

BD#:
2750743W005

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)	Docket No. CWA-05-2007-0005
)	
Lake Erie Shores Development, LLC)	Proceeding to Assess Class II
32100 Solon Road, Suite 202)	Administrative Penalty under Section
Solon, OH 44139)	309(g) of the Clean Water Act, 33 U.S.C.
)	§ 1319(g)
Respondent.)	
)	

CONSENT AGREEMENT AND FINAL ORDER

I. General Allegations

1. This is an administrative action instituted by Region 5 of the United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.18(a)(2) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 64 Fed. Reg. 40137 (codified at 40 C.F.R. Part 22). The Administrator of U.S. EPA has delegated the authority to take this action to the Regional Administrator of Region 5.

2. The Settling Respondent in this matter is:

Lake Erie Shores Development, LLC
32100 Solon Road, Suite 202
Solon, OH 44139.

Lake Erie Shores Development, LLC is hereinafter referred to as "Settling Respondent" or "LES Development."

3. Section 301 of the Act provides that the discharge of any pollutant from a point source into navigable waters by any person shall be unlawful. 33 U.S.C. § 1311.

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

5. Section 502(5) of the Act defines "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).

6. Section 502(12) of the Act defines "discharge of pollutants," as, inter alia, any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12).

7. Section 502(6) of the Act 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).

8. Section 502(14) of the Act 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).

9. Section 502(7) of the Act defines "navigable waters," in part, as the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7).

10. The regulation at 40 C.F.R. § 230.3 defines the term "waters of the United States" as "All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce....," "All interstate waters including interstate wetlands..." and

“All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters: ... which are or could be used by interstate or foreign travelers for recreational or other purposes...;” as well as “wetlands adjacent to [such] waters...”

11. The regulation at 40 C.F.R. § 232.2 defines "wetlands" as “those areas that are inundated or saturated by surface or groundwater 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.”

12. At various times applicable to the violations, Settling Respondent was the owner of land which it developed into the Lake Erie Shores Phases I, II, III and IVa., and North Shore Estates residential developments located north and south of Lake Road and west of Bacon Road in the Township of Painesville, Lake County, Ohio, as depicted generally on the map attached as Exhibit A (the Site).

13. Between 2001 and 2006, Settling Respondent or persons acting on behalf of Respondent used bulldozers and backhoes to clear, strip, excavate and deposit approximately 7,521.48 cubic yards of fill material into 4.035 acres of wetlands and approximately 202.44 cubic yards of fill material into 1,384 linear feet of McKinley Creek and its unnamed tributaries at the Site. As of the date of this Order, Settling Respondent had not received authorization for this fill activity under a Section 404 permit.

14. The wetlands identified in Paragraph 13 (the Wetlands) are adjacent to McKinley Creek and an unnamed tributary of McKinley Creek in the North Shore Estates area of the Site, two unnamed tributaries of McKinley Creek in Phases I-III of the Site, and an unnamed tributary

to the Grand River in Phase IVa. of the Site.

15. The Wetlands on the Site contribute to the chemical, physical and biological integrity of the area in which they are located. These Wetlands are located entirely within what is deemed by the Ohio Department of Natural Resources, Office of Coastal Management, as a "Designated Coastal Management Area," which is comprised of the lands located adjacent to Lake Erie. According to this Office of the Ohio DNR, "The designated Coastal Area extends in Lake Erie to the international boundary line between the United States and Canada and landward only to the extent necessary to include shore lands, the uses of which have a direct and significant impact on coastal waters as determined by the director of natural resources..."

16. McKinley Creek flows directly into Lake Erie at approximately Latitude: 41.7758°N Longitude: 81.2103°N (just east of the Site). The unnamed tributary of the Grand River flows into the Grand River, which flows directly into Lake Erie at approximately Latitude: 41.7603°N Longitude: 81.2808°W (west of the site). The wetland complex in the southwestern portion of Phase IVa is approximately .8 mi. from the Lake Erie shoreline. This is the longest distance between any Wetlands on the Site and the Lake Erie shoreline.

