

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

FILED  
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REGIONAL FIELD OFFICE CLERK  
EPA REGION VI

In the Matter of:

CABO Development, LLC

Respondent.

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DOCKET No. CWA-06-2012-2728

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the United States Environmental Protection Agency (“EPA”) pursuant to Section 309(g) of the Clean Water Act (“the Act”), 33 U.S.C. § 1319(g). This CAFO is issued to simultaneously commence and conclude this proceeding to assess a Class 1 civil penalty in accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), as described in the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits.”

2. The Parties agree that settlement of the relevant matters without litigation will save time and resources, that it is in the public’s interest, and that the entry of this CAFO is the most appropriate means of resolving such matters. Compliance with all the terms and conditions of this CAFO resolves only those violations alleged herein.

3. CABO Development, LLC (“Respondent”) admits the jurisdictional allegations herein; however, Respondent neither admits nor denies the specific Findings of Fact and Conclusions of Law contained in this CAFO.

4. Respondent has committed to complete a mitigation plan. As part of that mitigation plan, Respondent has agreed to establish several conservation easements that cumulatively account for 70 acres of preservation; remove cattle from the land near the tributary in order to preserve the tributary; and remove specified invasive cedar trees.

5. Respondent expressly waives any right to contest the factual allegations or Conclusions of Law contained in this CAFO and in this proceeding, and waives its right to appeal the Final Order set forth herein.

6. Before the taking of any testimony and without adjudication of any issue of law or fact, the parties agree to the terms of this CAFO and to its issuance. Respondent consents to the assessment and payment of a civil penalty in the amount and by the method stated below.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

7. Respondent is a limited liability company under the laws of the State of Oklahoma and as such, Respondent is a “person”, as that term is defined at Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. §§ 122.2 and 232.2.

8. At all times relevant to the violations alleged herein (“relevant time period”), Respondent owned real property (“the Property”), located at the Southeast 1/4 of the Southeast 1/4 of the Northwest 1/4 of Section 35, Township 20 North, Range 14 East in Owasso, Rogers County, Oklahoma. This site is known as Stone Canyon Residential Development.

9. On multiple dates between July 2008 and September 2008, Respondent discharged or caused the discharge of “dredged material” and/or “fill material”, as defined by Section 502 of the Act, 33 U.S.C., § 1362, and 40 C.F.R. § 232.2 from point sources, including heavy equipment in, on and to approximately 6.7 acres of jurisdictional waters of the United States within the subject property as those terms are defined by Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2.

10. During the relevant time period, the 6.7 acres of jurisdictional waters of the United States referred to in paragraph 9 *supra*, were “navigable waters” as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2.

11. The discharged dredged material and fill material are considered “pollutants” as that term is defined at Section 502(6) of the Act, 33 U.S.C. § 1362(6).

12. Each piece of equipment used for the discharge(s) acted as a “point source” as that term is defined at Section 502(14) of the Act, 33 U.S.C. § 1362(14).

13. Under Section 301(a) of the Act, 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, a permit issued under the Act.

14. Under Section 404 of the Act, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Chief of Engineers for the United States Army Corps of Engineers (“Corps”), is authorized to issue permits for the discharge of dredged or fill material into navigable waters of the United States.

15. At no time during the relevant time period did Respondent have a permit issued by the Corps authorizing the discharges alleged herein.

16. Under Section 309(g)(1)(A) of the Act, 33 U.S.C. § 1319(g)(1)(A), the Administrator is authorized to assess a Class I or Class II civil penalty whenever, on the basis of any available information, the Administrator finds that a person has violated Section 301 of the Act, 33 U.S.C. § 1311.

17. Each day of unauthorized discharge by Respondent is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

18. Under Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for a civil penalty in an amount not to exceed \$16,000 per day for each day during which a violation continues, up to a maximum of \$37,500.

19. The State of Oklahoma was notified and given an opportunity to consult with EPA regarding the proposed assessment of an administrative penalty against Respondent.

20. EPA notified the public of the proposed CAFO and afforded the public forty (40) days to comment on the proposed penalty in accordance with 40 C.F.R. § 22.45. At the expiration of the notice period, EPA received no comments from the public.

### III. TERMS OF SETTLEMENT

#### A. PENALTY PROVISIONS

21. Neither the fact that the Respondent and the EPA have agreed to this Order, nor the Findings of Fact and Conclusions of Law in it, shall be used for any purpose in any proceeding between Respondent and the EPA except the enforcement of this Order. As to others who are not parties to this Consent Order, nothing contained in this Order is an admission by Respondent of wrongdoing or fault on the part of Respondent as to any of the Findings of Fact and Conclusions of Law.

22. As to others who are not parties to this Consent Order, this Order is not an admission by Respondent of liability for conditions at or near the Stone Canyon Residential Development and is not a waiver of any right, cause of action or defense to which Respondent is otherwise entitled.

23. Based on the foregoing Findings of Fact and Conclusions of Law, EPA Region 6, considering the relevant criteria pursuant to Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and acting pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), hereby orders that Respondent shall pay to the United States a civil penalty in the amount of thirty-two thousand dollars (\$32,000.00) to settle the violations as alleged in this CAFO, in accordance with 40 C.F.R. § 22.18(c).

