

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF:

73599  
Jan  
James Wagner  
Fox Country Land Holdings, LP  
73999 Holzworth Road  
Flushing, Ohio 43977

DOCKET NO. CWA-05-2016-0012

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



Respondent.

ADMINISTRATIVE COMPLIANCE ORDER ON CONSENT

The United States Environmental Protection Agency (EPA) issues this Administrative Compliance Order on Consent (Order) to Mr. James Wagner, Fox Country Land Holdings, LP, (Respondent) under authority of Section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of the EPA, Region 5, who has duly redelegated this authority to the undersigned Director, Water Division, Region 5, EPA.

REGULATORY BASIS

1. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), states that: "Whenever, on the basis of any information available . . . the Administrator finds that any person is in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), the Administrator shall issue an order requiring such person to comply with such section . . . ."
2. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states: "Except as in compliance with Section 404 of the CWA the discharge of any pollutant by any person shall be unlawful."
3. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states: "The Secretary [of the Army] may issue permits. . . for the discharge of dredged or fill material into the navigable waters at

*Jan*

specified disposal sites."

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

5. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines a "pollutant" as "dredged spoil, solid waste . . . biological materials . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water."

6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as "the waters of the United States . . ."

7. The term "waters of the United States" includes: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce ("traditional navigable waters"); (ii) all inter-state waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries. 40 C.F.R. § 232.2.<sup>1</sup>

8. "Wetlands" are defined 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." 40 C.F.R. § 230.2.

9. The term "adjacent" is defined as "bordering, contiguous, or neighboring." 40 C.F.R. § 230.3(b).

---

<sup>1</sup> Citations to 40 C.F.R. Part 232 in this Order are to those effective through August 27, 2015. *See In re E.P.A.*, --- F.3d ---, 2015 WL 5893814 (6th Cir. 2015) (issuing a temporary nationwide stay of EPA and United States Army Corps of Engineers final rule defining the scope of waters protected under the CWA effective on August 28, 2015).



10. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] discrete fissure . . . from which pollutants are or may be discharged."

**GENERAL FINDINGS**

11. Respondent in this matter is:

73589  
JW  
Mr. James Wagner  
Fox Country Land Holdings, LP  
73999 Holzworth Road  
Flushing, Ohio 43977

12. The property subject to this Order is located south of Township Road 254, west of Township Road 259 northwest of Flushing, Harrison County, Ohio, (the Site). Respondent and the Village of Flushing are the current owners of record for areas constituting the Site (*See* Figure 1). Respondent did not own all of the property at the time of the discharges described in this Order but Respondent caused those discharges to occur.

13. Prior to 2009, the Site contained wetlands, including 10.28 acres of wetlands that are the subject of this Order. Prior to 2009, the Site contained streams, including 5,966 linear feet of stream that is the subject of this Order.

14. From approximately September 2009 up to June 2010, and possibly at other times, the Respondent, and/or those acting on the Respondent's behalf, performed land clearing, ditching and excavation activities on the Site using machinery (i.e. bulldozers, graders, dump trucks and excavating equipment) which resulted in the discharge of dredged and fill material (i.e. dirt, clay, topsoil, and sand) (*See* Figure 2)

15. Dirt, clay, topsoil, sand, rock and/or gravel are each "pollutants" as defined by Section

JW

502(12) of the Act, 33 U.S.C. § 1362(12).

16. At all times relevant to this Order, Respondent was a "person" as defined by Section 502(5) of the Act, 33 U.S.C. § 1362(5).

17. Respondent's deposits were "discharges" as defined by Section 502(12) of the Act, 33 U.S.C. § 1362(12).

18. Respondent discharged "pollutants" as defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6).

19. Earthmovers, bulldozers, dumptrucks and graders are each "point sources" as contemplated by Section 502(14) of the Act, 33 U.S.C. § 1362(14).

20. Prior to 2009, the Site contained wetlands that were inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances did support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

21. Therefore, the Site contained "wetlands" as defined by 40 C.F.R. § 232.2.


22. Based on United States Geological Survey topographic maps, National Wetland Inventory maps, Federal Emergency Management maps, National Resource Conservation Service soil survey maps, county plats, and various aerial photos, wetlands and streams on the Site were impacted by the Respondent's activities from September 2009 to June 2010.

23. The wetlands on Site were "bordering and contiguous" to the waters of Jockey Hollow Run, and "adjacent" to the Jockey Hollow Run, as defined by 40 C.F.R. § 232.2.

