



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

FEB - 2 2016

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Mr. John P. David  
D & H Properties, LLC  
4121 East Highway 390  
Panama City, Florida 32404

Re: Consent Agreement and Final Order No. CWA 04-2016-5500(b)

Dear Mr. David:

Enclosed is a copy of the Consent Agreement and Final Order that has been finalized by the U.S. Environmental Protection Agency Region 4 and the Regional Judicial Officer. Please make note of the provisions under Section V.

Thank you for your cooperation in settling this matter. Should you have any questions or concerns, please contact Ms. Wilda Cobb, Associate Regional Counsel, at (404) 562-9530 or via email at [cobb.wilda@epa.gov](mailto:cobb.wilda@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas McGill".

Thomas McGill  
Chief  
Ocean, Wetlands, and Streams Protection Branch

Enclosure

cc: Ms. Kelly Finch  
U.S. Army Corps of Engineers, Jacksonville District

Mr. Terry Wells  
U.S. Army Corps of Engineers, Pensacola Field Office

Ms. Paula Cobb  
Florida Department of Environmental Protection

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

HEARING CLERK  
2016 FEB -2 AM 8:26  
USEPA REGION 4  
OFFICE OF REGIONAL  
COUNSEL

IN THE MATTER OF: )  
) ADMINISTRATIVE  
) CONSENT AGREEMENT AND  
) FINAL PENALTY ORDER  
D & H Properties, LLC, )  
Panama City, Florida, )  
)  
RESPONDENT. ) Docket No.: CWA-04-2016-5500(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 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, who in turn has delegated this authority to the Chief of the Clean Water Enforcement Branch 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)]."

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. The term “Discharge Area” means the jurisdictional waters that have been impacted either through the discharge of dredged and/or fill material as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area includes approximately 6.48 acres of herbaceous and forested freshwater wetlands located near latitude 30° 15'1.55" north and longitude 85°36'10.52" west. The Discharge Area is indicated on the enclosed Exhibits A and B.

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

12. D & H Properties, LLC, at all times relevant to this Consent Agreement and Final Order, was the owner and/or operator of the Site.

13. D & H Properties, LLC, 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 June 24, 2014, to the present, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into wetlands on the Site using earth moving machinery, during unauthorized activities associated with the clearing and filling of wetlands for residential development.

15. Respondent impacted approximately 6.48 acres of herbaceous and forested freshwater wetlands that are adjacent to Mill Bayou, a tidally influenced navigable-in-fact 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), 33 U.S.C. § 1362(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. 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).

19. At no time during the discharge of dredged and/or fill material at the Discharge Area from June 24, 2014, to the present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent.

20. 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).

21. 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**

22. 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 Administrative Consent Agreement and Final Penalty Order will simultaneously commence and conclude this matter.

23. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and the factual allegations set out above.

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

25. 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.

26. 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.

27. EPA reserves the right to assess and collect any and all civil penalties for any violation described in this Consent Agreement 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.

28. 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. Payment

29. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors including the Respondent's ability to pay a penalty, EPA has determined that EIGHT THOUSAND DOLLARS (\$8,000) is an appropriate civil penalty to settle this action.

30. 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  
P.O. 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.

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  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Ms. Stacy Witherspoon  
Clean Water Enforcement Branch  
Wetlands Enforcement Section  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
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 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.

## **VI. General Provisions**

34. 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. 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 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.

36. 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.

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 Respondent and any officers, directors, employees, agents, successors and assigns of the Respondent.

39. 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.

40. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CAFO.

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

For Complainant:

Wilda Cobb  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9530

For Respondent:

D & H Properties, LLC  
Mr. John P. David  
4121 East Highway 390  
Panama City, Florida 32404

42. 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.

43. 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 Florida was provided a prior opportunity to consult with Complainant regarding this matter.

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

45. Effective upon signature of this CAFO by Respondent, Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from Respondent the payment required by this CAFO shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the EPA related to the matters addressed in this CAFO and that, in any action brought by the EPA related to the matters addressed, Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Respondent that it will not make this CAFO effective, the statute of limitations shall begin to run again commencing ninety days after the date such notice is sent by EPA.

#### **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 matters addressed and resolved in this CAFO, including but not limited to, any claim that any of the matters or actions described in this CAFO have resulted in a taking of Respondent's property without compensation.