17. McKinley Creek, Grand River and Lake Erie are navigable-in-fact water bodies, i.e., permanent, standing or flowing bodies of water forming geographic boundaries.

18. Lake Erie is an "interstate water" within the meaning of 40 C.F.R. § 232.2.

19. Settling Respondent LES Development is a limited liability company doing business in the State of Ohio.

20. Settling Respondent is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

21. The fill materials discharged in association with construction of lots, construction of roads, etc., to the Site constitute "pollutants" as defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6). These pollutants have likely resulted in increased nutrient loads, siltation, accumulation of sediments, and habitat and hydrological alterations at and around the Site and in downstream areas.

22. The addition of fill materials associated with construction of lots, construction of roads, etc., from backhoes and bulldozers into the Site constitutes a "discharge of a pollutant" as defined by Section 502(12) of the Act, 33 U.S.C. § 1362(12).

23. Backhoes and bulldozers are discernible, confined and discrete conveyances and constitute "point sources" as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14).

24. McKinley Creek, its tributaries, an unnamed tributary of the Grand River, and adjacent wetlands on the Site are "waters of the United States" as defined by the regulations at 40 C.F.R. § 232.2, and constitute "navigable waters" as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7).

25. Therefore, Settling Respondent is a person who discharged pollutants from a point source into "waters of the United States", without a permit, in violation of Section 301 of the Act, 33 U.S.C. § 1311.

26. Each day the pollutants remain in the "waters of the United States" constitutes a continuing violation of the Act and an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

27. Complainant, the Director of the Water Division, U.S. EPA, and Settling Respondent, LES Development, have discussed the allegations stated above, and pursuant to 40 C.F.R. § 22.18(a)(2), have agreed that this matter should be settled without resort to a hearing or

further proceedings, upon the terms set forth in this Consent Agreement and Final Order (CAFO).

28. Without trial or litigation of any fact of law, Settling Respondent: (1) admits that the U.S. EPA has jurisdiction over the subject matter set forth in this CAFO; (2) otherwise neither admits nor denies the factual and legal allegations alleged herein; and (3) consents to the stated civil penalty and terms of this CAFO.

29. Upon execution of the Final Order attached hereto, Settling Respondent waives all rights to request a judicial or administrative hearing on any issue of law or fact set forth in this CAFO, as provided by Section 309(g)(2)(b) of the Act, 33 U.S.C. § 1319(g)(2)(b) and 40 C.F.R. § 22.15(c), and waives all rights to appeal any term of this Consent Agreement.

NOW, THEREFORE, before the taking of any testimony, without the adjudication of any issue of fact or law, and upon the consent and agreement of the Parties, it is hereby stated as follows:

II. Civil Penalty

30. In consideration of LES Development's cooperation in settling this matter, and its agreement to submit to the U.S. Army Corps of Engineers Buffalo District Office an After-the-Fact (ATF) permit application to address the above allegations (as specified in a separate Administrative Order on Consent signed by U.S. EPA and Settling Respondent under Clean Water Act Section 309(a)), U.S. EPA hereby consents to a penalty of \$103,000 in resolution of its claims against LES Development for civil penalties for the violations alleged in this CAFO.

31. LES Development shall pay the civil penalty by cashiers or certified check payable to the "Treasurer, United States of America," within 30 days after the effective date of this CAFO.

32. LES Development must send the check to:

U.S. EPA - Region 5
P. O. Box 371531
Pittsburgh, PA 15251-7531

33. A transmittal letter, stating LES Development's name, complete address, the case docket number, and the billing document number must accompany the payment. LES Development must write the case docket number and the billing document number on the face of the check. LES Development must send copies of the check and transmittal letter to:

Regional Hearing Clerk (E-13J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Melissa Gebien
Enforcement Officer (WW-16J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Thomas J. Martin
Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3509

34. This civil penalty to be paid herein is not deductible for federal tax purposes.
35. On any amount that may become overdue under paragraph 30, interest shall accrue at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. In addition, late payment will be subject to nonpayment penalties in accordance with section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9).