24. Payment shall be made by one of the following methods within thirty (30) days of the effective date of this CAFO:

- (a) By mailing a bank check, a cashier's check or certified check, payable to "Treasurer of the United States", to:

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

- (b) By wire transfer to:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT Address = FRNYUS33  
33 Liberty Street  
New York, NY 10045

Field Tag 4200 of the Fedwire message should read:  
"D 68010727 Environmental Protection Agency"

- (c) By overnight mail (Express, FedEx, DHL, etc.) to:

U.S. Bank  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101  
Phone: 314-418-4087

- (d) By credit card payments to <https://www.pay.gov/paygov/>  
(enter sfo 1.1 in the search field)

When paying by check, the case name and docket number ("In the Matter of CABO Development, LLC, Docket No. CWA-06-2011-2728") should be clearly marked on the check to ensure credit for payment.

25. Respondent shall send simultaneous notice of payment, including a copy of the check or other proof of payment, to each of the following:

- (a) Lorena Vaughn  
Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 74202-2733
- (b) Tami Sundquist  
Wetlands Section (6WQ-EM)  
Water Quality Protection Division  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 74202-2733

(c) Russell Murdock  
Water Enforcement Legal Branch (6RC-EW)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 74202-2733

Respondent's adherence to these procedures will ensure proper credit when payment is received by EPA.

26. Respondent agrees not to claim, or attempt to claim, a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

27. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. See 40 C.F.R. § 13.11(b).

28. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent (6%) per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. See 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. See 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

29. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States' enforcement expenses, including but not limited to, attorneys' fees and costs incurred by the United States for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be twenty percent (20%) of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter.

30. Failure by Respondent to pay the penalty assessed according to the terms of this CAFO, in full, by its due date, may subject Respondent to a civil action to collect the assessed penalty and any accrued interest and penalties.

31. In the event a collection action is necessary, Respondent shall pay – in addition to any applicable penalty, fees, and interest described herein – all reasonable costs and expenses, including legal expenses and court costs, incurred by the United States for enforcement and collection proceedings for nonpayment of the amounts agreed hereunder, pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In any such collection action, the validity, amount, and appropriateness of the penalty, and the terms of this CAFO, shall not be subject to review.

#### B. GENERAL PROVISIONS

32. This CAFO shall become effective upon filing with EPA's Regional Hearing Clerk.

33. Issuance of this CAFO does not relieve Respondent from responsibility to comply with all requirements of the Act and the requirements of any permits issued thereunder, as described in Section 309(g)(7) of the Act, 33 U.S.C. § 1319(g)(7), nor does it constitute a waiver by EPA of its right to enforce compliance with the requirements of Respondent's permits or other requirements of the Act by actions pursuant to Section 309 of the Act, 33 U.S.C. § 1319.

34. The provisions of this CAFO shall be binding upon Respondent, its officers or officials, managers, employees, and their successors or assigns, in their capacity on behalf of Respondent.

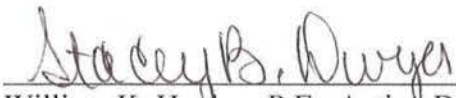
35. Each party agrees to bear its own costs and attorneys fees in this matter, except to the extent that Respondent may be responsible for reasonable costs and expenses of enforcement and collection proceedings for failure to comply with the terms of this CAFO. Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601 *et seq.* and any regulations promulgated pursuant to those Acts.

36. Each undersigned representative of the parties to this agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this agreement and to execute and legally bind that party to it.

In recognition and acceptance of the foregoing:

  
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David Charney  
CABO Development, LLC  
Respondent

Dec 28, 2012  
Date

for   
\_\_\_\_\_  
William K. Honker, P.E., Acting Director  
Water Quality Protection Division  
Complainant

Feb. 20, 2013  
Date

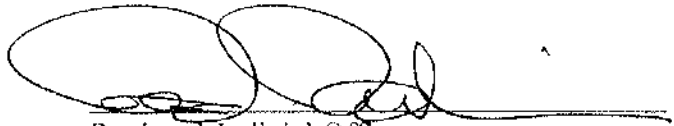


FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Complaint. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations including the regulations that were the subject of this action. Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. This CAFO shall become effective upon filing with the Regional Hearing Clerk, pursuant to 40 C.F.R. § 22.31(b).

Issuance Date: \_\_\_\_\_

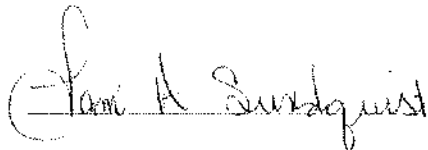
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Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of February, 2013, the original of the foregoing Consent Agreement and Final Order was hand delivered to the Regional Hearing Clerk, U.S. EPA, Region 6 (6RC-D), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and that a true and correct copy was placed in the United States Mail, by certified mail, return receipt requested, addressed to the following:

David Charney  
CABO Development, LLC  
12150 E. 96<sup>th</sup> Street North, Suite 202  
Owasso, OK 74055

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