



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

JUL 26 2007

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Messrs. Donald Evans  
Bob Evans  
Kevin Evans  
Evans Construction Company  
P.O. Box 400  
Silver Creek, Georgia 30173

**SUBJ: Consent Agreement and Final Order**  
**Docket No. CWA-04-2007-5506(b)**

Dear Messrs. Evans:

Enclosed please find the Consent Agreement and Final Order (CAFO), Docket No. CWA-04-2007-5506(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 Administrator signed the Final Order. In accordance with the terms of the CAFO, the date he 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 Paul Schwartz, Associate Regional Counsel, at (404) 562-9576.

Sincerely,

A handwritten signature in black ink, appearing to read "T. C. Welborn".

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

Enclosure

cc: Corps, Savannah  
Corps, Morrow  
GA EPD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )

Donald Evans, )  
Bob Evans, )  
Kevin Evans, )  
Evans Construction Company )  
Rome, Georgia )

RESPONDENTS. )

CONSENT AGREEMENT AND  
FINAL ORDER

Docket No.: CWA-04-2007-5506(b)

2007 JUL 25 AM 10:36  
HEARINGS DIVISION  
EPA REGION 4

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding under Section 309(g)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1), 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)(1) of the CWA, 33 U.S.C. § 1319(g)(1), 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 redelegated this authority to the Director of the Water Management Division (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 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 (Corps), 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."

10. Under 33 U.S.C. § 1319(g)(1)(A), the EPA can seek administrative penalties if the Administrator finds that a person has "violated any permit condition . . . in a permit issued under section 1344 . . . ."

### **III. Allegations**

11. Respondents at all times relevant to this Consent Agreement and Final Order (CAFO), were the owners and/or operators of a tract of land located in between the Oostanaula River and Veterans Memorial Parkway, near 34° 17.10' north latitude and 85° 10.15' west longitude, in the City of Rome, Floyd County, Georgia (Site). (Exhibits A and B).

12. Respondents are persons within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. In 1999, while developing the Site for commercial use, the Respondents impacted approximately 3.77 acres of wetlands (Discharge Area) that are adjacent to, and hydrologically connected to the Oostanaula River, a navigable-in-fact water. These violations were discovered by the Corps and referred to EPA.

14. EPA brought an enforcement action, which was concluded when the Respondents and EPA entered into Consent Agreement No. CWA-04-00-1013 on January 21, 2000. The Agreement required the Respondents to secure a permit from the Corps for any fill left in place and any additional fill that the Respondents would need to complete their development. The Agreement also required the Respondents to complete, at a minimum, a Wetlands Mitigation and Monitoring Plan that the Respondents had developed.

15. On February 23, 2000, the Respondents applied for a Nationwide Permit 32 (after-the-fact permit) from the Corps. The Corps issued a statement that the application was complete and acceptable on July 1, 2001.

16. Later site visits by the Corps and EPA revealed that the Respondents were not implementing the mitigation plan.

17. After further reminders from both Agencies that the mitigation needed to be completed, on December 6, 2005, Respondents requested that the Corps allow them to revise the mitigation plan and perform offsite mitigation instead of constructing the back water slough.

18. On February 10, 2006, the Corps referred the case to EPA to resolve as an enforcement action under the 1989 Memorandum of Agreement on Enforcement.

19. Nothing has changed as to the underlying violations that were incorporated in Consent Agreement No. CWA-04-00-1013.

a. The discharged dredged and/or fill material, including earthen material deposited on the Discharge Area, were "pollutants" as defined under the CWA § 502(6).

b. The earth moving machinery employed by the Respondents to deposit the dredged and/or fill material on the Discharge Area are "point sources" as defined under the CWA § 502(14).

c. Respondents' placement of the dredged and/or fill material on the Discharge Area constituted a "discharge of pollutants" as defined under the CWA § 502(12).

d. The Respondents did not have a Section 404 permit for the work that they conducted at the Discharge Area prior to obtaining such a permit from the Corps on July 1, 2001. Thus, any discharge by the Respondents of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, was a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

e. Each day the material discharged by the Respondents remained in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constituted a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

20. By not completing the mitigation that resolved the previous violations, the Respondents were committing additional violations of Section 404. The purpose of this CAFO, is to penalize the Respondents for not fulfilling the permit conditions of the Section 404 permit that they ultimately obtained for their work in the Discharge Area.

#### **IV. Stipulations and Findings**

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

22. For the purposes of this CAFO, the Respondents admit the jurisdictional allegations set out above and neither admit nor deny the factual allegations set out above.

23. Respondents hereby waive their right to contest the allegations set out above and their right to appeal the Final Order accompanying this Consent Agreement.

