

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:

Bennett Quality Homes, Inc.,
Westlake, Ohio; and,

Talp, Inc.,
Westlake, Ohio,

Respondents.

Docket No. CWA-05-2017-0010



CONSENT AGREEMENT AND FINAL ORDER

Jurisdictional Allegations

1. This is an administrative action commenced and concluded under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the Consolidated Rules) as codified at 40 C.F.R. Part 22, for violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
2. 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). 40 C.F.R. § 22.13(b).
3. Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency (U.S. EPA), Region 5.
4. Respondents are Bennett Quality Homes, Inc., 27899 Clemens Road, Westlake, Ohio, 44145-1141, and Talp, Inc., 30257 Clemens Road, Unit D, Westlake, Ohio, 44145-1004, corporations and residential development companies, and each a "person" as that term is defined

at section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 501.2.

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 stipulate that U.S. EPA has jurisdiction over the subject matter of this CAFO and waives any jurisdictional objections it may have.

8. Respondents waive their right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and any right to appeal this CAFO.

9. By executing this CAFO, the Respondents do not admit liability or admit Complainant's factual allegations set forth in this CAFO. The Respondents' execution of this CAFO does not constitute a waiver or admission of any kind, including without limitation a waiver of any defense, legal or equitable, which Respondents may have in this or any other administrative or judicial proceeding, other than a proceeding to enforce this CAFO.

Statutory and Regulatory Background

10. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), states that: "Whenever, on the basis of any information available the Administrator finds that any person has violated [section 301 of the CWA, 33 U.S.C. § 1311], ... the Administrator ... may, after consultation with the State in which the violation occurs, assess a ... class II civil penalty under [section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B)]. "

11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that "Except as in

compliance with [section 404 of the CWA] the discharge of any pollutant by any person shall be unlawful.”

12. 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 specified disposal sites.”

13. Section 502(12)(A) of the CWA, 33 U.S.C. § 1362(12)(A), defines a “discharge of pollutants” as “ ... any addition of any pollutant to navigable waters from any point source.”

14. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “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.”

15. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” as “ ... dredged spoil, solid waste, ... biological materials, ... rock, sand [or] agricultural waste discharged into water.”

16. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “ ... the waters of the United States”

17. Federal regulations, at 40 C.F.R. § 232.2, define the term “waters of the United States” to include rivers, streams and “wetlands.”

18. Federal regulations, at 40 C.F.R. § 230.3(t), define “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.”

19. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and its implementing regulations at 40 C.F.R. Part 19, increased the statutory maximum penalty under section 309(g)(3) of the CWA, 42 U.S.C. § 1319(g)(3), for violations occurring after January 12, 2009, from \$10,000 to \$16,000 per day of violation and from a \$125,000 to a \$177,500 maximum penalty.

Factual Allegations

20. Each Respondent was and remains a “corporation” incorporated in the state of Ohio.

21. Therefore, each Respondent was a “person” as defined at section 502(6) of the Act, 33 U.S.C. § 1362(5).

22. On or about March 14, 2013, Respondents owned or operated, at least in part, or in equity, seven parcels of real property all located on or around Merion Court, Westlake, Ohio, (approximately Latitude 41.4426, Longitude -81.9645), as depicted in attached Exhibit No. 1, (“the Site”).

23. On or about March 14, 2013, Respondents, or their contractors, added rock or sand or cellar dirt or fill material from bulldozers, excavators, backhoes, and trucks, into 3.36 acres of waters on the Site.

24. The addition of rock or sand or cellar dirt or fill material into the waters of the Site constituted a “discharge of pollutants” within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

25. The rock or sand or cellar dirt or fill material constituted “pollutants” within the meaning of the definition set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

26. The bulldozers, excavators, backhoes, and trucks constituted “point sources” within the meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

27. The 3.36 acres of waters on the Site were “wetlands” within the meaning of the definition set forth at 40 C.F.R. § 230.3(t).

28. The wetlands on the Site were “adjacent” to Porter Creek within the meaning of the definition set forth at 40 C.F.R. § 230.3(s)(7).

29. The waters of Porter Creek were a “tributary” to Lake Erie within the meaning of the definition set forth at 40 C.F.R. § 230.3(s)(5).