24. The waters of the Site flowed into the waters of Boggs Fork.

25. The waters of Boggs Fork flowed into the waters of Stillwater Creek.

26. The waters of Stillwater Creek flow into the Tuscarawas River, a traditionally navigable

A handwritten signature in black ink, appearing to be 'J.A.', is located at the bottom center of the page.

water.

27. The wetlands and streams on the Site, Jockey Hollow Run, Boggs Fork, and Stillwater Creek 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.

28. Respondent was a person who discharged pollutants from point sources into navigable waters in violation of Section 301 of the Act, 33 U.S.C. § 1311.

29. Each day the pollutants remain in navigable waters constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

30. At no time did Respondent have a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities referenced above or for the discharge of pollutants referenced in this Order.

### **COMPLIANCE REQUIREMENTS**

**BASED ON THE FOREGOING FINDINGS**, and pursuant to the authority under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), duly delegated to the undersigned, **IT IS HEREBY ORDERED:**

31. Respondent shall refrain from further discharges of pollutants into waters on the Site, except in compliance with the CWA.

32. This Order shall become effective on the date it is executed by the Director, Water Division, Region 5, EPA.

33. Within 30 days of the effective date of this Order, Respondent must submit to EPA for approval a Restoration Plan (the plan) to provide restoration for impacts to wetlands and streams identified above. The plan must be consistent with the general guidelines attached as Exhibit 1



*(General Guidelines for Removal and Restoration: Exhibit 1).*

34. If EPA finds the submitted plan acceptable, EPA will notify Respondent of its approval, and Respondent must commence site restoration and/or mitigation activities according to the approved plan or portion thereof. If EPA determines that the proposed plan or its included implementation schedule is unacceptable in whole or in part, EPA will notify Respondent and provide corrective comments as appropriate within 30 days of submission. Respondent must revise the plan, incorporating EPA's comments within 15 calendar days of the date of its receipt of EPA's notification and comments.

35. Any structure, work or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration or environmental benefit must be identified in the plan. This includes 3.24 acres of fill to be left in place. Respondent must implement any structure, work or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration or environmental benefit in accordance with the terms and conditions of the appropriate Section 404 Permit and with the provisions of this Order. Respondent shall contact the United States Army Corps of Engineers (USACE) for the appropriate CWA 404 authorization (Exhibit 3 – Nationwide Permit 32) ("the Section 404 Permit") within 30 calendar days of approval of the plan by EPA and prior to commencing any work. No work shall proceed until authorization has been received by USACE.

36. Respondent must commence implementation of the plan no later than four (4) months after issuance of the Section 404 Permit from the USACE.

37. Prior to commencing restoration activities on the portion of the Site owned by the Village of Flushing, Respondent must obtain written consent from the Village of Flushing.

A handwritten signature in black ink, appearing to be 'JRW', is located at the bottom right of the page.

38. The requirements of the approved or modified plan will be incorporated into the requirements of the Section 404 Permit.

39. Within 30 days of completing wetland and stream restoration and mitigation activities, Respondent must submit to EPA written certification that the work on wetlands and streams on Site have been completed in accordance with the approved plan. Such certification must include photographs and a summary of all work performed to include an as-built drawing, a timeline of the activities, description of the activities, and identification of any problems encountered during implementation. All written certifications, documentation, and monitoring reports shall be submitted to EPA at the addresses specified in paragraph 44.

40. Within thirty (30) calendar days of the effective date of this Order, Respondent shall establish a real estate instrument (i.e. conservation easement) on approximately 36.863 acres of property which includes 12.30 acres of wetland and 5,709 linear feet of stream (protection) (*See* Figure 3) to address wetland and stream impacts associated with this violation. The real estate instrument shall be recorded and filed with the Harrison County Recorder's Office.

41. At a minimum, the real estate instrument shall run with the land and bind all of Respondents' assigns and successors in interest; prohibit any division or subdivision of the protective area; prohibit any filling, excavations, or other changes in the general topography of the protective area; prohibit any commercial activity or industrial development on the on-site protective area; prohibit the drilling of new wells for the production of oil, gas, or other related products on the protective area; prohibit the placement or construction of any man-made modifications such as buildings, structures, fences, roads, and parking lots on the protective area, except for barbed wire fences to prevent livestock from entering the protective area; prohibit any

A handwritten signature in black ink, appearing to be 'J. Wagner', is located at the bottom right of the page.

