

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF:

Warmus Builders, Inc.  
Green, Ohio

Respondent.



DOCKET NO.

CWA-05-2019-0003

Administrative Order on Consent  
Under Section 309(a) of the Clean Water  
Act, 33 U.S.C. § 1319(a).

**I. INTRODUCTION**

1. The U.S. Environmental Protection Agency ("EPA") makes the findings of fact set forth below (Section IV) and is issuing this Administrative Order on Consent ("Order on Consent" or "Order") to Warmus Builders, Inc. ("Respondent") under the authority of Section 309(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a). The Administrator of EPA has delegated the authority to issue such orders to the Regional Administrator of EPA Region 5, who has redelegate this authority to the Director of the Water Division, EPA, Region 5.
2. This Order is mutually entered into by EPA and Respondent.
3. EPA alleges that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging a pollutant or pollutants into navigable waters from a point source without a permit to do so.
4. By entering into this Order, Respondent: (1) consents to EPA's authority to issue this Order; (2) neither admits nor denies the factual findings and/or allegations as set forth in this Order; (3) agrees to undertake all actions required by the terms and conditions of this Order; and (4) agrees not to contest the authority of EPA to issue this Order or the validity of any terms or conditions in this Order.

5. For the purposes of this Order only, 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 Order on Consent, including, but not limited to, any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

## **II. STATUTORY AUTHORITY**

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, including dredged or fill material, into waters of the United States, by any person except, *inter alia*, in compliance with a permit issued by the U.S. Army Corps of Engineers (the “Corps”), under Section 404 of the CWA (“404 permit”), 33 U.S.C. § 1344.

7. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits under Section 404 of the CWA for the discharge of dredged or fill material into navigable waters. A violation of a 404 permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

8. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), provides that whenever EPA finds that any person is in violation of requirements of, *inter alia*, Sections 301, 308, or 404 of the CWA, 33 U.S.C. § 1311, 1318, 1344, or is in violation of any condition or limitation that implements those sections in a 404 permit, EPA shall issue an order requiring such person to comply with such requirements, conditions, or limitations. Section 309(a)(5) of the CWA, 33 U.S.C. § 1319(a)(5), requires that any such order shall specify a time for compliance that EPA determines to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

### III. DEFINITIONS

9. All terms used, but not defined, in this Order have the meanings provided to them in the CWA, 33 U.S.C. § 1251 *et seq.*, and the effective EPA regulations promulgated under the CWA.
10. “404 Permit” means a written authorization issued by an approved State to implement the requirements of Part 233, or by the Corps under 33 C.F.R. Parts 320-330.
11. “Act” or “CWA” means the Clean Water Act, 33 U.S.C. § 1251 *et seq.*
12. “Day” or “days” means a calendar day or calendar days unless expressly stated to be a business day. When computing any period of time under this Order, should the last day fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.
13. “Dredged material” means material that is excavated or dredged from waters of the United States. 40 C.F.R. § 232.2.
14. “Discharge of dredged material” means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. 40 C.F.R. § 232.2. The term includes but is not limited to the following:
- A. The addition of dredged material to a specified discharge site located in waters of the United States;
  - B. The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and
  - C. Any 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 land clearing, ditching, channelization, or other excavation.
15. “Discharge of fill material” under 40 C.F.R. § 232.2, means the addition of fill material into waters of the United States.
16. “Discharge of a pollutant” as defined in Section 502(12) of the CWA, means *inter alia*, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

17. “Effective Date” has the definition provided in Section VII of this Order.
18. “EPA” means the United States Environmental Protection Agency.
19. “Fill material” means material placed in waters of the United States where the material has the effect of: replacing any portion of a water of the United States with dry land; or changing the bottom elevation of any portion of a water of the United States. The term fill material does not include trash or garbage. 40 C.F.R. § 232.2.
20. “Navigable waters” as defined in Section 502(7) of the CWA, means “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
21. “Order on Consent” and “Order” means this document, all attachments hereto, and all subsequent modifications thereto.
22. “Owner or operator” means the owner or operator of any activity subject to regulation under the 404 program. 40 C.F.R. § 232.2.
23. “Paragraph” means a portion of this Order identified by an Arabic numeral.
24. “Parties” means the EPA and Respondent.
25. “Person” as defined in Section 502(5) of the CWA, means an “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).
26. “Point source” as defined in Section 502(14) of the CWA, means “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).
27. “Pollutant” as defined in Section 502(6) of the CWA, means “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).

