



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

MAY 29 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable Rayburn Waddell
525 Main Street
Philadelphia, Mississippi 39530

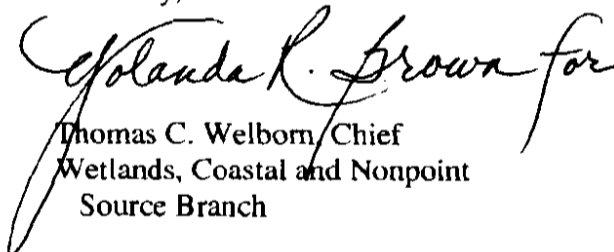
SUBJ: Consent Agreement and Final Order
Docket No. CWA-04-2008-5505(b)

Dear Mr. Waddell:

Enclosed please find the Consent Agreement and Final Order (CAFO), Docket No. CWA-04-2008-5505(b), which the U.S. Environmental Protection Agency (EPA) has executed. After the public comment period was over and EPA reviewed and resolved any comments on the CAFO, the Regional Hearing Officer signed the Final Order. In accordance with the terms of the CAFO, the date she signed the Final Order is the effective date of the CAFO.

If you have any further comments or questions regarding this matter, please contact Mike Wylie of my staff at (404) 562-9409, or your attorney can contact Philip Mancusi-ungaro, Associate Regional Counsel, at (404) 562-9519.

Sincerely,


Thomas C. Welborn, Chief
Wetlands, Coastal and Nonpoint
Source Branch

Enclosures

cc: Corps, Vicksburg
MSDEQ, Jackson

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)

City of Philadelphia)
Philadelphia, Mississippi)

RESPONDENT.)
_____)

)
)
) **CONSENT AGREEMENT AND**
) **FINAL PENALTY ORDER**

) **Docket No.: CWA-04-2008-5505(b)**

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CONSENT AGREEMENT

I. Statutory Authority

1. This is a civil penalty proceeding under Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(A), and 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*, published at 64 Fed. Reg. 40176 (July 23, 1999), codified at 40 Code of Federal Regulations (C.F.R.) Part 22 (Part 22).

2. The authority to take action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), is vested in the Administrator of the United States Environmental Protection Agency (EPA). The Administrator has delegated this authority to the Regional Administrator Region 4, who in turn has delegated this authority to the Director of the Water Management Division, who in turn has delegated this authority to the Chief of the Wetlands, Coastal and Nonpoint Source Branch of EPA, Region 4 (Complainant).

II. Statutory and Regulatory Background

3. Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A), states “[w]henever, 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 I civil penalty or a Class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)].”

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states “[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful.” Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (COE), to issue permits for the discharge of dredged or fill material into navigable waters.

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

6. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny 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.”

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose 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.”

III. Allegations

10. EPA alleges as follows and Respondent neither admits nor denies the factual allegations described below. For purposes of this Consent Agreement and Final Order (CAFO), Respondent admits to the jurisdictional allegations described below.

11. The City of Philadelphia, Mississippi (Respondent), at all times relevant to this CAFO, was the owner of Northside Park, west of County Road 561, in Philadelphia, Neshoba County, Mississippi, near 32 degrees 48.234 minutes north latitude and 89 minutes 6.654 minutes west longitude, (the Site) (Exhibits A and B).

12. Respondent, at all times relevant to this CAFO, was the operator of the Site.

13. Respondent, is a person within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Commencing on or after April 16, 2007, through September 17, 2007, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into wetlands and tributaries on the Site using earth moving machinery, during unauthorized activities associated with the construction of a public park.

15. Respondent impacted approximately 0.11 acres of wetlands that are adjacent to an unnamed tributary of Woodard Creek and approximately 4,400 linear feet of unnamed tributaries

to Woodard Creek. Woodard Creek is a tributary of the Pearl River, a navigable water of the United States. The impacted wetlands and tributaries of Woodard Creek are navigable waters of the United States as defined in 40 C.F.R. § 232.2.

16. The discharged dredged and/or fill material, including earthen material deposited at the Site, are “pollutants” as defined under the CWA § 502(6).

17. The earth moving machinery employed by the Respondent, and/or Respondent’s agents, to deposit the dredged and/or fill material at the Site are “point sources” as defined under the CWA § 502(14).

18. Respondent’s placement of the dredged and/or fill material at the Site constitutes a “discharge of pollutants” as defined under the CWA § 502(12).

19. At no time during the discharge of dredged and/or fill material at the Site from April 16, 2007, through September 17, 2007, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent. Each discharge by the Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

20. Each day the material discharged by the Respondent remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

IV. Stipulations and Findings

21. Complainant and Respondent have conferred for the purpose of settlement under 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this administrative CAFO will simultaneously commence and conclude this matter.

22. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and neither admits nor denies the factual allegations set out above.

23. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

24. Respondent consents to the assessment of and agree to pay the administrative penalty as set forth in this CAFO and consent to the other conditions set forth in this CAFO.

25. By signing this CAFO, Respondent certifies that the information they have supplied concerning this matter was at the time of submission, and continues to be, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

26. EPA reserves the right to assess and collect any and all civil penalties for any violation described in this CAFO to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to EPA.

27. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of the CWA.

28. This CAFO resolves liability associated only with the violations described herein.

V. Payment of Penalty

29. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, and considering the nature of the violations and other relevant factors, EPA has determined that twenty thousand dollars (\$20,000) is an appropriate civil penalty to settle the allegations involved with this action.

30. Respondent shall submit payment of the twenty thousand dollars (\$20,000) penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CAFO via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CAFO. Such payment shall be tendered to:

U.S. Environmental Protection Agency
Cincinnati Accounting Operations
Mellon Lockbox 371099M
Pittsburgh, PA 15251-7099

31. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

and

Mike Wylie
U.S. Environmental Protection Agency - Region 4
Wetlands Regulatory Section
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

32. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

33. Under 40 C.F.R. Part 13 and 31 U.S.C. § 3717 *et seq.*, if EPA does not receive payment of the penalty assessed by this CAFO in full by its due date, interest shall accrue on the unpaid balance from the due date through the date of payment at an annual rate equal to the rate of the current value of funds to the United States Treasury as prescribed and published by the Secretary of the Treasury. If all or part of the payment is overdue, EPA will assess a late-payment handling charge of fifteen dollars (\$15.00), with an additional delinquent notice charge of fifteen dollars (\$15.00) for each subsequent thirty (30) day period. EPA will also assess on a monthly basis an up to six per cent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date.

34. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by the Respondent to pay the penalty assessed by the CAFO in full by its due date may subject the Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

VI. General Provisions

35. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, and local laws, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CAFO shall not be a defense to any actions subsequently commenced under federal laws and regulations administered by the EPA.

36. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any federal or state statute, regulation or permit.

37. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent of only claims for civil penalties under the CWA with respect to only those violations alleged in this CAFO. Except as otherwise set forth in this document, compliance with this CAFO shall resolve the allegations of violations contained in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondents, or other liability resulting from violations that were not alleged in this CAFO. Other than as expressed in this document, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

38. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

39. This CAFO applies to and is binding upon the Respondent and any officers, directors, employees, agents, successors and assigns of the Respondent.

40. Any change in the legal status of Respondent including, but not limited to, any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CAFO.

41. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this CAFO.

42. In accordance with 40 C.F.R. § 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Philip Mancusi-Ungaro
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street
Atlanta, Georgia 30303
(404) 562-9519

For Respondent:

Robert Thomas, City Attorney
Alford, Thomas & Kilgore
435 Center Avenue
P. O. Box 96
Philadelphia, Mississippi 35360-0096
(601) 656-1871

43. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

44. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the State of Mississippi was provided a prior opportunity to consult with Complainant regarding this matter.