James Wagner, Fox Country Land Holdings, LP, Administrative Order 2016

cutting of trees, except on or along the existing earthen berms as necessary to protect the integrity of the berms, ground cover or vegetation, or destroying such plant life by means of herbicides, on the conservation easement, except for the control of invasive plant species; prohibit waste, garbage, and unsightly or offensive materials from accumulating on the protective area; and prohibit dredging, straightening, filling, channelizing, impeding, diverting, or otherwise altering water courses and streams and adjacent riparian buffers on the conservation easement.

42. Within fourteen (14) calendar days of filing the real estate instrument with the County Recorder, Respondent must submit to EPA a copy of the recorded real estate instrument at the addresses specified in paragraph 43.

43. Submittals provided to EPA under this Order shall be certified and submitted by the Respondent under authorized signature to the following address:

Andrea Schaller, Enforcement Officer  
U.S. Environmental Protection Agency (WW-16J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

#### **GENERAL PROVISIONS**

44. EPA does not waive any rights to use the information requested herein in an administrative, civil, or criminal action.

45. Neither the issuance of this Order by EPA nor the compliance with its terms affects the Respondent's ongoing obligation to comply with the CWA or any other federal, state, or local law or regulation nor does it preclude further enforcement action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, for the violations cited herein.

46. Failure to comply with the terms of this Section 309(a) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as



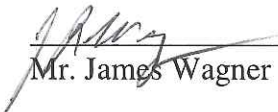


James Wagner, Fox Country Land Holdings, LP, Administrative Order 2016

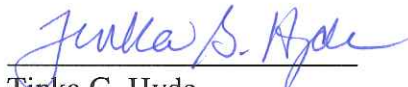
modified by 40 C.F.R. Part 19. Should the EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if, after notice and opportunity for a hearing, the court determines that you have violated the Act and failed to comply with the terms of the Order. The court has the authority to impose separate civil penalties for violation of the Act as well as for violation of this Order.

47. Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondent may have with respect to any issue of fact or law set forth in this CWA Section 309(a)(3) Administrative Order on Consent, including, but not limited to, any right of judicial review of the Section 309(a)(3) Compliance Order on Consent under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.

