</p> <p>Riverside Development, Inc. & CMK, LTD Westlake, Ohio 44028</p> <p><u>Respondents.</u></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. CWA-05-2024-0002</p> <p>Proceeding to Assess a Class II Civil Penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)</p>
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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 & Compliance Assurance Division, EPA Region 5, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondents are Riverside Development, Inc. and CMK, LTD., an Ohio corporation and an Ohio limited liability company respectively, operating in the State of 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.

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.

8. Respondents waive any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondents may have with respect to any issue of fact or law set forth in this CAFO including, but not limited to, their 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); their right to appellate review under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B); their 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 their right to appeal this CAFO. Respondents also consent to the issuance of this CAFO without further adjudication.

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 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).

12. 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).

13. 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).

14. 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).

15. 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).

16. 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.”

17. 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*.

Factual Allegations and Alleged Violations

18. Respondents are, respectively, a corporation and a limited liability company, and, therefore, are both a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

19. At all times relevant to this order, Respondents owned or operated, at least in part, or in equity, one parcel of real property, Lorain County Permanent Parcel Number: 1200022000034, located south of Redfern Road and east of East River Road (SR 252), in Columbia Township, Lorain County, Ohio, (approximately Latitude 41.30485, Longitude - 81.89817), (“the Site”).

20. Complainant alleges that Respondents violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging a pollutant or pollutants, including but not limited to dredged or fill material, into the navigable waters at the Site, including but not limited to wetlands, from a point source without a permit to do so.

21. The Site property includes three tributaries to Baker Creek and abutting forested wetland that flow into Baker Creek, a perennial tributary, which flows into the West Branch Rocky River and eventually the Rocky River. The Rocky River is a navigable water recognized by the United States Army Corps of Engineers Buffalo District.

22. Accordingly, Baker Creek and the West Branch Rocky River 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 (1993).

Count 1: Unlawful Discharge of Pollutants into Tributaries to Baker Creek

23. The statements in Paragraphs 1 through 22 are hereby incorporated by reference as if set forth in full.

24. Beginning on or about October of 2015 until May 2016, Respondents, acting directly or through their agents, used bulldozers, track hoes, and other mechanized land-moving equipment to discharge dredged or fill material into approximately 844 linear feet of two tributaries to Baker Creek on the Site.

25. At no time relevant to these discharges did Respondents have or apply for a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material into the tributaries that flow into Baker Creek as described in paragraph 24.

26. The dredged or fill material, discharged into tributaries to Baker Creek, is a "pollutant" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. Respondents used equipment, including but not limited to bulldozers, track hoes, and other mechanized land-moving equipment, to place the dredged or fill material into the tributaries to Baker Creek.

28. The bulldozers, track hoes, and other mechanized land-moving equipment are discernible, confined and discrete conveyance, specifically rolling stock, and constitute a "point source" as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

29. Respondents' addition of dredged or fill material from a point source into the tributaries to Baker Creek constitutes a "discharge of a pollutant" as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

30. Because Respondents owned or operated a point source for the discharge of pollutants to navigable waters, Respondents were subject to the CWA and the applicable CWA 404 Program requirements at all times relevant to this Order. Thus, any such discharge has been and is subject to the CWA and applicable state and federal regulations.

31. Therefore, Respondents are persons who discharged pollutants from a point source into navigable waters, without a permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

32. Each day the pollutants remained in the navigable waters constituted a continuing violation of the CWA and an additional day in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Count 2: Unlawful Discharge of Pollutants into

Wetlands Abutting Tributaries to Baker Creek

33. The statements in Paragraphs 1 through 22 are hereby incorporated by reference as if set forth in full.

34. Beginning on or about October of 2015 until May 2016, Respondents, acting directly or through their agents, used bulldozers, track hoes, and other mechanized land-moving equipment to discharge dredged or fill material into approximately 13.016 acres of wetlands abutting tributaries to Baker Creek on the Site.

35. At no time relevant to these discharges did Respondents have or apply 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 abutting the tributaries to Baker Creek as described in paragraph 34.