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

25. By signing this CAFO, Respondents certify that the information they have supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondents realize 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 herein to the extent that any information or certification provided by Respondents were materially false or inaccurate at the time such information or certification was provided to EPA.

27. Complainant and Respondents 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.

#### **V. Payment**

28. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors, EPA has determined that one hundred fifty-seven thousand five hundred dollars (\$157,500.00) is an appropriate civil penalty to settle this action.

29. Respondents shall submit payment of the 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 the Respondent signing it 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

30. At the time of payment, Respondents 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

31. 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.

32. Under 40 C.F.R. § 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 and No/100 Dollars (\$15.00), with an additional delinquent notice charge of \$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.

33. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by the Respondents to pay the penalty assessed by the CAFO in full by its due date may subject the Respondents 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 a 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**

34. This CAFO shall not relieve Respondents of their obligation to comply with all applicable provisions of federal, state, or local law, 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.

35. 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 Respondents' violation of this CAFO or of the statutes and regulations upon which this Agreement is based, or for Respondents' violation of any federal or state statute, regulation or permit.

36. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondents of all 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 Respondents 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.

37. 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.

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

39. The obligations of the Respondents under this CAFO are joint and several.

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

41. Each party shall bear its own costs and attorneys 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:

Paul Schwartz  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303  
(404) 562-9576

For Respondent:

Ted Sandler, Esq.  
Hartman, Simons, Spielman & Wood, LLP  
6400 Powers Ferry Road, N.W.  
Suite 400  
Atlanta, Georgia 30339  
(770) 951-6588

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 Georgia 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. Respondents hereby covenant not to sue and agree 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 Respondents' 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.

**AGREED AND CONSENTED TO:**

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

Dee Stewart for  
James D. Giattina, Director  
Water Management Division  
U.S. EPA, Region 4

Date: 7/16/07

For RESPONDENTS:

Donald Evans  
Donald Evans

Date: 4-11-07

Bob Evans  
Bob Evans

Date: 4-12-07

Kevin Evans  
Kevin Evans

Date: 4/11/07

EVANS CONSTRUCTION CO.

Donald Evans  
Donald Evans, President

Date: 4-11-07

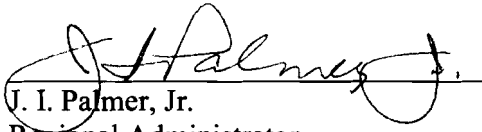
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
Donald Evans, )  
Bob Evans, ) CONSENT AGREEMENT AND  
Kevin Evans, ) FINAL ORDER  
Evans Construction Company )  
Rome, Georgia, )  
)  
RESPONDENTS. ) Docket No.: CWA-04-2007-5506(b)  
\_\_\_\_\_)

**FINAL ORDER**

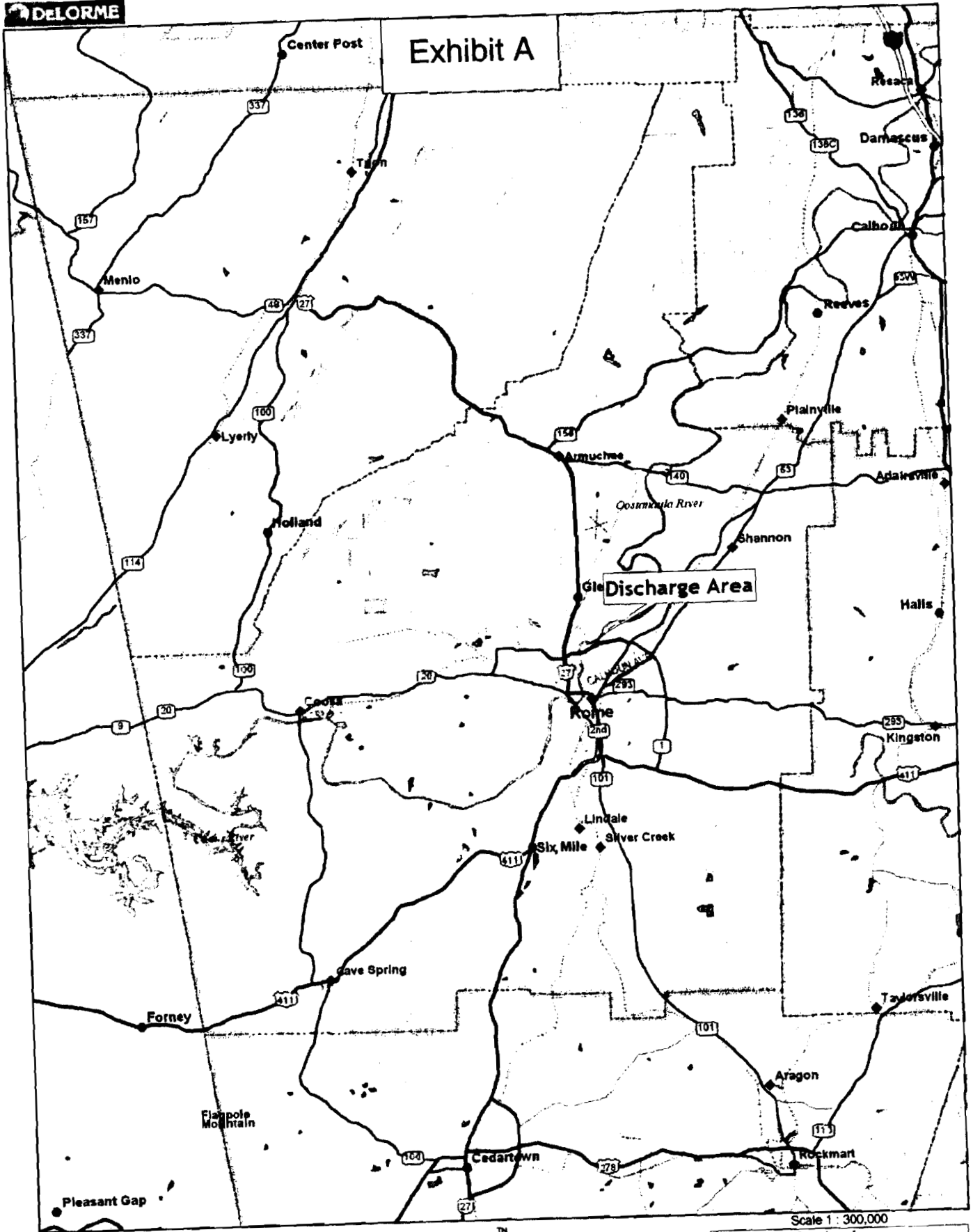
In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. Part 22, and authorities delegated to me, I approve the attached Consent Agreement and incorporate it by reference into this Final Order. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), with the authority vested in me, I order Respondents to comply with the terms of the attached Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