#### **VIII. Effective Date**

48. 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:**

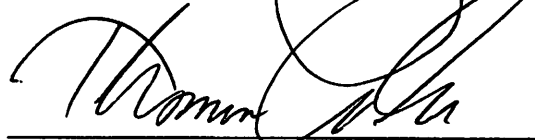
For RESPONDENT:

  
\_\_\_\_\_

Mr. John P. David  
President  
D & H Properties, LLC

Date: 11/12/15

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

  
\_\_\_\_\_

Thomas McGill, Chief  
Ocean, Wetlands, and Streams Protection Branch  
Water Protection Division  
U.S. EPA Region 4

Date: 2/1/16

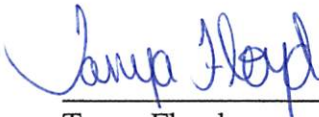
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
 )  
 ) ADMINISTRATIVE  
 D & H Properties, LLC, ) CONSENT AGREEMENT AND  
 Panama City, Florida, ) FINAL PENALTY ORDER  
 )  
 RESPONDENT. ) Docket No.: CWA-04-2016-5500(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



\_\_\_\_\_  
Tanya Floyd  
Regional Judicial Officer

Date: February 1, 2016

**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-04-2016-5500(b)** on the parties listed below in the manner indicated:

EPA Internal Mail:

Christopher Parker  
Clean Water Enforcement Branch  
Wetlands Enforcement Section  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

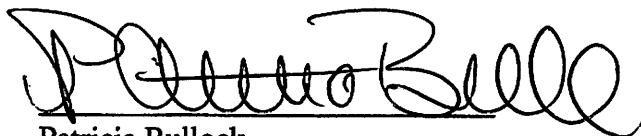
By hand-delivery:

Wilda Cobb  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

By Certified mail,  
return receipt requested:

D & H Properties, LLC  
Mr. John P. David  
4121 East Highway 390  
Panama City, Florida 32404

Dated: 2-2-16



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

## **ATTACHMENT A**

### **COLLECTION INFORMATION**

#### **WIRE TRANSFERS:**

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

#### **OVERNIGHT MAIL:**

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

St. Louis, MO 63101

Contact: Natalie Pearson

314-418-4087

#### **ACH (also known as REX or remittance express):**

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17<sup>th</sup> Street, NW

Washington, DC 20074

Contact – Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

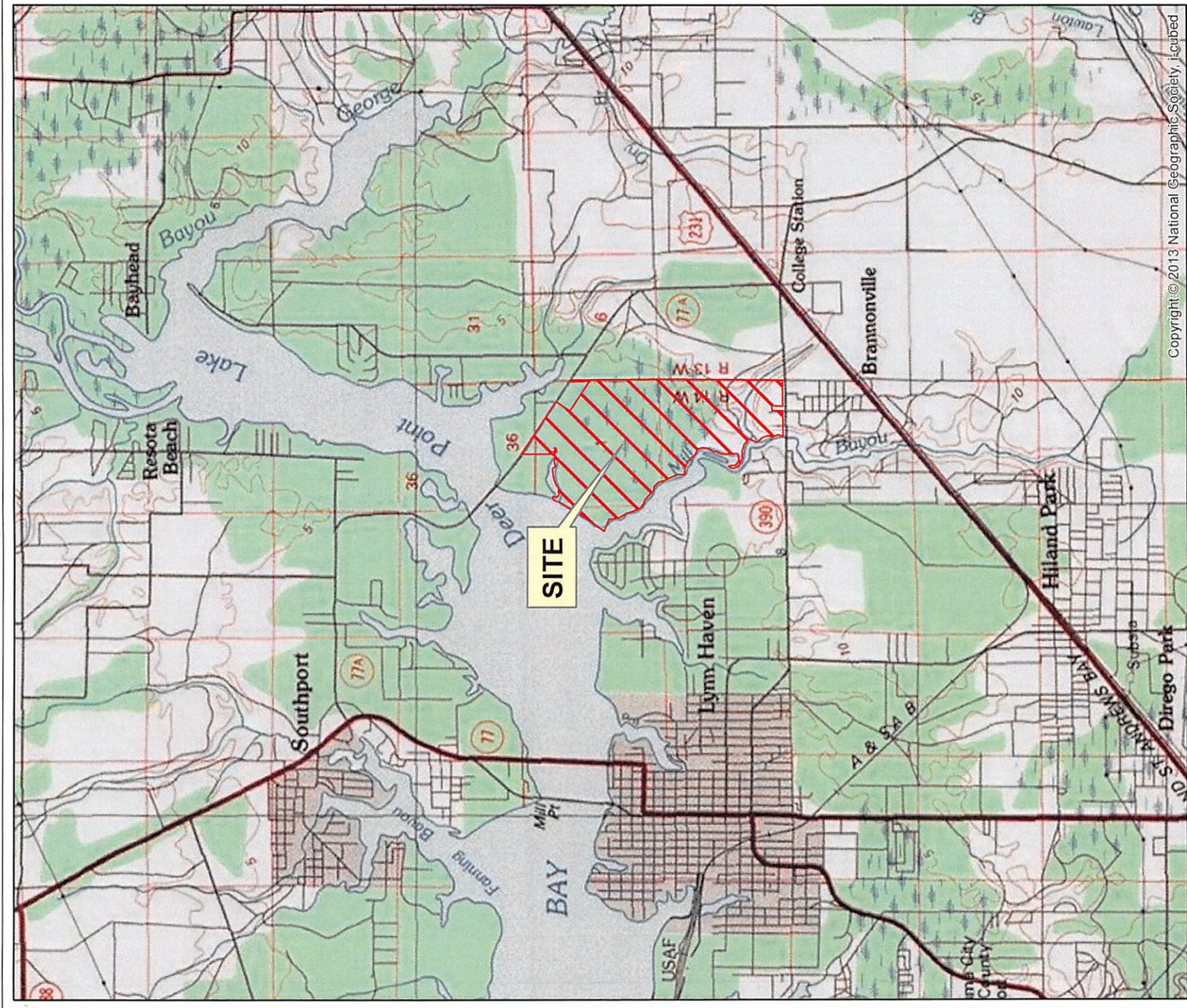
CTX Format

#### **ON LINE PAYMENT:**

There is now an On Line Payment Option, available through the Dept. of Treasury.