III. General Provisions

36. LES Development certifies that it is complying fully with Sections 301(a) and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

37. Without trial or litigation of any fact or law, Settling Respondent admits that the U.S. EPA has jurisdiction over the subject matter set forth in this CAFO and consents to the stated civil penalty and terms of this CAFO as set forth herein.

38. LES Development's compliance with the terms of this CAFO shall resolve U.S. EPA's claims against Lake Erie Shores Development, LLC, its member, manager, successors and assigns, for any civil penalties under Section 309(d) or (g) of the Act, 33 U.S.C. § 1319(d) or (g), for the violations alleged in this CAFO.

39. This CAFO does not affect LES Development's responsibility to comply with the Act and other applicable federal, state and local laws, and regulations.

40. Nothing in this CAFO restricts U.S. EPA's authority to seek LES Development's compliance with the Act and other applicable laws and regulations.

41. The terms of this CAFO bind LES Development and its successors, and assignees.

42. Each person signing this CAFO certifies that he or she has the authority to sign this consent agreement for the party whom he or she represents and to bind that party to its terms.

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

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

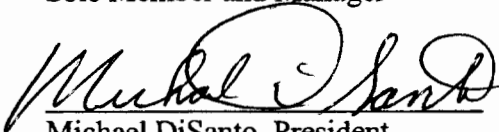
45. U.S. EPA consulted with the State of Ohio regarding this action by mailing a copy of this CAFO to the Ohio Environmental Protection Agency and by offering the State of Ohio an opportunity to comment on the proposed penalty. U.S. EPA also caused a public notice to be published in a local newspaper regarding this action. In accordance with Section 309(g)(5) of

the CWA, 33 U.S.C. § 1319(g)(5), this order will become effective 30 days after the execution of the accompanying Final Order by the Regional Administrator.

**LAKE ERIE SHORES DEVELOPMENT, LLC,
RESPONDENT**

By: DiSanto Enterprises, Inc.
Sole Member and Manager

Dated: 4-1-07


Michael DiSanto, President

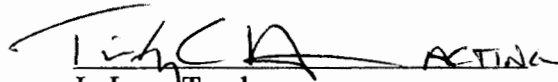
CWA-05-2007-0005

In the Matter of: Lake Erie Shores Development, LLC

Docket No. CWA-05-2007-0005

**U.S. ENVIRONMENTAL PROTECTION
AGENCY, COMPLAINANT**

Dated: 6/11/07

 ACTING

Jo Lynn Traub
Director, Water Division
U.S. Environmental Protection Agency, Region 5

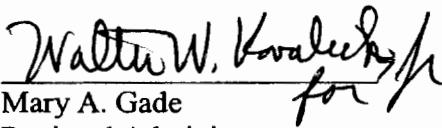
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Docket No. CWA-05-2007-0005

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Lake Erie Shores Development, LLC, of Solon, Ohio is hereby **ORDERED** to comply with all of the terms of the preceding Consent Agreement, effective 30 days after the date of my signature.