Date: 4-20-2016

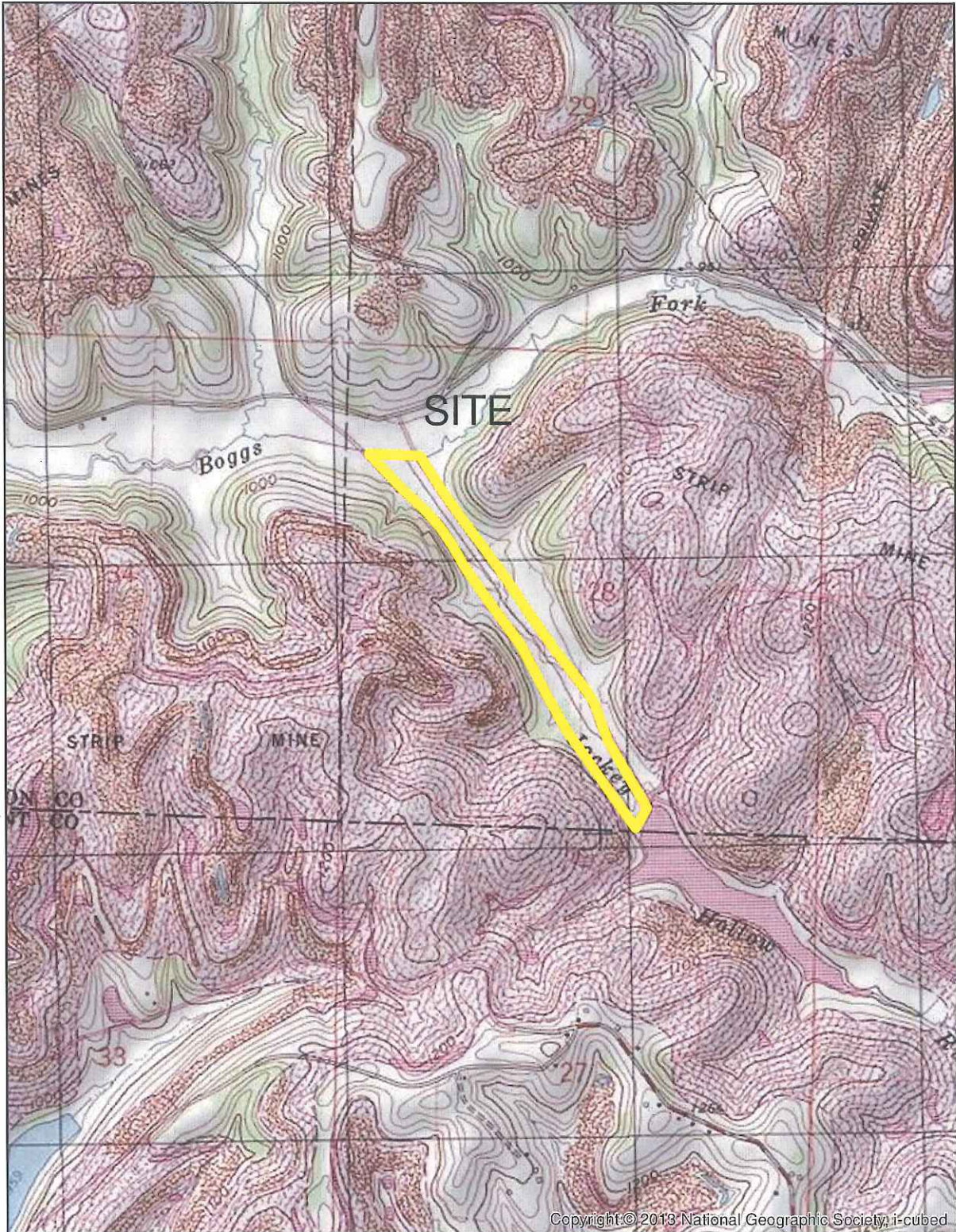
  
Mr. James Wagner

Date: 4-27-2016

  
Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection Agency  
Region 5

# Figure 1 Location

CWA-05-2016-0012

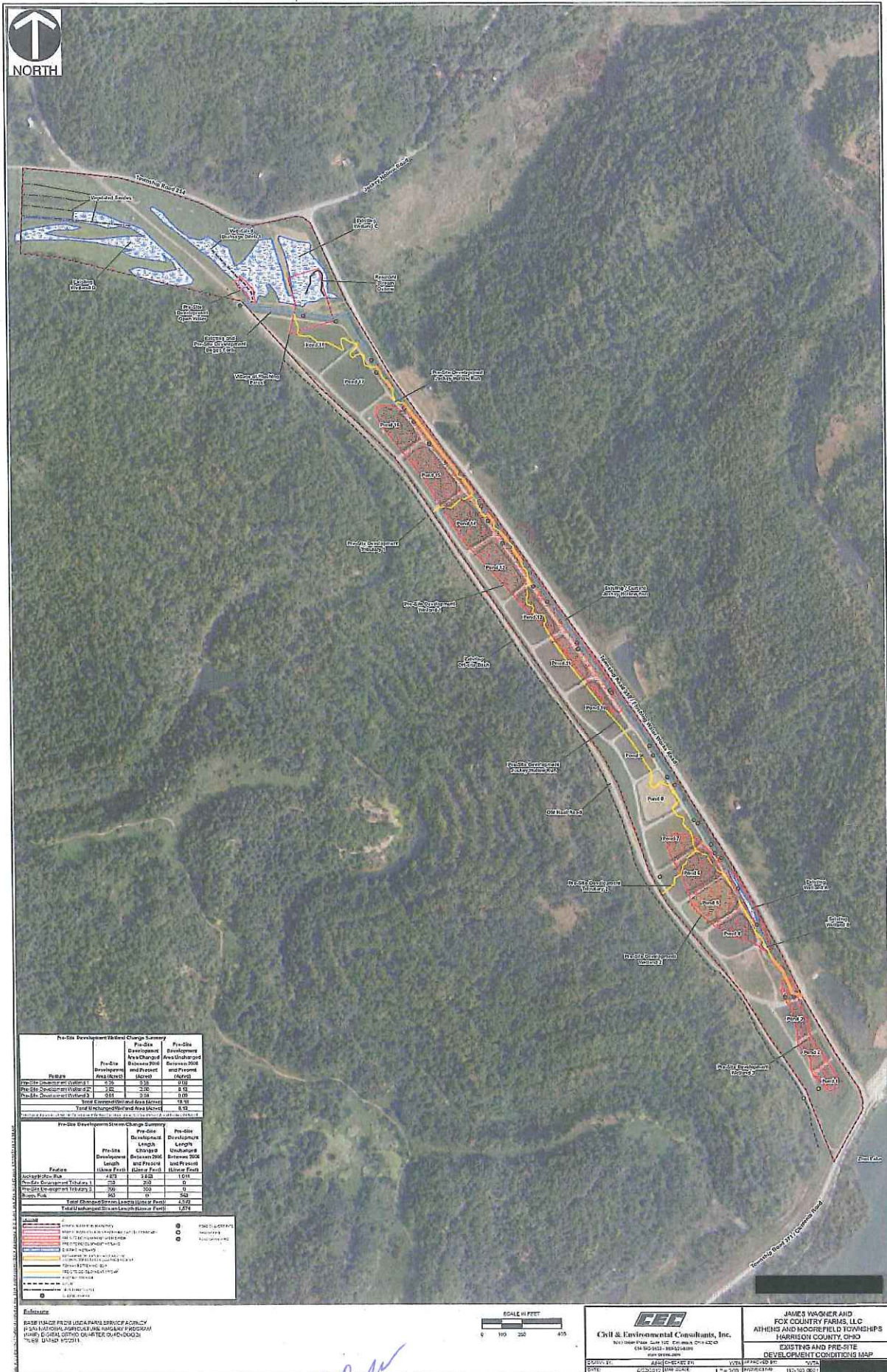


Fox Country Farms  
Harrison County, Ohio

A handwritten signature in blue ink, appearing to read "JAC".

Figure 2

CWA-05-2016-0012

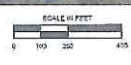


Pre-Site Development Watershed Change Summary			
Feature	Pre-Site Development Area (Acres)	Pre-Site Development Area (Acres)	Pre-Site Development Area (Acres)
Watershed Change 1	1.26	1.26	1.26
Watershed Change 2	0.00	0.00	0.00
Watershed Change 3	0.00	0.00	0.00
<b>Total Watershed Change</b>	<b>1.26</b>	<b>1.26</b>	<b>1.26</b>

Pre-Site Development Stream Change Summary			
Feature	Pre-Site Development Length (Linear Feet)	Pre-Site Development Length (Linear Feet)	Pre-Site Development Length (Linear Feet)
Stream Change 1	1,872	1,872	1,872
Stream Change 2	0	0	0
Stream Change 3	0	0	0
<b>Total Stream Change</b>	<b>1,872</b>	<b>1,872</b>	<b>1,872</b>

- Legend
- Watershed Change 1
- Watershed Change 2
- Watershed Change 3
- Stream Change 1
- Stream Change 2
- Stream Change 3
- Other
- Scale
- North Arrow

