UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 4

In the Matter of: Mr. Floyd Davis, Respondent.	Docket No. CWA-04-2020-0503(b)

CONSENT AGREEMENT

I. NATURE OF ACTION

1. This is an administrative penalty assessment proceeding brought under Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), (CWA or the Act) and Sections 22.13(b) and 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at Title 40 of the Code of Federal Regulations (C.F.R.), Part 22.

2. This Consent Agreement and the attached Final Order shall collectively be referred to as the CAFO.

3. Having found that settlement is consistent with the provisions and objectives of the Act and applicable regulations, the Parties have agreed to settle this action pursuant to 40 C.F.R. § 22.18 and consent to the entry of this CAFO without adjudication of any issues of law or fact therein.

II. PARTIES

4. Complainant is the Chief of the Water Enforcement Branch of the United States Environmental Protection Agency (EPA), Region 4, who has been delegated the authority on behalf of the Administrator of the EPA to enter into this CAFO pursuant to 40 C.F.R. Part 22 and Section 309(g)(2)(A) of the CWA.

5. Respondent is Mr. Floyd Davis (Respondent), an individual resident of the State of Alabama. This proceeding pertains to Respondent's site located at latitude 33.5939°N and longitude 85.6035°W in Wedowee, Alabama.

III. GOVERNING LAW

6. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with Section 404 of the CWA, 33 U.S.C. § 1344. Section 404 of the CWA 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.

7. 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....."

8. 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."

9. 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."

10. Federal regulations under 40 C.F.R. § 232.2 (1993) defined the term "waters of the United States" to include "wetlands adjacent to waters (other than waters that are themselves wetlands)."

11. Federal regulations under 40 C.F.R. § 232.2 (1993) and 33 C.F.R. § 328.3(b) defined or 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."

12. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Complainant represents that the State of Alabama was provided a prior opportunity to consult with the Complainant regarding this matter.

13. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45, Complainant will provide public notice of and reasonable opportunity to comment on the proposed issuance of this CAFO prior to issuance of the Final Order.

IV. FINDINGS OF FACTS

14. 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 4.99 acres of forested wetlands impacted by Respondent. The Discharge Area is indicated on the enclosed Exhibits A and B.

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

16. Commencing on or about June 2016, to May 2017, Respondent, or those acting on behalf of 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 expansion of a pasture.

17. Respondent's unauthorized activities impacted approximately 4.99 acres of forested wetlands adjacent to the Tallapoosa River, a Rivers and Harbors Act (RHA) section 10, 33 U.S.C. § 403, traditional navigable water (TNW).

18. On October 10, 2017, the EPA and US Army Corps of Engineers performed a Compliance Evaluation Inspection (CEI) to evaluate Respondent's discharge of dredged/fill material at the Site to assess compliance with the CWA, and the regulations promulgated thereunder at 40 C.F.R. § 232.

19. During the CEI of the Site, EPA's inspectors observed:

    (a) A discharge of dredge or fill material into approximately 4.99 acres of wetlands.

V. ALLEGED VIOLATIONS

20. At all times relevant to this action, Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

21. At all times relevant to this action, the Respondent owned and/or operated the Site.

22. 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).

23. 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).

24. 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).

25. At no time during the discharge of dredged and/or fill material at the Discharge Area from June 2016 to present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent.

26. 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).

27. 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.

VI. STIPULATIONS

28. The issuance of this CAFO simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).

29. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

    (a) admits that EPA has jurisdiction over the subject matter alleged in this CAFO;

    (b) neither admits nor denies the factual allegations set forth in Section IV (Findings of Facts) of this CAFO;

    (c) consents to the assessment of a civil penalty as stated below;

    (d) consents to the conditions specified in this CAFO;

    (e) waives any right to contest the allegations set forth in Section V (Alleged Violations) of this CAFO; and

    (f) waives its rights to appeal the Final Order accompanying this CAFO.

30. For the purpose of this proceeding, Respondent:

    (a) agrees that this CAFO states a claim upon which relief may be granted against Respondent;

    (b) acknowledges that this CAFO constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;

    (c) waives any rights it may possess at law or in equity to challenge the authority of EPA to bring a civil action in a United States District Court to compel compliance with the CAFO, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action;

    (d) waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum, or communication is to persuade such official to accept and issue this CAFO; and

    (e) agrees to comply with the terms of this CAFO.