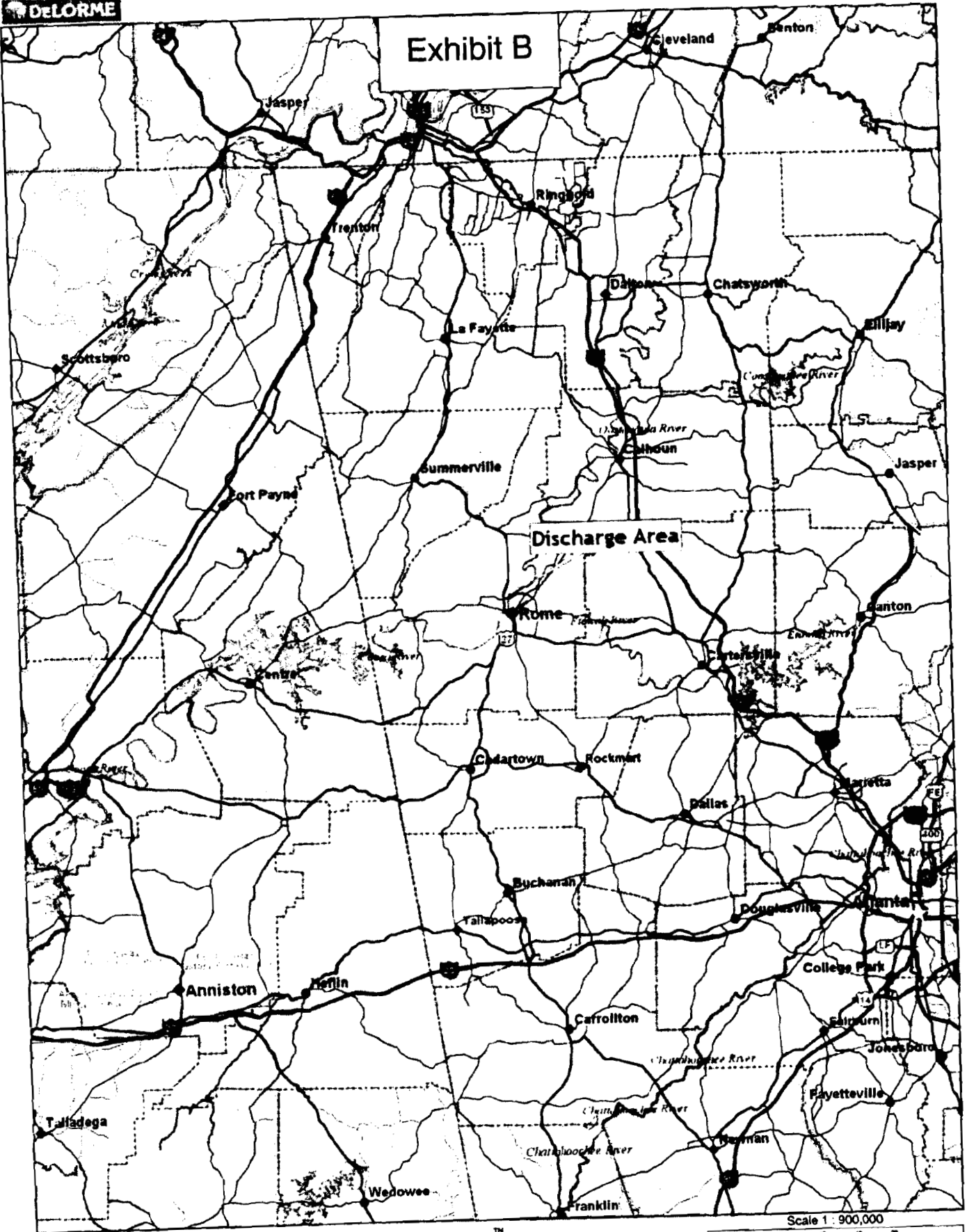
  
\_\_\_\_\_  
J. I. Palmer, Jr.  
Regional Administrator  
U.S. EPA, Region 4

Date: JUL 20 2007

Exhibit A

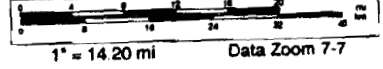


# Exhibit B



Discharge Area

Scale 1 : 900,000



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
) ADMINISTRATIVE  
Donald Evans, ) CONSENT AGREEMENT AND  
Bob Evans, )  
Kevin Evans, )  
Evans Construction Company )  
Rome Georgia ) FINAL PENALTY ORDER  
)  
RESPONDENTS. ) Docket No.: CWA-04-2007-5506(b)  
)

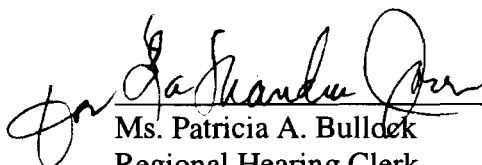
---

**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 Donald Evans, Bob Evans, Kevin Evans, and Evans Construction Company, Docket No. CWA-04-5506(b) was served on July 26, 2007, in the manner specified to each of the persons listed below.

By hand-delivery: Paul Schwartz  
Assistant Regional Counsel  
U.S. EPA, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303

By certified mail,  
return receipt requested: Jeffrey S. Dehner  
Hartman, Simons, Spielman & Wood, LLP  
6400 Powers Ferry Road, N.W., Suite 400  
Atlanta, Georgia 39339

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

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM  
=====

TO BE COMPLETE BY ORIGINATING OFFICE:

(attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Mike Wylie 7/17/07  
in the Wetlands Regulatory Section [Name] at 404-562-9409 [Date]  
[Office] [Telephone Number]

- Non-SF Judicial Order/Consent Decree. USAO COLLECTS.  Administrative Order/Consent Agreement. FMS COLLECTS PAYMENT.  
