



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

AUG 30 2012

CERTIFIED MAIL 7010 1060 0002 1705 7571  
RETURN RECEIPT REQUESTED

Mr. Richard E. Glaze, Jr.  
Balch & Bingham, LLP  
30 Ivan Allen, Jr. Boulevard, N.W.  
Suite 700  
Atlanta, Georgia 30308-3036

Re: Consent Agreement and Final Order  
Docket No. CWA-04-2012-5507(b)

Dear Mr. Glaze:

Enclosed is a copy of the Consent Agreement and Final Order (CAFO) that has been finalized by the U.S. Environmental Protection Agency, Region 4 and the Regional Administrator. Please make note of the provisions under Section VII.

Thank you for your cooperation in this matter. If you have any questions regarding this CAFO, please contact Mr. Wayne Lee, Associate Regional Counsel, at (404) 562-9523.

Sincerely,

James D. Giattina  
Director  
Water Protection Division

Enclosure

cc: Mr. Anthony R. Lobred  
U.S. Army Corps of Engineers

Ms. Trudy Fisher  
Mississippi Department of Environmental Quality

Ms. Kim Thurman  
Mississippi Department of Transportation

Mr. Mark McConnell  
Mississippi Department of Transportation, Jackson

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HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF:	)	
	)	ADMINISTRATIVE
MISSISSIPPI DEPARTMENT OF	)	CONSENT AGREEMENT AND
TRANSPORTATION,	)	FINAL PENALTY ORDER
JACKSON, MISSISSIPPI,	)	
	)	Docket No.: CWA-04-2012-5507(b)
	)	
RESPONDENT.	)	

**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 Protection Division of EPA Region 4 (Complainant).

**II. Statutory and Regulatory Background**

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), 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, 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. The term "Discharge Area" means the jurisdictional waters that have been impacted either through filling or dredging as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Areas are to the Souinlovey Creek, its tributaries and approximately 27 acres of abutting wetlands, and occurred during a road improvement project along State Route 513. The site is located in the Rose Hill vicinity of Jasper County, Mississippi near latitude 32.175319°N and longitude 88.928770°W. The discharge areas are delineated in the attached Exhibits A and B.

11. The term "Site" means the parcel or parcels of land on which the Discharge Area is located.

12. Respondent, the Mississippi Department of Transportation, at all times relevant to this Consent Agreement and Final Order ("CAFO"), was the owner and/or operator of the Site.

13. The Mississippi Department of Transportation 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 about October 2010 to the present, Respondent, and/or those acting on behalf of the Respondent, discharged dredged and/or fill material into streams and wetlands on the Site using earth moving machinery during the course of a road improvement project.

15. Respondent's unauthorized activities impacted approximately 2,200 linear feet of jurisdictional waters within the Souinlovey Creek and its tributaries, as well as 27 acres of abutting forested wetlands, which all flow into the Upper Chickasawhay River, a navigable water of the United States.

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

17. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Discharge Area are "point sources" as defined under the CWA § 502(14), 33 U.S.C. § 1362(14).

18. A "discharge of a pollutant," as defined at Section 502(12)(A) of the CWA, 33 U.S.C. § 1362 (12)(A), is any addition of any pollutant to navigable waters from any point source.

19. Respondent's placement of the dredged and/or fill material at the Discharge Area constitutes a "discharge of pollutants" as defined under the CWA § 502(12), 33 U.S.C. § 1362(12).

20. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes unlawful the discharge of any pollutant into waters of the United States except as in compliance with certain sections of the CWA, including Section 404, 33 U.S.C. § 1344. A Section 404 permit is a legal prerequisite to discharges of the type described above.

21. At no time during the discharge of dredged and/or fill material into the jurisdictional waters of the United States, on or about October 2010, to the present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing such activities performed in wetlands by Respondent.

22. The discharges have, therefore, been made in violation of Section 301(a) of the CWA.

23. 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).

24. 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**

25. Complainant and Respondent 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 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.

26. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above but neither admits nor denies the factual allegations set out herein.

27. Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondent may have with respect to any issue of fact or law set forth herein or within the accompanying Order on Consent, including, but not limited to, any right of judicial review of the Section 309(a)(3) Compliance Order on Consent under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.

28. Respondent consents to the assessment of and agrees to pay the administrative penalty as set forth in this CAFO and consents to the other conditions set forth in this CAFO.

29. By signing this CAFO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, 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.

30. 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.

31. 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.

#### **V. Penalty and Payment**

32. 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 SEVENTY-SEVEN THOUSAND FIVE-HUNDRED DOLLARS (\$177,500) is an appropriate civil penalty to settle this action.

33. Respondent shall submit payment of the penalty specified in the preceding paragraph within 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 submitted by U.S. Postal Service to:

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

For other payment options (Ex: Wire Transfers, Overnight Mail, ACH, and On Line) please refer to Attachment A.

34. 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

Ms. Mary E. Halback  
U.S. Environmental Protection Agency- Region 4  
Wetlands Section  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

35. 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.

36. 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 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.

## **VII. General Provisions**

37. This CAFO shall not relieve Respondent of its 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. Respondent agrees to obtain the necessary U.S. Army Corps of Engineer permit for the impacts remaining in place. 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.

