

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. _____
)	
RICHARD M. OSBORNE SR.,)	
individually and as Trustee of the Richard)	
M. Osborne Trust; MADISON/ROUTE)	
20, LLC; MIDWAY INDUSTRIAL)	
CAMPUS CO., LTD.; NAYLOR FAMILY)	
PARTNERSHIP; J.T.O., INC.;)	COMPLAINT
CITY OF WILLOUGHBY, OHIO; and)	
STATE OF OHIO,)	
)	
Defendants.)	
)	

Plaintiff United States of America (“United States”), through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), alleges as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under section 309(b) and (d) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(b) and (d), to obtain injunctive relief and/or civil penalties against Richard M. Osborne Sr., individually and as Trustee of the Richard M. Osborne Trust (“Osborne Sr.”); Madison/Route 20, LLC (“Madison”); Midway Industrial Campus Company, LTD. (“Midway”); Naylor Family Partnership; J.T.O., Inc. (“JTO”); and the City of Willoughby (collectively “Defendants”), for the discharge of pollutants into waters of the United States in the Cities of Willoughby and Mentor, Lake County, Ohio, without authorization by the United States

Department of the Army, in violation of CWA section 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344. The State of Ohio is named as a defendant pursuant to CWA section 309(e). 33 U.S.C. § 1319(e).

2. In this action, the United States seeks: (1) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of CWA section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and at the direction of the Environmental Protection Agency, to restore and/or mitigate the damages caused by their unlawful activities; and (3) to require Defendants Osborne Sr., Madison, Midway, and the City of Willoughby to pay civil penalties as provided in 33 U.S.C. § 1319(d).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the Northern District of Ohio pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because the Defendants reside and/or conduct business in this District, the subject property is located in this District, and the cause of action alleged herein arose in this District.

5. Notice of the commencement of this action has been provided to the State of Ohio pursuant to CWA section 309(b), 33 U.S.C. § 1319(b).

THE PARTIES

6. Plaintiff in this action is the United States of America. Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

7. Osborne Sr. is an individual who resides and conducts business in the Northern District of Ohio. Osborne Sr. planned development of some or all of the real property that is the subject of this Complaint (hereinafter referred to as the “Riverside Commons Site”) for commercial and industrial use. At all times relevant to this complaint, Osborne Sr. was a principal of Madison, and president of Midway. Osborne Sr. is also the sole Trustee of the Richard M. Osborne Trust, through which Osborne Sr. owned several parcels of property at the Riverside Commons Site. Osborne Sr. resides at 8780 Fox Hollow Lane, Kirtland Hills, Lake County, Ohio.

8. Madison is a limited liability company organized under the laws of Ohio, which conducts business in the Northern District of Ohio, with a business address of 1110 Euclid Ave., Cleveland, Cuyahoga County, Ohio. Madison owns several parcels of property at the Riverside Commons Site, and planned development of the Riverside Commons Site for commercial and industrial use.

9. Midway is a limited liability company organized under the laws of Ohio, which conducts business in the Northern District of Ohio, with a business address of 8500 Station Street, Mentor, Lake County, Ohio. Midway owns several parcels of property at the Riverside Commons Site, and planned development of the Riverside Commons Site for commercial and industrial use.

10. Naylor Family Partnership is a partnership organized under the laws of Ohio, which conducts business in the Northern District of Ohio. Naylor Family Partnership holds a one-third membership ownership in Midway, and owns or owned one or more parcels of property at the Riverside Commons Site.

11. JTO is a corporation organized under the laws of Ohio, which conducts business in the Northern District of Ohio, with a business address of 6011 Heisley Road, Mentor, Lake County, Ohio. JTO is a general contractor, and constructed roads and sewers at the Riverside Commons Site.

12. The City of Willoughby is a municipality organized under the laws of Ohio with a business address of One Public Square, Willoughby, Lake County, Ohio. The City of Willoughby planned and contracted for the construction of roads, utilities, and sewers at the Riverside Commons Site.

13. The State of Ohio is a party to this action pursuant to CWA section 309(e), 33 U.S.C. § 1319(e).

STATUTORY BACKGROUND

14. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except in compliance with, inter alia, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

15. CWA section 502(12), 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

16. CWA section 502(6), 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, rock, sand and cellar dirt.

17. CWA section 502(7), 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

18. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define “waters of the United States” to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii)

tributaries to the above waters; and (iv) wetlands adjacent to any of the above waters or their tributaries.

19. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 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.”

20. 33 C.F.R. § 328.3(c) and 33 C.F.R. § 328.3(b) define “adjacent” as “bordering, contiguous, or neighboring.”

21. CWA section 502(14), 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

22. CWA section 502(5), 33 U.S.C. § 1362(5), defines “person” to include “an individual, corporation, partnership, [or] municipality.”