28. “Respondent” means Warmus Builders, Inc.

29. “State” means the State of Ohio.

30. 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.”

31. “Work” means any and all activities Respondent is required to undertake and accomplish to achieve compliance under this Order.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

33. 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.

34. From on or about July 2015, to August 2015, Respondent added rock, sand, cellar dirt or fill material into approximately 0.4 acres of wetlands (Wetland A) at the Site, of which 0.087 acres of fill remains in place.

35. Respondent added the rock, sand, cellar dirt or fill material into Wetland A at the Site

using a bulldozer and tractor pulled scrappers.

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

37. 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.

38. 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).

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

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

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, which meets 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. 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.

45. 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.

46. 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.”

47. 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.”

48. 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).

49. The rock, sand, cellar dirt or fill 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).

50. The addition of the rock, sand, cellar dirt or fill 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).

51. The bulldozer and tractor pulled scrappers that Respondent used to add the rock, sand, cellar dirt or fill 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).

52. The rock, sand, cellar dirt or fill 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).

53. The addition of the rock, sand, cellar dirt or fill 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).

54. The bulldozer and/or rolling stock that Respondent used to add the rock, sand, cellar dirt or fill 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).

55. Because Respondent is a person who owned or operated equipment that acted as point sources for the discharge of pollutants to navigable waters, Respondent has been subject to the CWA at all times relevant to this Order. Thus, any such discharge has been and is subject to the CWA.

56. At no time relevant to these discharges 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 and Stream 2 for the discharges described in paragraphs 34 and 36.

57. Accordingly, each instance in which Respondent discharged pollutants to navigable waters without a CWA Section 404 permit authorizing such discharges is a discrete violation of Section 301 of the CWA, 33 U.S.C. § 1311.

58. Each day the pollutants remain in navigable waters without a CWA Section 404 permit constitutes an additional day of violation of Sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

#### **V. ORDER ON CONSENT**

59. Based on the foregoing findings and the authority vested in the undersigned Director, Water Division, it is hereby ordered and agreed to in accordance with Section 309(a) of the CWA, 33 U.S.C. § 1319(a), that Respondent comply with the following actions:

A. Respondent shall refrain from further discharges of pollutants into waters of the U.S.



at the Site, except in compliance with the CWA.

- B. Respondent shall purchase 0.1 mitigation credits pursuant to an agreement with the Stream and Wetlands Foundation (Exhibit A) as mitigation for 0.087 acres of fill to remain in place in Wetland A and 0.004 acres of fill to remain in place in Stream 2 from the discharges of pollutants by Respondent identified in Counts 1 and 2, above (Figure 2).

## **VI. GENERAL PROVISIONS**

- 60. Respondent has had the opportunity to confer with and submit information to EPA concerning the validity and provisions of this Order.
- 61. The terms of this Order are binding on Respondent and its assignees and successors.
- 62. The undersigned signatory for each party has the authority to bind each respective party to the terms and conditions of this Order.
- 63. Failure to comply with this Order may subject Respondent to penalties up to \$53,484 per day for each violation pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19.
- 64. This Order does not affect Respondent's responsibility to comply with the CWA, any permits issued under the CWA, and any other local, state, and federal laws and regulations.
- 65. This Order does not restrict EPA's authority to enforce any permits issued under the CWA or any section of the CWA or its implementing regulations.
- 66. EPA reserves all rights and remedies, legal and equitable, available to address any other violation of the CWA. Neither issuance of this Order by EPA nor compliance with its terms precludes further enforcement action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319 for any other violations of the CWA committed by Respondent.

