

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

USEPA, REGION 4
OFFICE OF REGIONAL
COUNSEL

2017 AUG 17 PM 4:29

HEARING CLERK

IN THE MATTER OF:)
)
D.R. HORTON, INC.,) CONSENT AGREEMENT AND
OSCEOLA COUNTY, FLORIDA,) FINAL ORDER
)
RESPONDENT.) Docket No.: CWA-04-2017-5501(b)
_____)

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 ("the EPA"). The Administrator has delegated this authority to the Regional Administrator, EPA Region 4, who has further delegated this authority to the Director of the Water Protection Division, EPA Region 4 ("the 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 ("the 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.”

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 is approximately 2.4 acres of herbaceous freshwater wetlands adjacent to Lake Tohopekaliga.

11. The term “Site” means the parcel or parcels of land on which the Discharge Area is located. The Site is approximately 1600 acres and is located southwest of Neptune Road (State Road 525), within Section 31, Township 25S, Range 30E, and Sections 25 and 36, Township 25S, Range 29E, and Sections 1 and 12, Township 26S, Range 29E and Section 31, Township 25S, Range 30E, Osceola County, Florida, near latitude 28.271827° north and longitude 81.356818° west (See Exhibits A and B).

III. Allegations

12. The Respondent, D.R. Horton, Inc., at all times relevant to this Consent Agreement and Final Order, was the owner and operator of the Site.

13. D.R. Horton, Inc., is a person within the definition set forth under the CWA § 502(5), 33 U.S.C. § 1362(5).

14. Commencing on or about November 8, 2013, to the present, the Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into wetlands at

the Site using earth moving machinery during unauthorized activities associated with the clearing and filling of wetlands for a multi-phased residential development.

15. The Respondent impacted approximately 2.4 acres of herbaceous freshwater wetlands (“the Discharge Area”) that are adjacent to Lake Tohopekaliga, a 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), U.S.C. § 1362(6).

17. The earth moving machines 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), U.S.C. § 1362(14).

18. The 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), U.S.C. § 1362(12).

19. At no time during the discharge of dredged and/or fill material at the Discharge Area from November 8, 2013, 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 the 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. The Complainant and the 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 issues of law or fact in this matter, and in accordance with 40 C.F.R. Part 22.13(b), this Consent Agreement and Final Order (“CAFO”) will simultaneously commence and conclude this matter.

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

23. The 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. The 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.

25. By signing this CAFO, the 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. The 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. The Complainant 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 the Respondent was materially false or inaccurate at the time such information or certification was provided to the Complainant.

27. The Complainant and the 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

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, the EPA has determined that NINETY-FIVE THOUSAND DOLLARS (\$95,000) is an appropriate civil penalty to settle this action.

29. The 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 the 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.

30. At the time of payment, the 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. EPA, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

and

Mr. Christopher Parker
Marine Regulatory and Wetlands Enforcement Section
U.S. EPA, Region 4
Atlanta Federal Center
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 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

33. This CAFO shall not relieve the 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.

34. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of the Respondent's violation of this CAFO or of the statutes and regulations upon which

this agreement is based, or for the Respondent's violation of any federal or state statute, regulation or permit.

35. Full payment of the civil penalty, as provided in Section V above, shall resolve the Respondent's liability for Federal civil penalties for the violations alleged in this CAFO. Full payment of the civil penalty, as provided in Section V above, shall not affect the right of the EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any other violations of law.

36. 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.

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

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

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

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

For Complainant:

Mr. Matthew Hicks
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-9670

For Respondent:

Mr. Ted I. Harbour
Senior Vice President and Chief Legal Officer
301 Commerce Street, Suite 500
Fort Worth, TX 76102-4178
(817) 390-8200

41. 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.

42. 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.

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

44. Effective upon signature of this CAFO by the Respondent, the Respondent agrees that the time period commencing on the date of its signature and ending on the date the EPA receives from the 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, the 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 the Respondent that it will not make this CAFO effective, the statute of limitations shall begin to run again commencing 90 days after the date such notice is sent by the EPA.

VII. Release by Respondent

45. 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 resolution by civil penalties of the violations alleged 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. Provided however, that nothing in this CAFO limits the ability of the Respondent to bring any available claims, causes of action or defenses with respect to 1) compliance with this CAFO, or 2) any future administrative or judicial proceedings, including without limitation issuance of a dredge and/or fill permit relating to any facts, allegations, stipulations or findings alleged in this CAFO.

VIII. Effective Date

46. 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:



Ted I. Harbour
Senior Vice President and Chief Legal Officer
D.R. Horton, Inc.