23. CWA section 502(4), 33 U.S.C. § 1362(4), defines “municipality” to include “a city.”

24. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

25. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

26. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

27. CWA section 309(e), 33 U.S.C. § 1319(e), provides that “Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party.”

GENERAL ALLEGATIONS

28. Defendants are persons within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

29. The Riverside Commons Site is comprised generally of approximately 280 acres within the Cities of Willoughby and Mentor, Lake County, Ohio and located immediately south of State Route 2, north of certain Conrail railroad tracks, east of Lost Nation Road and west of the Great Lakes Industrial Park.

30. The Riverside Commons Site is less than 0.05 miles east of the Chagrin River and approximately 3.2 miles upstream from Lake Erie.

31. The Chagrin River flows into Lake Erie and both bodies are traditionally navigable waters under 33 C.F.R. § 328.3(a)(1).

32. Prior to the unauthorized activities referenced in Paragraph 39, below, the Riverside Commons Site contained a contiguous wetland of approximately 170 acres, as defined by 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2, and 12,800 linear feet of waterways.

33. The Riverside Commons Site tributaries and wetland are “waters of the United States” within the meaning of the CWA and the regulations promulgated thereunder.

34. Tributaries at the Riverside Commons Site are relatively permanent bodies of water that flow either directly or indirectly through other tributaries to the Chagrin River.

35. The impacted wetland at the Riverside Commons Site is adjacent to the Tributaries on or at the Site that flow to the Chagrin River.

36. The impacted wetland at the Riverside Commons Site has or had a continuous surface connection, prior to the subject unauthorized activities, to one or more of the tributaries on or at the Site that flow to the Chagrin River.

37. The impacted wetland at the Riverside Commons Site is part of a larger watershed of contiguous, similarly-situated waters, and exhibits flow characteristics and functions that, when considered alone or in combination with similarly situated features in the region, significantly affect the chemical, physical, and biological integrity of the Chagrin River and/or Lake Erie.

38. The impacted wetland at the Riverside Commons Site, *inter alia*, provides or provided flood control and/or flood storage; provides or provided pollutant trapping and/or filtering functions; provide or provided nutrient transport; and/or maintains or maintained the chemical composition of the water, natural discharge patterns, and water quality functions that contributed to the aquatic and wildlife habitat of the watershed of the Chagrin River and Lake Erie.

39. From August 2001 through December 2004, one or more of the Defendants and/or persons acting on their behalf, or with Defendants' consent and/or knowledge, discharged dredged or fill material from point sources into waters of the United States without a permit under CWA section 404 at the Riverside Commons Site in the Cities of Willoughby and Mentor, Lake County, Ohio.

40. The dredged or fill material that one or more of the Defendants and/or persons acting on their behalf, or with Defendants' consent and/or knowledge, caused to be discharged includes, among other things, dirt, spoil, rock and sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

41. One or more of the Defendants and/or persons acting on their behalf, or with Defendants' consent and/or knowledge, used mechanized land-clearing and earth-moving equipment to accomplish the discharges. This equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

42. The unauthorized activities at issue in Paragraph 39 include, but are not limited to, the following:

- a. the discharge of dredged or fill material into the central area of the wetland at the Riverside Commons Site for construction of roads, utilities and a storm sewer system;
- b. the discharge of dredged or fill material in the northwest area of the wetland at the Riverside Commons Site for development, including access roads and building site;
- c. the discharge of dredged or fill material to divert a relatively permanently flowing water; and
- d. the discharge of dredged or fill material into approximately 45 acres of wetland within the Mentor side of the Riverside Commons Site by means of mechanized land-clearing and disking.

43. One or more of the Defendants either owned, leased or otherwise controlled the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

44. One or more of the Defendants conducted, contracted for, supervised and/or otherwise controlled the unauthorized discharges at issue in Paragraph 39.

45. Defendants' activities at the Riverside Commons Site resulted in the filling of approximately 69.5 acres and 3,800 linear feet of waters of the United States, and adverse impact to additional acres of waters of the United States.

46. Defendants did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344.

47. Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States, including wetland and tributaries, at the Riverside Commons Site.

48. Pursuant to CWA sections 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, Defendants are liable for a civil penalty for each day of violation of CWA section 301(a), 33 U.S.C. § 1311(a), in the wetland and tributaries at the Riverside Commons Site.

49. Unless enjoined, Defendants and/or persons acting on their behalf, or with Defendants' consent and/or knowledge, are likely to continue to discharge dredged or fill material into and/or to allow dredged or fill material to remain in the wetland and tributaries at Riverside Commons Site in violation of CWA section 301, 33 U.S.C. § 1311.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, the United States of America, respectfully requests that this Court order the following relief:

That the Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA;

That the Defendants, or any combination thereof, be enjoined to undertake measures, at Defendants' own expense and at the direction of the Environmental Protection Agency, to effect complete restoration of the Riverside Commons Site and/or to conduct off-site mitigation for irreversible environmental damage, as appropriate;

That the Defendants Osborne Sr., Madison, Midway, and the City of Willoughby be assessed pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA section 301(a), 33 U.S.C. § 1311(a);

That the United States be awarded costs and disbursements in this action; and

That this Court grant Plaintiff, the United States of America, such other relief as the Court may deem just and proper.

Respectfully submitted,

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