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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

MICHAEL ACHEN and  
CMK INVESTMENTS LLC

Respondents.

)  
)  
) CONSENT AGREEMENT  
) AND FINAL ORDER

)  
) \*  
) Docket No. CWA-10-2009-0042  
)  
)

**I. AUTHORITY**

1.1. This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA, Region 10, who has delegated the authority to the Regional Judicial Officer.

1.2. Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA hereby issues, and Respondents Michael Achen and CMK Investments LLC, hereby consent to, the issuance of the Final Order contained in Part V of this CAFO.

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1 **II. PRELIMINARY STATEMENT**

2 2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this  
3 CAFO commences this proceeding, which will conclude when the Final Order contained  
4 in Part V of this CAFO becomes final.

5 2.2. A concise statement of the factual basis for alleging violations of the Act,  
6 together with specific references to the provisions of the Act and implementing  
7 regulations Respondents are alleged to have violated, appears in Part III of this CAFO.

8 **III. EPA'S ALLEGATIONS**

9 3.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of  
10 pollutants to navigable waters by any person, except as authorized by a permit issued  
11 pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344. Each discharge of  
12 pollutants from a point source that is not authorized by such a permit constitutes a  
13 violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

14 3.2. Michael Achen is a principal of CMK Investments LLC and is a "person"  
15 within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and  
16 1362(5).

17 3.3. CMK Investments LLC is a limited liability company registered in the  
18 State of Washington, and is a "person" within the meaning of Sections 301(a) and 502(5)  
19 of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

20 3.4. Michael Achen and/or CMK Investments LLC (jointly referred to  
21 hereafter as "Respondents") own, possess, and/or control property located at the  
22 intersection of State Route 503 and the proposed Rasmussen Street, City of Battle  
23 Ground, Clark County, Washington. The abbreviated legal description of this parcel is  
24 #158 Section 3, Township 3 North, Range 2 East, Willamette Meridian. Respondents'  
25 property is hereinafter referred to as "the Site."  
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1           3.5.    The Site contains wetlands that are adjacent to an unnamed ditch which  
2 contains relatively permanent waters. This unnamed ditch connects to Mill Creek which  
3 drains into the East Fork of the Lewis River.

4           3.6.    Mill Creek, the East Fork of the Lewis River, the unnamed ditch and its  
5 adjacent wetlands are “navigable waters” and “waters of the United States” within the  
6 meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), 33 C.F.R. § 328.3(a), and  
7 40 C.F.R. § 232.2.

8           3.7.    Sometime around August 2004 and July 2005, Respondents and/or  
9 persons acting on their behalf used heavy equipment to harvest timber, remove tree  
10 stumps and logging debris, restore ditches, and regrade the Site, which resulted in the  
11 discharge of fill and/or dredged material into approximately six acres of the wetlands at  
12 the Site. The heavy equipment used to fill the wetlands is a “point source” within the  
13 meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

14           3.8.    The fill and/or dredged material referenced in paragraphs 3.7, above  
15 constitutes a “pollutant” within the meaning of Section 502(6) of the Act,  
16 33 U.S.C. § 1362(6).

17           3.9.    By causing such fill and/or dredged material to enter waters of the United  
18 States, Respondents engaged in the “discharge of pollutants” from a point source within  
19 the meaning of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

20           3.10.   Respondents’ discharges of fill and/or dredged material described above  
21 were not authorized by any permit issued pursuant to Section 402 or 404 of the Act, 33  
22 U.S.C. § 1342 or 1344, and Respondents are therefore in violation of Section 301 of the  
23 Act, 33 U.S.C. § 1311.

24           3.11.   On September 28, 2005, EPA issued a compliance order to Respondents  
25 informing them that the discharge of fill and/or dredged material to the wetlands was in  
26

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1 violation of federal law, and directing Respondents to do no further discharging of  
2 dredged or fill material in wetlands at the Site.

3 3.12. In 2005, at EPA's direction, Respondents partially restored the Site by  
4 removing the unauthorized fill from the drainage features on the Site and replanting the  
5 wetland areas with seeded vegetation.

6 3.13. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40  
7 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for  
8 each day during which the violation continues, up to a maximum amount of \$157,500.

#### 9 **IV. CONSENT AGREEMENT**

10 The parties to this action hereby stipulate as follows:

11 4.1. Respondents admit the jurisdictional allegations contained in this CAFO.

12 4.2. Respondents neither admit nor deny the factual allegations contained in  
13 this CAFO.

14 4.3. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), the nature,  
15 circumstances, extent, and gravity of the alleged violations, Respondents' economic  
16 benefit of noncompliance and ability to pay the proposed penalty, and other relevant  
17 factors, EPA has determined and Respondents agree that an appropriate penalty to settle  
18 this action is in the amount of THIRTY THOUSAND DOLLARS (\$30,000).

19 4.4. Respondents consent to the issuance of the Final Order in Part V below  
20 and to payment of the civil penalty cited in the foregoing paragraph within thirty (30)  
21 days of the effective date of the Final Order.

22 4.5. Payment under this CAFO shall be made by cashier's check or certified  
23 check, payable to the order of "Treasurer, United States of America" and shall be  
24 delivered to the following address:

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

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1 Respondents shall note on the check(s) the title and docket number of this case.