67. The CWA includes provisions for administrative penalties, for civil injunctive relief and penalties, and for criminal penalties for violations of the CWA. Specifically, EPA may:

- a) assess civil administrative penalties under 33 U.S.C. § 1319(g) and 40 C.F.R. Part 19 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;
- b) seek civil injunctive relief and penalties for violations of the CWA under 33 U.S.C. § 1319(b) and civil judicial penalties for violations of this Order under 33 U.S.C. § 1319(d). In accordance with 40 C.F.R. Part 19, EPA may seek civil judicial penalties of \$37,500 per day of violation for violations that occurred after December 6, 2013 through November 2, 2015; and
- c) seek criminal penalties, including fines and imprisonment, for negligent or knowing violations of the CWA under 33 U.S.C. § 1319(c).

#### **VII. EFFECTIVE DATE**

68. This Order shall become effective upon signature by EPA below.

#### **VIII. FINAL REPORT AND TERMINATION OF THIS ORDER**

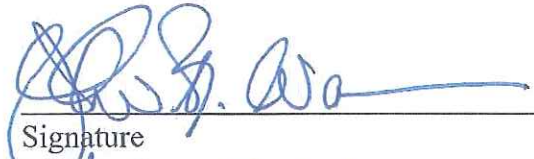
69. After receipt and review of Respondent's submittal, attached hereto as Exhibit A, EPA is satisfied all requirements of this Order have been completed and acknowledges the same.

CWA-05-2019-0003

Docket No.

IT IS SO AGREED AND ORDERED:

FOR RESPONDENT, Warmus Builders, Inc.:

  
Signature

4-26-19  
Date

John F. Warmus  
Name

President  
Title

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

*Linda Helst*

*4/26/19*

*for*

Joan Tanaka  
Acting Director  
Water Division  
U.S. EPA Region 5

Date



Stream and Wetlands  
FOUNDATION

128 South Broad Street, Suite 238  
P.O. Box 369  
Lancaster, Ohio 43130  
T: (740) 664-4016  
F: (740) 669-0890

VIA EMAIL ([jfw@warmusbuilders.com](mailto:jfw@warmusbuilders.com))

September 7, 2018

Mr. John Warmus  
Warmus Builders, Inc.  
1531 Boettler Road, Suite C  
Uniontown, Ohio 44685

RE: Brier Creek Senior Living Community, USEPA Enforcement Action  
ACCT: TUSC-49

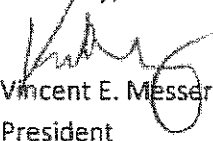
Dear Mr. Warmus:

The Stream + Wetlands Foundation received on September 7, 2018 a payment of \$4,050 (check #1100) for the purchase of 0.1 non-forested credit from our Huntington In-Lieu Fee Program for the above referenced project. It is our understanding that this purchase of wetland mitigation credit is being made to provide compensatory mitigation for alleged violations made by the United State Environmental Protection Agency (USEPA). The project is located on Brier Creek Parkway in the City of Green, Summit County, Ohio.

This payment along with the previously made deposit payment fulfills your financial obligation to the Stream + Wetlands Foundation for this purchase. Please retain a copy of this letter for your records. You also should provide a copy of this letter to the USEPA.

Thank you very much for allowing Stream + Wetlands Foundation to assist you with the wetlands mitigation needs of this project. Should you need further assistance, please feel free to call anytime.