BASE MAP FROM USGS AIR PHOTO ARCHIVE  
 DATA PROVIDED BY THE HARRISON COUNTY GIS DEPARTMENT  
 DATE: 04/20/16

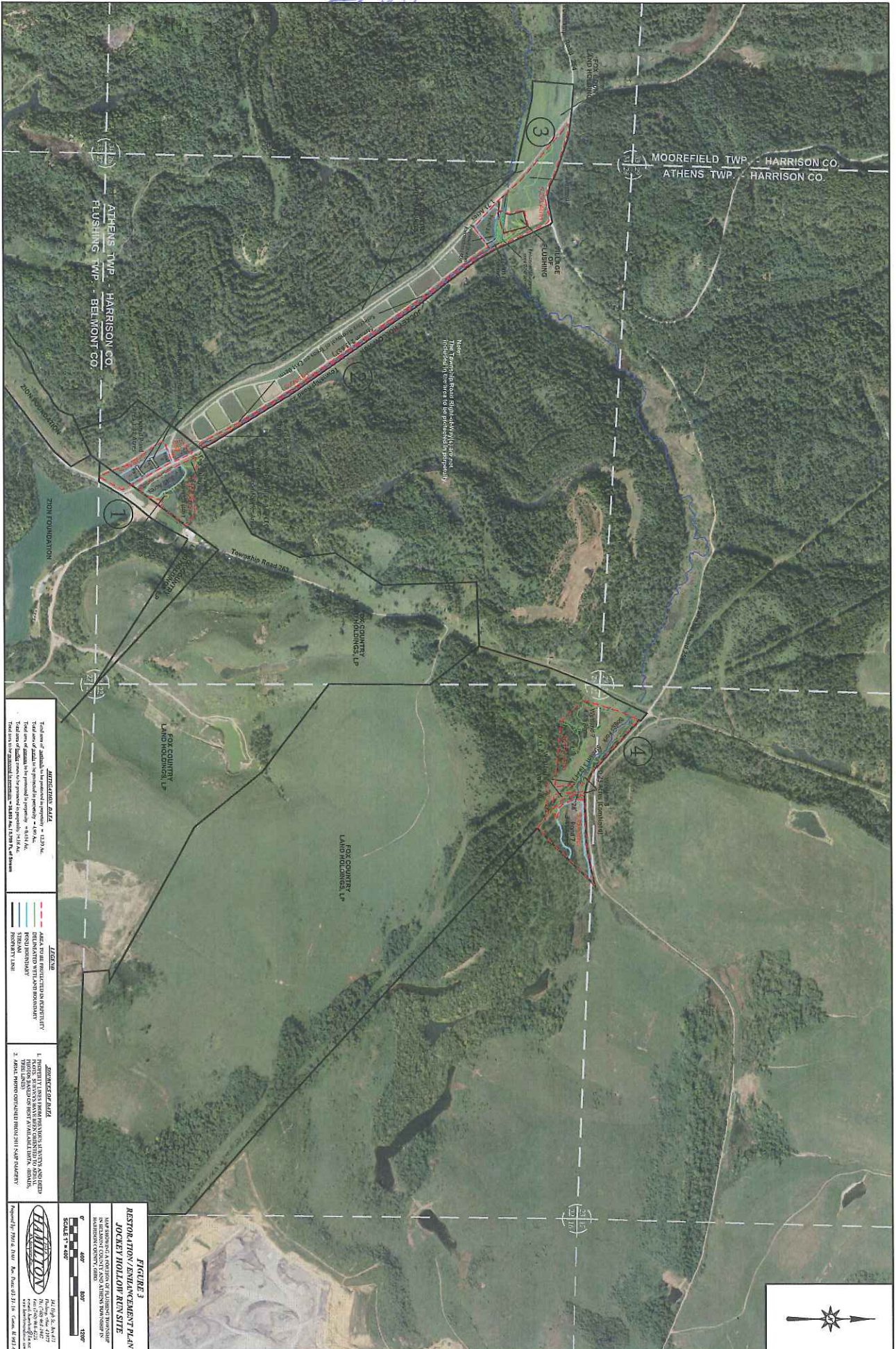


**CEC**  
 Civil & Environmental Consultants, Inc.  
 10000 New Line Rd., Columbus, OH 43240  
 614-885-8422 - 614-885-8400  
 www.cecinc.com

JAMES WAGNER AND FOX COUNTRY FARMS, LLC  
 ATHENS AND HOOVERFIELD TOWNSHIPS  
 HARRISON COUNTY, OHIO  
 EXISTING AND PRE-SITE DEVELOPMENT CONDITIONS MAP

DATE: 02/25/17  
 SCALE: 1" = 200'

*J. Wagner*



Note:  
The Township Reuse Right-of-Way(s) are not  
fringed by the site to be protected in perpetuity.

**ATTENTION DATA**  
Total area of site to be protected in perpetuity = 1,239 Ac.  
Total area of site to be protected in perpetuity = 1,000 Ac.  
Total area of site to be protected in perpetuity = 1,000 Ac.  
Total area of site to be protected in perpetuity = 1,000 Ac.

**LEGEND**  
- - - - - AREA TO BE RESTRICTED IN PERPETUITY  
- - - - - DELINEATED SETBACK BOUNDARY  
- - - - - PROPERTY LINE

**SOURCES OF DATA**  
1. PROJECT AREA BOUNDARIES, PROPERTY LINES AND SETBACK BOUNDARIES FROM AERIAL PHOTOGRAPHY AND FIELD SURVEY.  
2. AERIAL PHOTOGRAPHY FROM 2011, 2012 AND 2013.

**FIGURE 3**  
**RESTORATION/ENHANCEMENT PLAN**  
**JOCKEY HOLLOW RENS SITE**  
IN BELMONT COUNTY AND ATHENS TOWNSHIP  
HARRISON COUNTY, OHIO

Scale: 1" = 400'  
0' 100' 200' 300' 400'

Prepared by: **HAMILTON** CONSULTANTS, INC.  
441 High St., Suite 112  
Cincinnati, OH 45202  
Tel: 513.263.4444  
Fax: 513.263.4444  
www.hamiltonconsultants.com