38. 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.

39. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent 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 Respondent, 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.

40. 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.

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

42. 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.

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

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

For Complainant:

Wayne Lee  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street Atlanta, Georgia 30303  
(404) 562-9523

For Respondent:

Melinda McGrath  
Executive Director  
Mississippi Department of Transportation  
Post Office Box 1850  
Jackson, Mississippi 39215-1850

45. 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.

46. 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.

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

#### **VIII. Release by Respondent**

48. Respondent hereby covenants 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 Respondent's property without compensation.

#### **IX. Effective Date**

49. 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:

  
James D. Grattina, Director  
Water Protection Division  
U.S. Environmental Protection Agency

Date: \_\_\_\_\_

For RESPONDENT:

MISSISSIPPI DEPARTMENT OF TRANSPORTATION

  
Melinda McGrath  
Executive Director  
Mississippi Department of Transportation

Date: 7/10/12

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )

MISSISSIPPI DEPARTMENT OF )  
TRANSPORTATION, )  
JACKSON, MISSISSIPPI, )

RESPONDENT. )  
\_\_\_\_\_ )

ADMINISTRATIVE  
CONSENT AGREEMENT AND  
FINAL PENALTY ORDER

Docket No.: CWA-04-2012-5507(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)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondent are hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY



Gwendolyn Keyes Fleming  
Regional Administrator  
U.S. EPA, Region 4

Date: 8/28/2012

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of: **Docket No. CWA-04-2012-5507(b)** on the parties listed below in the manner indicated:

EPA Internal Mail:

Constance Tallman U.S. EPA, Region 4  
Wetlands Enforcement Program  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9230

By hand-delivery:

Wayne Lee  
Associate Regional Counsel, U.S.  
Environmental Protection Agency, Region 4  
61 Forsyth Street Atlanta, Georgia 30303  
(404) 562-9523

By Certified mail, return receipt requested:

Melinda McGrath  
Executive Director  
Mississippi Department of Transportation  
Post Office Box 1850  
Jackson, Mississippi 39215-1850

Dated: 8/30/12



Patricia Bullock  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9511

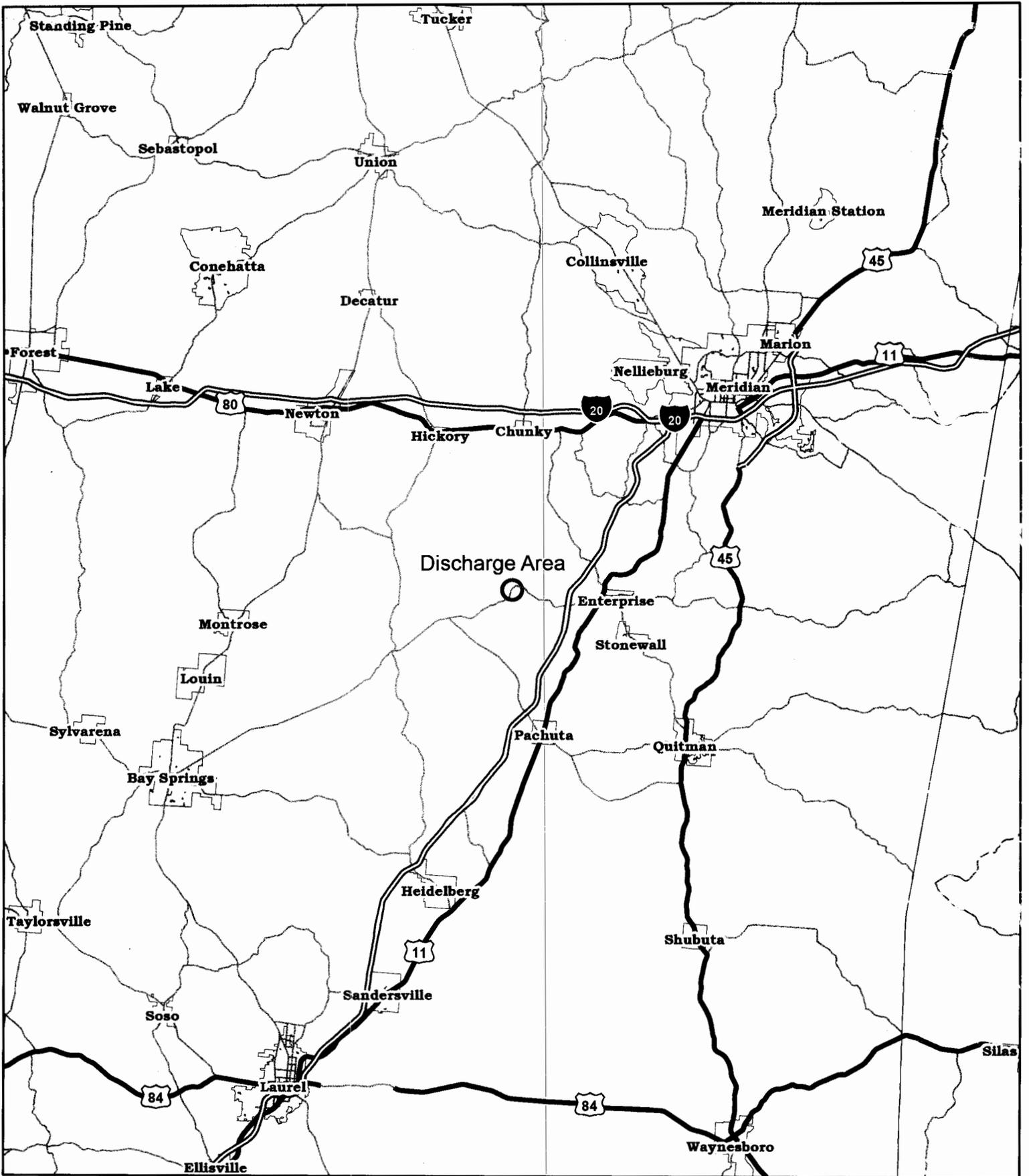
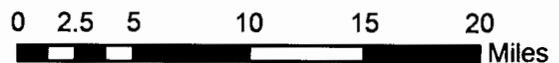