45. This CAFO in no way affects the rights of the Complainant as against any person or entity not a party to this CAFO.

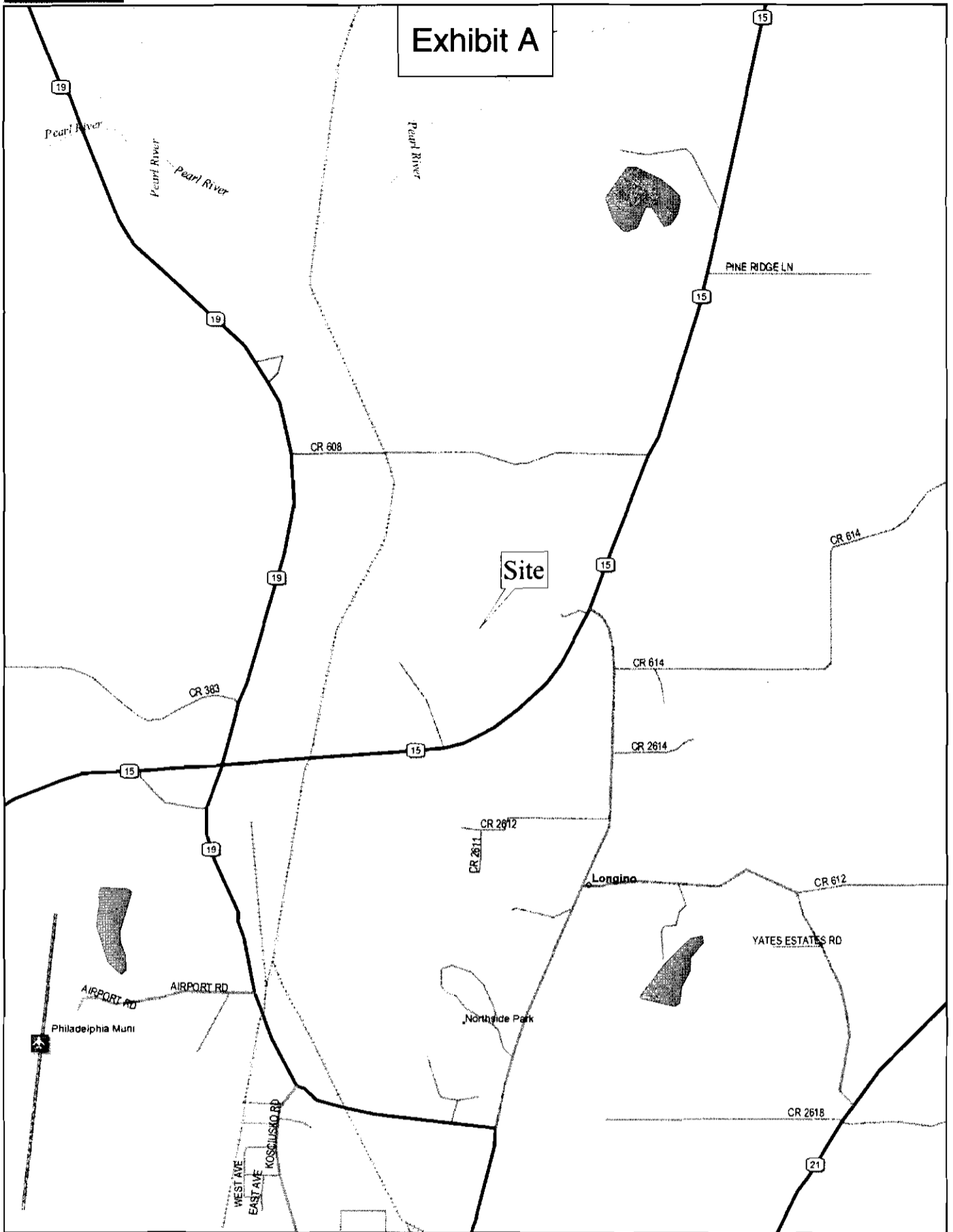
VII. Release by Respondent

46. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a taking of Respondent's property without compensation.

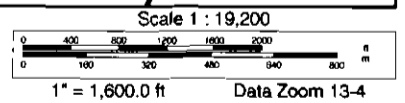
VIII. Effective Date

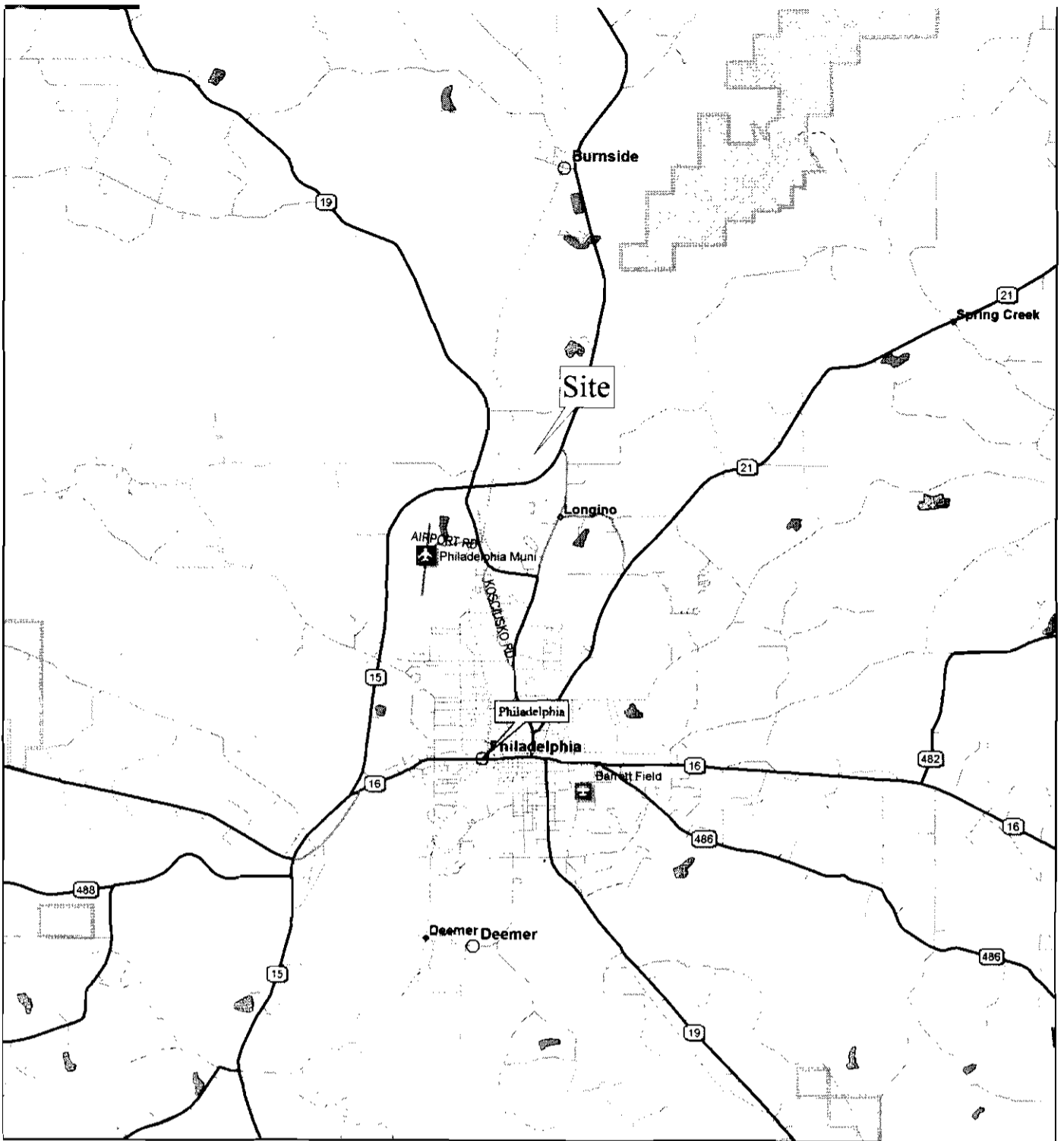
47. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