30. The wetlands on the Site were also “adjacent” to Lake Erie within the meaning of the definition set forth at 40 C.F.R. § 230.3(s)(7).

31. Lake Erie was and is currently used in interstate or foreign commerce within the meaning of the definition set forth at 40 C.F.R. §§ 230.3(s)(1) and (2).

32. The wetlands on the Site, Porter Creek, and Lake Erie were and remain “waters of the United States” within the meaning of the definition set forth at 40 C.F.R. §§ 230.3(s)(1), (5), and (7) and “navigable waters” within the meaning of the definition set forth at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

33. Therefore, Respondents discharged pollutants from a point source into navigable waters.

34. Respondents failed to obtain a CWA Section 404 Dredge and Fill Permit.

35. Therefore, Respondents violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

36. Each day Respondents' discharged material remained in the waters on Site constituted a discrete, separate, and additional violation of Section 301 of the CWA, 33 U.S.C. § 1311.

37. The Administrator may assess a penalty not to exceed \$16,000 for each day of violation of section 301 of the CWA to a maximum of \$177,500 for these violations. 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19.

Civil Penalty

38. Complainant has determined that an appropriate civil penalty to settle this action is \$35,000.00 pursuant to the facts of this action and the civil penalty factors listed at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

39. Within 30 days after the effective date of this CAFO, Respondents must pay the \$35,000.00 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

40. The check must note the case caption and the docket number of this CAFO.

41. A transmittal letter, stating Respondents' name, the case title, Respondents' complete address and the case docket number must accompany the payment. Respondents must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Marco Finocchiaro (WW-16J)
Wetlands Enforcement Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Jeffery M. Trevino (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

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

43. If Respondents do not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, 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.

44. 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 by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondents must pay the United States' enforcement expenses, including but not limited to attorneys' fees and costs incurred by the United States for collection proceedings. Respondent must also pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue.

General Provisions

45. This CAFO resolves Respondents' liability, and any liability of the Respondents' owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, servants, successors and

assigns for only federal civil penalties for the violations and facts alleged in this CAFO.

46. This CAFO does not 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.

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

48. This CAFO is a "final order" for the purposes of any future enforcement action under section 309 of the CWA, 33 U.S.C. § 1319.

49. The terms of this CAFO bind Respondents and Respondents' owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, successors and assigns.

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

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

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

53. The effective date of this CAFO is the date it is filed with the Regional Hearing Clerk, after having been signed by the Regional Administrator and subject to the requirements of section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C).

54. Complainant is providing public notice of and reasonable opportunity to comment on the proposed issuance of the CAFO according to section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4).

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Bennett Quality Homes, Inc., Westlake, Ohio, Respondent

Date: 4-27-17


Donald E. Bennett
Vice President

Talp. Inc, Westlake, Ohio, Respondent

Date: 4/27/17


Kenneth Andreano
Vice President

Region 5, U.S. Environmental Protection Agency, Complainant

Date: 5/30/17


Christopher Korleski
Director, Water Division

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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.

Date

Ann L. Coyle
Regional Judicial Officer
Region 5
United States Environmental Protection Agency

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CERTIFICATE OF SERVICE

I certify that today I filed with the Regional Hearing Clerk, Region 5, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (Mail Code (C-19J)), Chicago, Illinois, 60604-3590, the original and one copy of this Clean Water Act Section 309(g) Consent Agreement and Final Order and served the following parties in the following manners at the following addresses a true and correct copy.

Donald Bennett
Vice-President
Bennett Quality Homes, Inc.
27899 Clemens Road
Westlake, Ohio, 44145-1141

Copy by U.S. Certified Mail
Return Receipt Requested No.

Kenneth Andreano
Vice-President
Talp, Inc
30257 Clemens Road, Unit D
Westlake, Ohio 44145-1004

Copy by U.S. Certified Mail
Return Receipt Requested No.