*Sincerely,*

  
Vincent E. Messerly, P.E.  
President

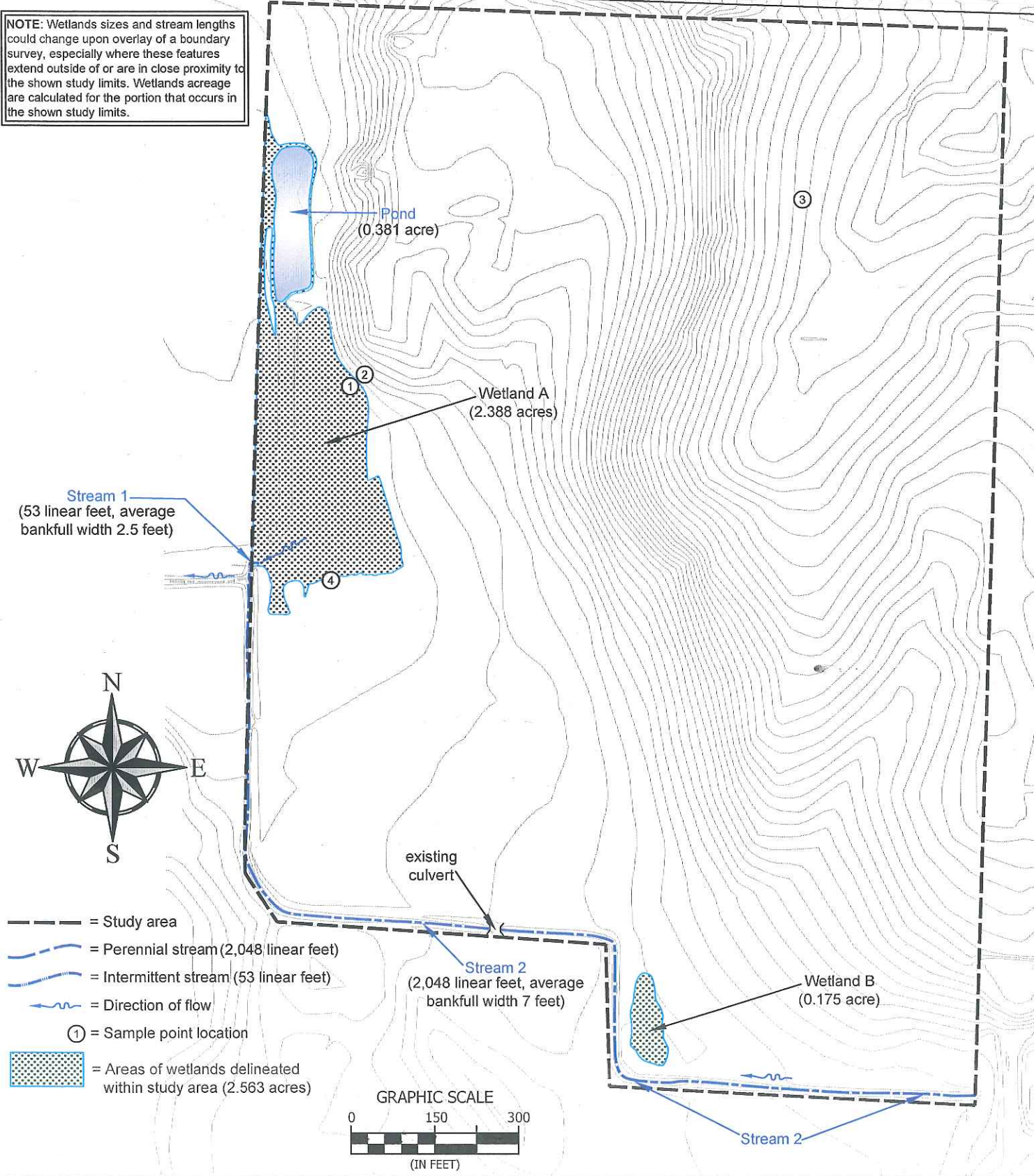
Cc: Todd Crandall, Davey Resource Group, via email  
Cory Wilson, USACE, Dover Field Office, via email

# Figure 1

## Appendix A Water Resources Map

Prepared for <b>Warmus Builders</b>	
53.6 Acres, Boettler Road Green, Ohio	
Prepared by <b>DAVEY</b> RESOURCE GROUP <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