 SF Judicial Order/Consent Decree. FMS COLLECTS.  Other Receivables  
 This is an original debt.  This is a modification.

PAYEE: Donald Evans, Bob Evans, Kevin Evans, Evans Construction Company  
[Name of person and/or Company/Municipality making the Payment]

The Total Dollar Amount of Receivable: \$ 157,500.00  
[If in installments, attach schedule of amounts and respective due dates]

The Case Docket Number: CWA-04-2007-5506 (b)

The Site-Specific Superfund (SF) Account Number: \_\_\_\_\_

The Designated Regional/Headquarters Program Office: \_\_\_\_\_

=====

TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT SECTION:

The IFMS Accounts Receivable Control Number is: \_\_\_\_\_ Data \_\_\_\_\_

If you have any questions call: \_\_\_\_\_ in the Financial Management Section,

Telephone Number: \_\_\_\_\_ COMMERCIAL \_\_\_\_\_

=====

DISTRIBUTION:

A. JUDICIAL ORDERS: Copies of this form with an attached copy of the front page of the FINAL JUDICIAL ORDER should be mailed to:

- |  |   |
|--|---|
| 1. Debt Tracking Officer<br>Environmental Enforcement Section<br>Department of Justice/RH 1647<br>P.O. BOX 7611, Benjamin Franklin Station<br>Washington, DC 20044 | 2. Originating Office (ORC)<br>3. Designated Program Office |
|--|---|

B. ADMINISTRATIVE ORDERS: Copies of this form with an attached copy of the front page of the ADMINISTRATIVE ORDER should be sent to:

- |  |   |
|--|---|
| 1. Originating Office<br>3. Regional Hearing Clerk | 2. Designated Program Office<br>4. Regional Counsel |
|--|---|