Date: 5/25/2017

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



Mary S. Walker, Director
Water Protection Division
U.S. EPA Region 4

Date: 8/9/17

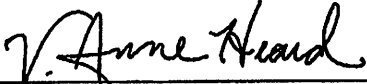
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)
)
D.R. HORTON, INC.,) CONSENT AGREEMENT AND
OSCEOLA COUNTY, FLORIDA,) FINAL ORDER
)
RESPONDENT.) Docket No.: CWA-04-2017-5501(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 is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY



V. Anne Heard
Acting Regional Administrator
U.S. EPA, Region 4

AUG 15 2017
Date: _____

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-04-2017-5501(b)** on the parties listed below in the manner indicated:

EPA Internal Mail:

Mr. Christopher Parker
Marine Regulatory and Wetlands Enforcement Section
U.S. EPA, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

By hand-delivery:

Mr. Matthew Hicks
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

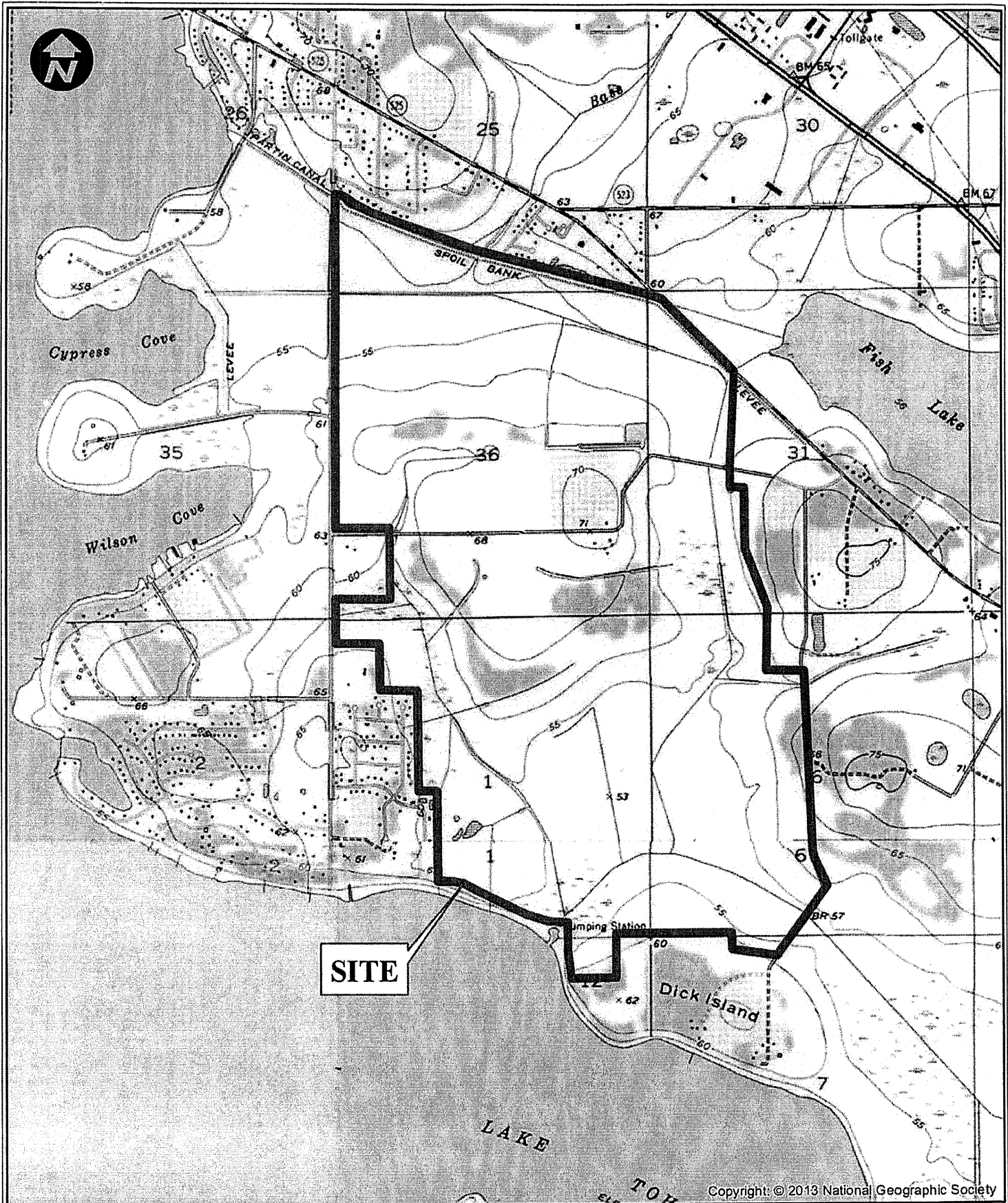
By Certified mail,
return receipt requested:

Mr. Ted I. Harbour
D.R. Horton, Inc.
301 Commerce Street, Suite 500
Fort Worth, TX 76102-4178

Dated: 8-17-17



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



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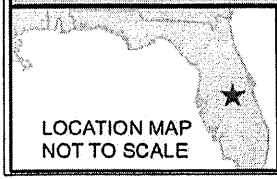
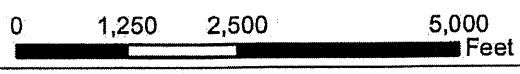


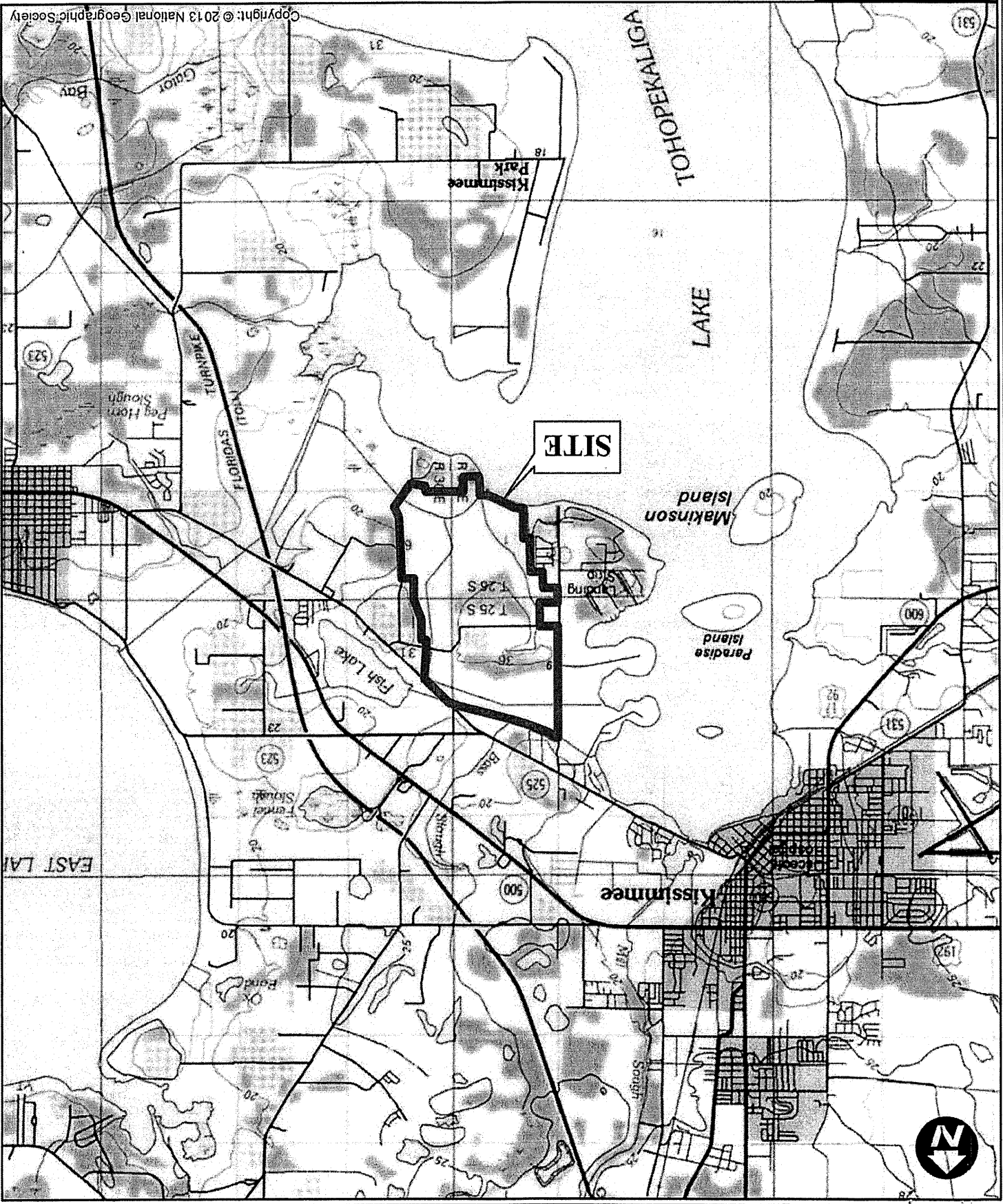
EXHIBIT A
TOHO PRESERVE
OSCEOLA COUNTY, FLORIDA





0 3,750 7,500 15,000 Feet

EXHIBIT B
TOHO PRESERVE
OSCEOLA COUNTY, FLORIDA



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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 17th 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 (Enter sfo 1.1 in the search field Open form and complete required fields).