Exhibit A - MDOT  
Jasper County, Mississippi



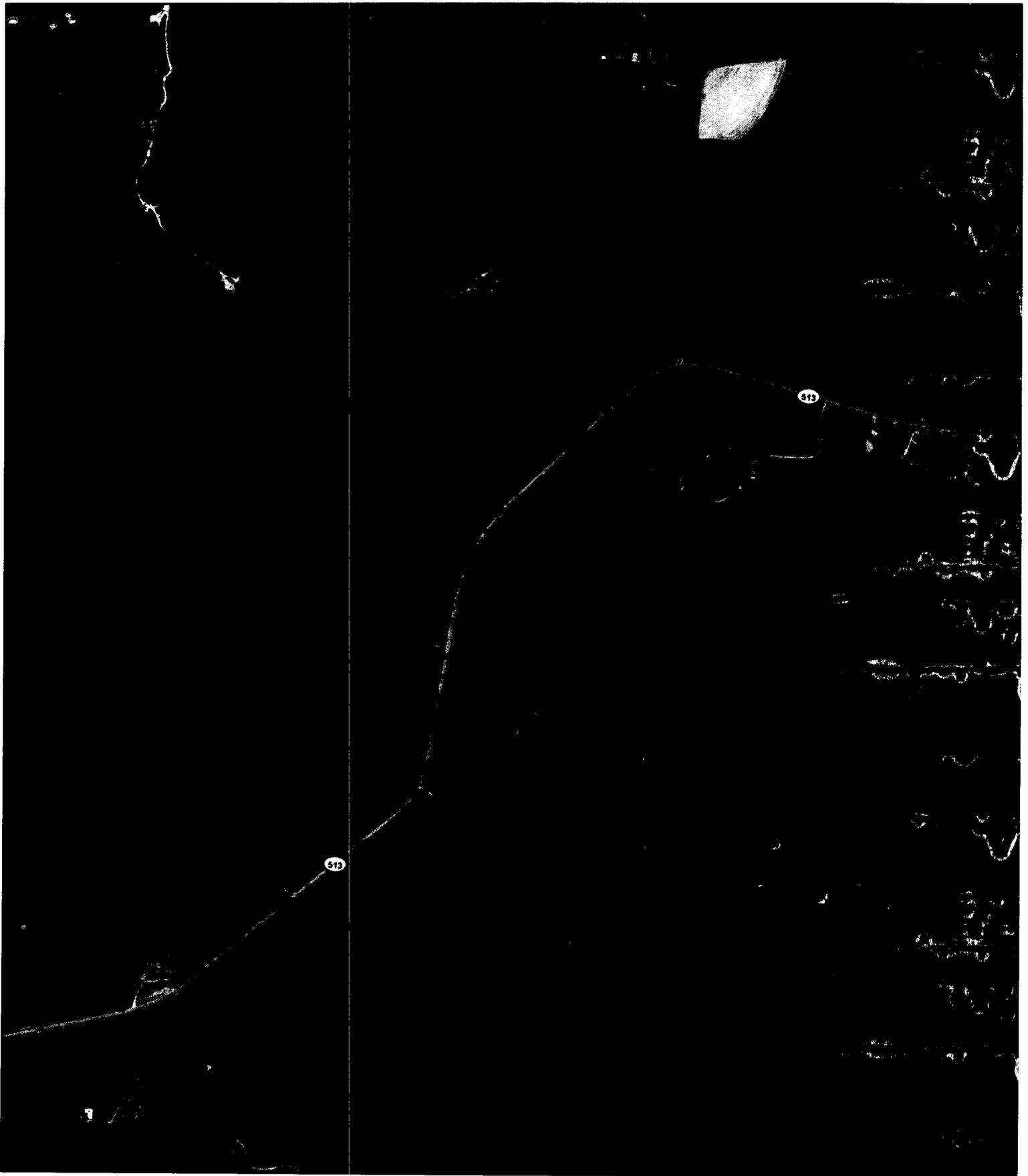


Exhibit B - MDOT  
Jasper County, Mississippi