Exhibit A

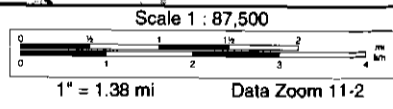


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AGREED AND CONSENTED TO:

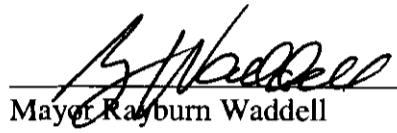
For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



Thomas C. Welborn, Chief
Wetlands, Coastal and Nonpoint Source Branch
Water Management Division
U.S. EPA, Region 4

Date: 5/21/08

For RESPONDENT, CITY OF PHILADELPHIA



Mayor Rayburn Waddell

Date: 3-24-08

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:

The City of Philadelphia
Philadelphia, Mississippi

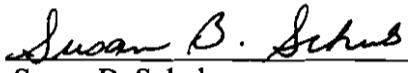
RESPONDENT.

)
)
) ADMINISTRATIVE
) CONSENT AGREEMENT AND
) FINAL PENALTY ORDER
)
) Docket No.: CWA-04-2008-5505(b)
)

FINAL ORDER

In accordance with 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*, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY



Susan B. Schub
Regional Judicial Officer

Date: 5/29/08

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)
)
) **ADMINISTRATIVE**
) **CONSENT AGREEMENT AND**
) **FINAL PENALTY ORDER**
)
) **RESPONDENT.**) **Docket No.: CWA-04-2008-5505(b)**

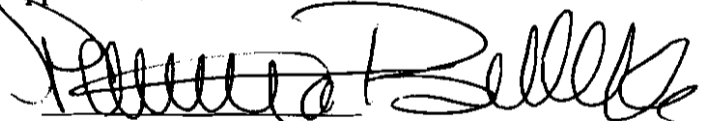
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the attached **ADMINISTRATIVE CONSENT AGREEMENT AND FINAL PENALTY ORDER** in the matter of the City of Philadelphia, Mississippi, Docket No. CWA-08-5505(b) (filed with the Regional Hearing Clerk on ~~MAY 29 2008~~, 2008) was served on ~~MAY 29 2008~~, 2008, in the manner specified to each of the persons listed below.

By hand-delivery: Philip Mancusi-Ungaro
Associate Regional Counsel
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303

By certified mail,
return receipt requested: The Honorable Rayburn Waddell
Mayor of Philadelphia
525 Main Street
Philadelphia, Mississippi 39350

John E. Milner
Brunini, Grantham, Grower, and Hewes, PLLC
1400 Trustmark Building
248 East Capitol Street
Jackson, Mississippi 39201



Ms. Patricia A. Bullock
Regional Hearing Clerk
61 Forsyth Street, SW
Atlanta, GA 30303
(404) 562-9511