36. The dredged or fill material, discharged into the wetlands abutting the tributaries to Baker Creek, is a “pollutant” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

37. Respondents used equipment, including but not limited to bulldozers, track hoes, and other mechanized land-moving equipment, to place the dredged or fill material in the wetlands abutting the tributaries to Baker Creek.

38. The bulldozers, track hoes, and other mechanized land-moving equipment are discernible, confined and discrete conveyance, specifically rolling stock, and constitute a “point source” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. Respondents’ addition of dredged or fill material from a point source into the wetlands abutting the tributaries to Baker Creek constitutes a “discharge of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

40. Because Respondents owned or operated a point source for the discharge of pollutants to the wetlands abutting the tributaries to Baker Creek, Respondents were subject to the CWA and the applicable CWA 404 Program requirements at all times relevant to this Order. Thus, any such discharge has been and is subject to the CWA and applicable state and federal regulations.

41. Therefore, Respondents are persons who discharged pollutants from a point source into the wetlands abutting the tributaries to Baker Creek, without a permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

42. Each day the pollutants remained in the wetlands abutting the tributaries to Baker Creek constituted a continuing violation of the CWA and an additional day in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Civil Penalty

43. 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 \$25,847 per day of violation up to a total of \$323,081, for violations of Section 301 of the CWA that occurred after November 2, 2015 and for which penalties are assessed on or after January 6, 2023.

44. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondents' 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 Fifty Thousand Dollars and No cents (\$50,000.00).

45. Within 30 days after the effective date of this CAFO, Respondents must pay the \$50,000.00 civil penalty by sending a cashier's or certified check, via express mail, payable to "Treasurer, United States of America," to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, Missouri 63101

46. Within 5 days of payment, Respondents must provide proof of payment via email to the following individuals:

Juliane Grange
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
grange.juliane@epa.gov

Yone Yu
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency
yu.yone@epa.gov

John P Steketee
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
steketee.john@epa.gov

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

48. 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.

49. 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, 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

50. Pursuant to 40 C.F.R. § 22.5, the parties consent to service of this CAFO by email at the following email addresses: steketee.john@epa.gov (for Complainant) and sfarolino@ralaw.com (for Respondents). *See* 40 C.F.R. §§ 22.5-6.

51. Full payment of the penalty as described in paragraphs 45 and 46 and full compliance with this CAFO shall not in any case affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law other than those alleged in this CAFO.

52. Full payment of the penalty as described in paragraphs 45 and 46 and full compliance with this CAFO shall only resolve Respondents' liability for federal administrative and/or civil penalties for the violations and facts alleged in this CAFO.

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

54. Respondents certify that they are complying with Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344.

55. 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).

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

57. 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.

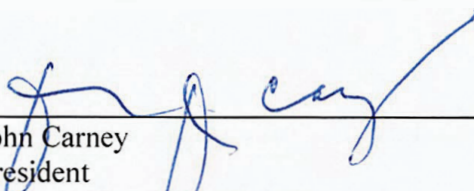
58. Each party agrees to bear its own costs and attorneys' fees in this action.

59. This CAFO constitutes the entire agreement between the parties with respect to the resolution of EPA's administrative and/or civil penalty claims for the violations and facts alleged in this CAFO.

60. 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:
Riverside Development, Inc. &
CMK, LTD.
Westlake, Ohio 44028
Docket No. CWA-05-2024-0002**

Riverside Development, Inc. & CMK, LTD., Westlake, Ohio 44028, Respondents



John Carney
President
Riverside Development, Inc.
Co-Owner
CMK, LTD.
Westlake, Ohio

September 18, 2023

Date

United States Environmental Protection Agency, Complainant

Carolyn
Persoon (for) Digitally signed by
Carolyn Persoon (for)
Date: 2023.09.26
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Michael D. Harris
Division Director
Enforcement & Compliance Assurance Division
U.S. EPA Region 5

Date

**In the Matter of:
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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: _____ Date: _____
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5