This payment option can be accessed from the information below:

[WWW.PAY.GOV](http://WWW.PAY.GOV) (Enter sfo 1.1 in the search field Open form and complete required fields).



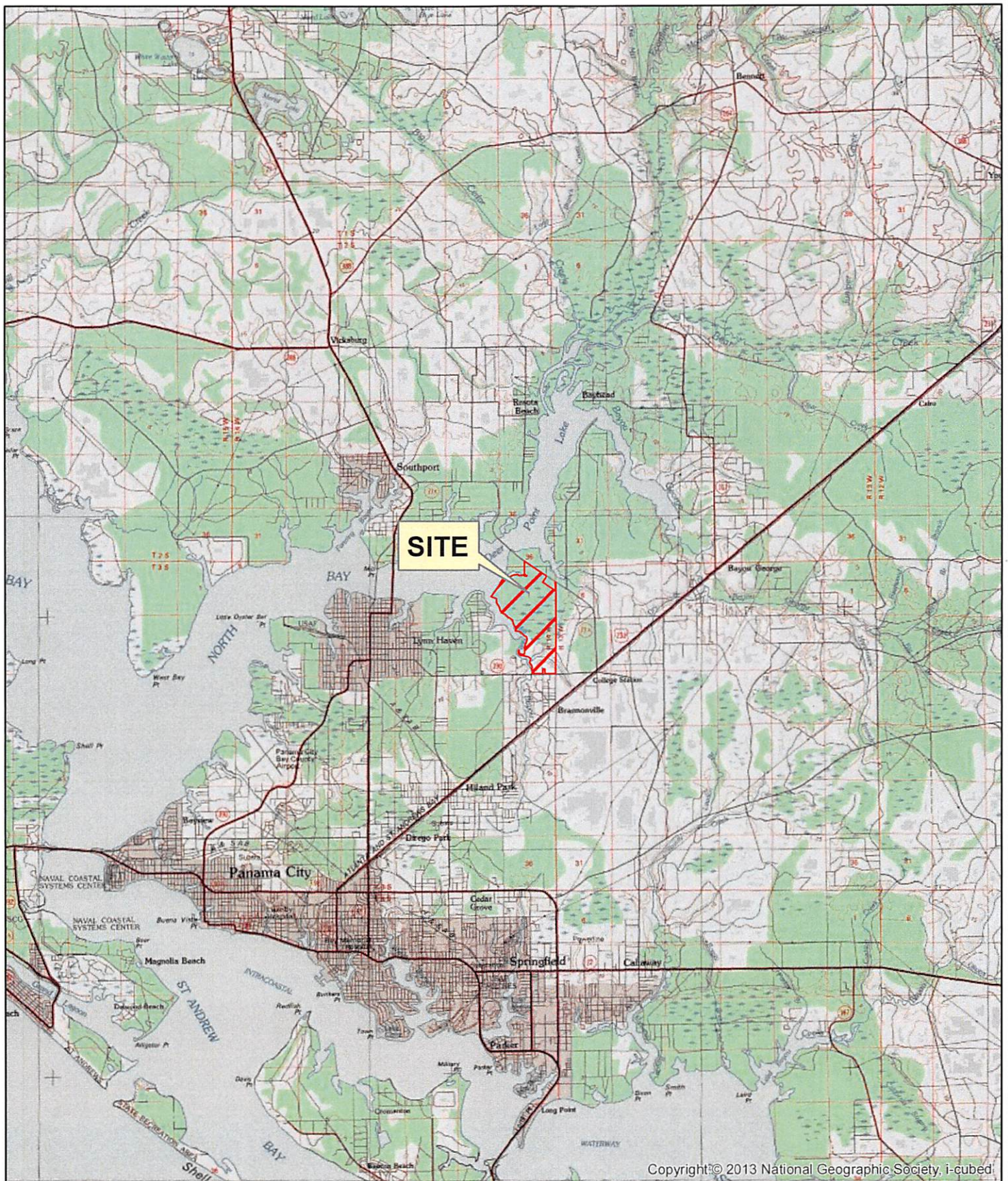
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LOCATION MAP  
NOT TO SCALE

EXHIBIT A  
D&H PROPERTIES  
BAY COUNTY, FLORIDA





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EXHIBIT B  
D&H PROPERTIES  
BAY COUNTY, FLORIDA