Joseph P. Koncelik
Counsel to Respondents

Copy by Electronic Mail to
joseph.koncelik@tuckerellis.com

Jeffery M. Trevino
Counsel to Complainant

Copy by Electronic Mail to
trevino.jeffery@epa.gov

Ann Coyle
Regional Judicial Officer

Copy by Electronic Mail to
coyle.ann@epa.gov

Date

LaDawn Whitehead
Regional Hearing Clerk
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (C-19J)
Chicago, Illinois 60604-3590

Exhibit No. 1

**Bennett Quality Homes, Inc. and Talp, Inc.
Country Club Estates Subdivision Phase VIII Site**

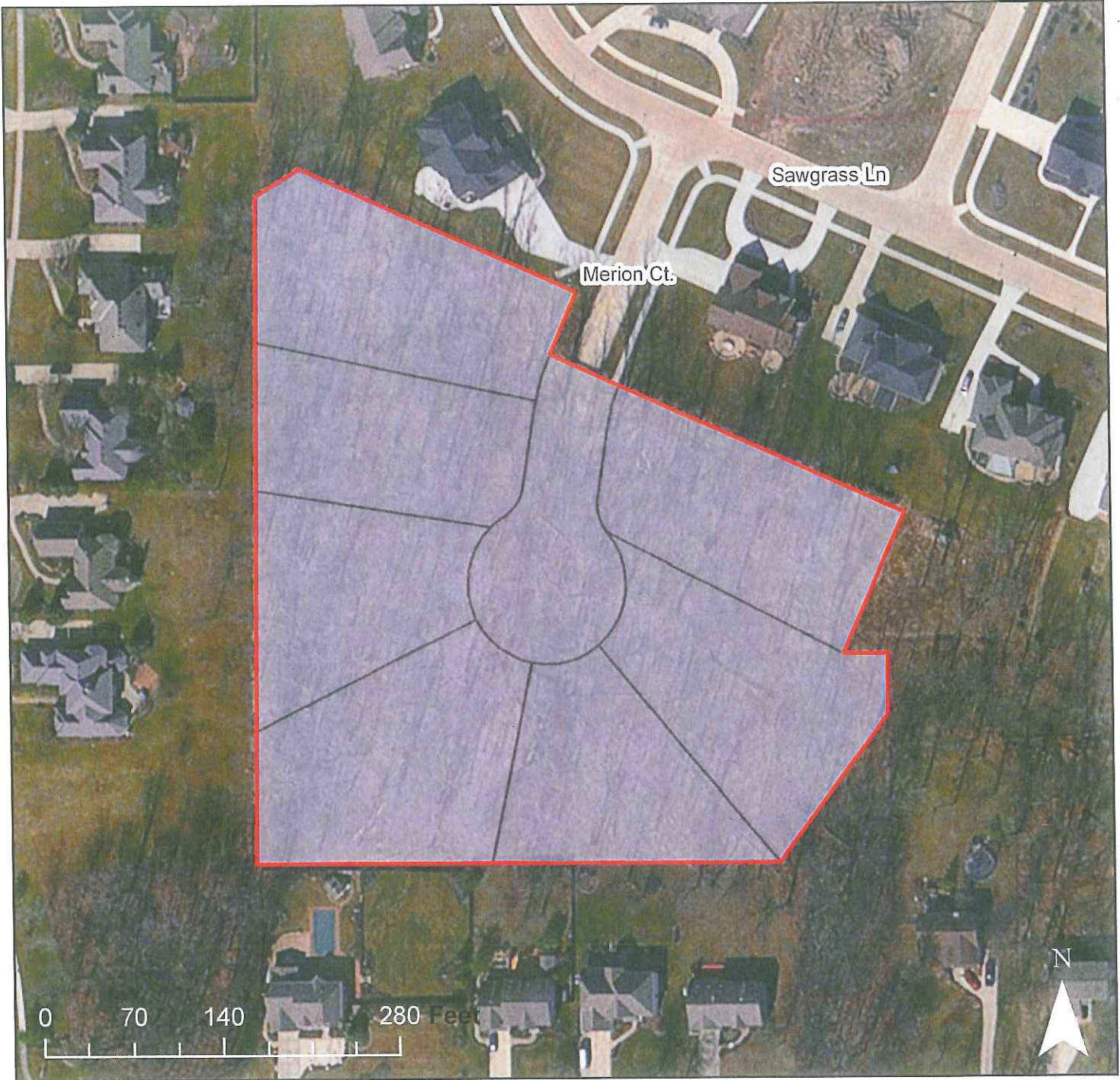


Exhibit 1 - Site Boundary
Country Club Estates Phase VIII
Merion Court
City of Westlake, OH 44145