Dated: 7/24/07


for

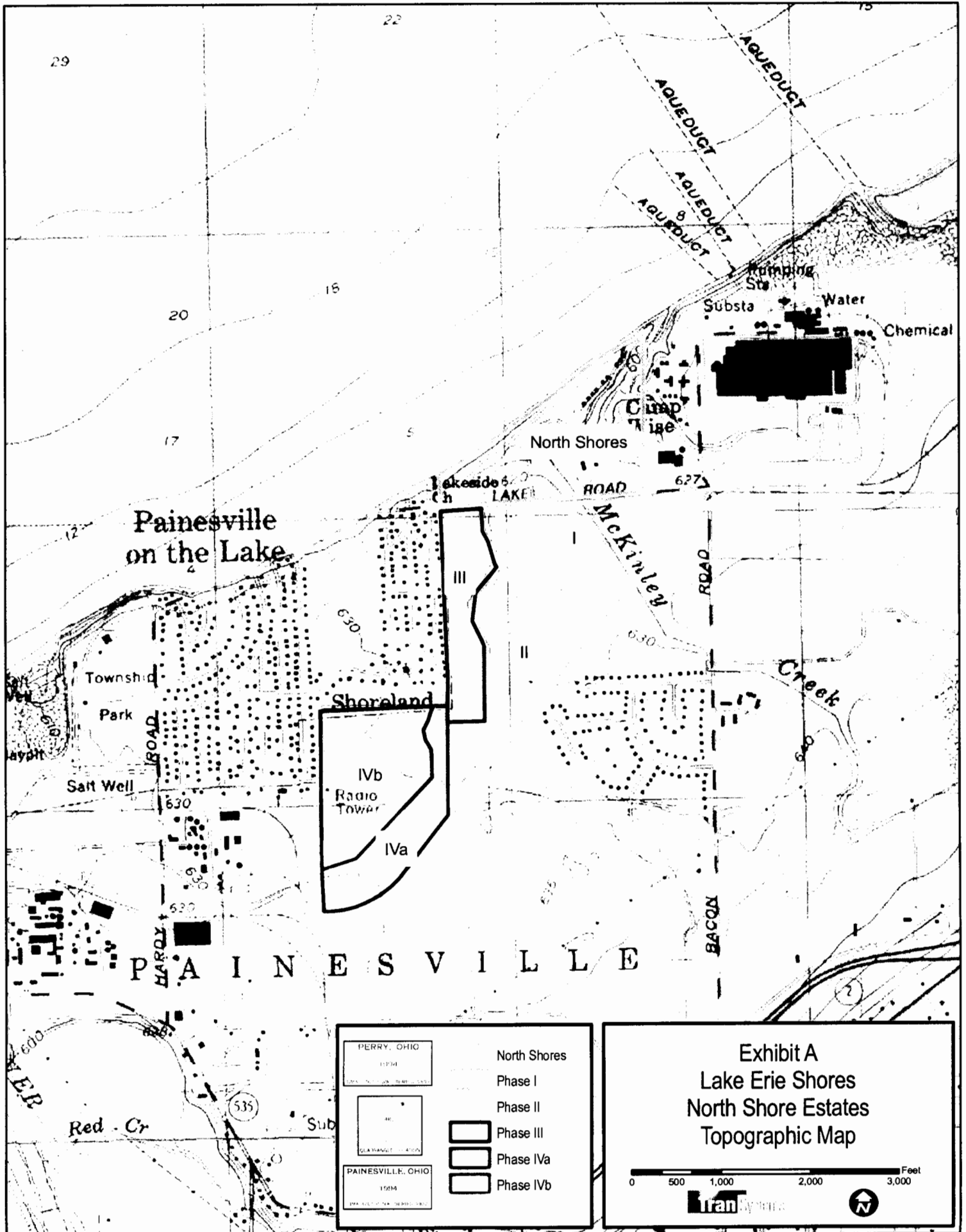
Mary A. Gade

Regional Administrator

U.S. Environmental Protection Agency, Region 5

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RECEIVED
U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 5
COLUMBUS, OHIO



CASE NAME: Lake Erie Shores Development, LLC
DOCKET NO: CWA-05-2007-0005

FILED TO
REGIONAL HEARING CLERK
17 AUG -2 PM 2:35


CERTIFICATE OF SERVICE

I hereby certify that today I filed one original Consent Agreement and Final Order in the office of the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590.

I then caused a copy to be mailed on August 2, 2007 to Respondent:

Mr. Michael DiSanto
Lake Erie Shores Development, LLC
32100 Solon Road, Suite 202
Solon, OH 44139

Dated: August 2, 2007


Melissa Gebien, Enforcement Officer
United States Environmental Protection
Agency, WW-16J
77 W. Jackson Boulevard
Chicago, IL 60604-3590
(312) 886-6833