2 Respondents may also pay the penalty by wire transfer in accordance with instructions  
3 provided by EPA.

4 4.6. Respondents shall serve photocopies of the check or documentation of the  
5 wire transfer described above on the Regional Hearing Clerk and EPA at the following  
6 two addresses:

7 Regional Hearing Clerk  
8 U.S. Environmental Protection Agency  
9 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158  
10 Seattle, Washington 98101

11 Office of Ecosystems and Communities  
12 U.S. Environmental Protection Agency  
13 1200 Sixth Avenue, Suite 900, Mail Stop ETPA-083  
14 Seattle, Washington 98101-3140  
15 Attn: Rebecca Chu

16 4.7. Should Respondents fail to pay the penalty assessed by this CAFO in full  
17 by its due date, the entire unpaid balance of penalty and accrued interest shall become  
18 immediately due and owing. Should such a failure to pay occur, Respondents may be  
19 subject to a civil action to collect the assessed penalty under the Clean Water Act. In any  
20 collection action, the validity, amount, and appropriateness of the penalty shall not be  
21 subject to review.

22 4.8. Should Respondents fail to pay the penalty assessed by this CAFO in full  
23 by its due date, Respondents shall also be responsible for payment of the following  
24 amounts:

- 25 a. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.  
26 § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at the  
rate established by the Secretary of the Treasury pursuant to 31 U.S.C.  
§ 3717(a)(1) from the effective date of the Final Order contained herein, provided,  
however, that no interest shall be payable on any portion of the assessed penalty

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1 that is paid within thirty (30) days of the effective date of the Final Order  
2 contained herein.

3 b. Attorney Fees, Collection Costs, Nonpayment Penalty. Pursuant to  
4 Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), should Respondents fail to  
5 pay on a timely basis the amount of the penalty assessed by the Final Order  
6 contained herein, Respondents shall pay (in addition to any assessed penalty and  
7 interest) attorney fees, costs for collection proceedings, and a quarterly  
8 nonpayment penalty for each quarter during which such failure to pay persists.  
9 Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of  
10 the aggregate amount of Respondents' penalties and nonpayment penalties which  
11 are unpaid as of the beginning of such quarter.

12 4.9. Respondents waive their right to an adjudicatory hearing on any issue  
13 addressed in this CAFO.

14 4.10. The provisions of this CAFO shall bind Respondents and their agents,  
15 servants, employees, successors, and assigns.

16 4.11. Except as provided in paragraph 4.8 above, each party shall bear its own  
17 costs, fees, and disbursements in this action.

18 4.12. Respondents agree not to claim or attempt to claim a federal income tax  
19 deduction or credit covering all or any part of the civil penalty paid to the United States  
20 Treasury.

21 4.13. The parties represent that they are duly authorized to execute this CAFO  
22 and that the person signing this CAFO on each of their behalf is duly authorized to bind  
23 them to the terms of this CAFO.  
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1 STIPULATED AND AGREED:

2 MICHAEL ACHEN and CMK INVESTMENTS LLC

3  
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Dated: 12-9-08

5 MICHAEL ACHEN, as an individual and  
6 as a Principal of CMK INVESTMENTS LLC

7 U.S. ENVIRONMENTAL PROTECTION AGENCY

8  
9 

Dated: 2-03-09

10 DEBORAH E. HILSMAN  
11 Assistant Regional Counsel

12 **V. FINAL ORDER**

13 5.1. The terms of the foregoing Consent Agreement are hereby ratified and  
14 incorporated by reference into this Final Order. Respondents are hereby ordered to  
15 comply with the foregoing terms of settlement.

16 5.2. This CAFO constitutes a compromise and settlement by EPA and  
17 Respondents of all EPA's claims for civil penalties pursuant to the Clean Water Act for  
18 the particular violations alleged in this CAFO. In accordance with 40 C.F.R. § 22.31(a),  
19 nothing in this CAFO shall affect the right of EPA or the United States to pursue  
20 appropriate injunctive or other equitable relief or criminal sanctions for any violations of  
21 law. This CAFO does not waive, extinguish, or otherwise affect Respondents'  
22 obligations to comply with all applicable provisions of the CWA and regulations and  
23 permits issued thereunder.

24 5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C.  
25 § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Washington Department of Ecology has been  
26 given the opportunity to consult with EPA regarding the assessment of an administrative

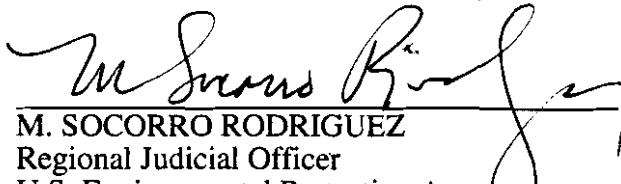
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1 penalty against Respondents.

2 5.4. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A),  
3 EPA has published public notice to inform the public of its intent to assess an  
4 administrative penalty against Respondents and to invite public comment in accordance  
5 with 40 C.F.R. § 22.45. More than 40 days have elapsed since the issuance of this public  
6 notice, and EPA has received no petitions to set aside the Consent Agreement contained  
7 herein.

8 5.5. This Final Order shall become effective upon filing.

9  
10 SO ORDERED this 26<sup>th</sup> day of March, 2009.

11   
12 M. SOCORRO RODRIGUEZ  
13 Regional Judicial Officer  
14 U.S. Environmental Protection Agency  
15 Region 10  
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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Michael Achen and CMK Investments LLC**, **DOCKET NO.: CWA-10-2009-0042** was filed with the Regional Hearing Clerk on March 27, 2009.


On March 27, 2009 the undersigned certifies that a true and correct copy of the document was delivered to:

Deborah Hilsman, Esquire  
US Environmental Protection Agency  
1200 Sixth Avenue, ORC-158  
Suite 900  
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on March 27, 2009, to:

Steven F. Hill, Esq.  
Miller Nash LLP  
500 East Broadway, Suite 400  
P.O. Box 694  
Vancouver, WA 98666-0694

DATED this 27<sup>th</sup> day of March 27, 2009.

  
\_\_\_\_\_  
Carol Kennedy  
Regional Hearing Clerk  
EPA Region 10