31. In accordance with 40 C.F.R. § 22.5, the individuals named in the certificate of service are authorized to receive service related to this proceeding and the parties agree to receive service by electronic means at the following valid email addresses: schlachter.zachary@epa.gov and Beckwith.Natalie@epa.gov for the EPA and atruitt@kmcllaw.com for the Respondent.

32. 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 proposed CAFO based on comments received during the public comment period.

VII. TERMS OF PAYMENT

33. Respondent consents to the payment of a civil penalty, which was calculated in accordance with the Act, in the amount of $17,000.00, which is to be paid within thirty (30) calendar days of the Effective Date of this CAFO.

34. Payment(s) shall be made by cashier's check, certified check, by electronic funds transfer (EFT), or by Automated Clearing House (ACH) (also known as REX or remittance express). If paying by check, the check shall be payable to: Treasurer, United States of America, and the Facility name and docket number for this matter shall be referenced on the face of the check. If Respondent sends payment by the U.S. Postal Service, the payment shall be addressed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

If Respondent sends payment by non-U.S. Postal express mail delivery, the payment shall be sent to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
Mail Station: SL-MO-C2-GL
St. Louis, Missouri 63101
Contact Number: (314) 425-1819

If paying by EFT, Respondent shall transfer the payment to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

If paying by ACH, Respondent shall remit payment to:

US Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking
Physical location of US Treasury facility:
5700 Rivertech Court
Riverdale, Maryland 20737
Contact: Craig Steffen, (513) 487-2091
REX (Remittance Express): 1-866-234-5681

35. Respondent shall send proof of payment, within 24 hours of payment of the civil penalty, to:

(a) Regional Hearing Clerk
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
R4RegionalHearingClerk@epa.gov

and

(b) Mr. Zach Schlachter
Water Enforcement Branch
Surface Water and Groundwater Section
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
Schlachter.zachary@epa.gov

36. "Proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with the Facility name and "Docket No. CWA-04-2020-0503(b)."

37. Pursuant to 33 U.S.C. § 1319(g)(9), If Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may recover, in addition to the amount of the unpaid penalty assessed, the following amounts on any portion overdue:

a. Interest. Interest will begin to accrue on the civil penalty from the Effective Date of this CAFO. If the civil penalty is paid within 30 days of the Effective Date of this CAFO, Interest is waived. However, if the civil penalty is not paid in full within 30 days, Interest will continue to accrue on any unpaid portion until the unpaid portion of the civil penalty and accrued Interest are paid. Interest will be assessed currently prevailing rates.

b. Non-Payment Penalty. A 20 percent quarterly nonpayment penalty pursuant to 33U.S.C. § 1319(g)(9); and

c. Attorneys' Fees and Costs of Collection. The United States' attorneys' fees and costs of collection.

38. In addition to what is stated in the prior Paragraph, if Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may:

(a) refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13 and 13.14;

(b) collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H;

(c) suspend or revoke Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17; and/or

(d) request that the Attorney General bring a civil action in the appropriate district court to recover the amount assessed, in addition to the amounts described above, pursuant to 33 U.S.C. § 1319(g)(9). In any such judicial action, the validity, amount, and appropriateness of the penalty and of this CAFO shall not be subject to review.

39. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.

40. 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 Effective Date shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by EPA related to the matters addressed in this CAFO and that, in any action brought by 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.

VIII. EFFECT OF CAFO

41. In accordance with 40 C.F.R. § 22.18(c), Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.

42. Full payment of the civil penalty, as provided in Section VII (Terms of Payment), shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. 40 C.F.R. § 22.18(c).

43. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws or statutes, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, except as expressly provided herein.

44. Nothing herein shall be construed to limit the power of EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment as provided under the Act.

45. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of both Parties, and approval of the Regional Judicial Officer.

46. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.

47. Any change in the legal status of the Respondent, or change in ownership, partnership, corporate or legal status relating to the Facility, will not in any way alter Respondent's obligations and responsibilities under this CAFO.

48. By signing this Consent Agreement, Respondent acknowledges that this CAFO will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.

49. By signing this Consent Agreement, the Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.

50. By signing this Consent Agreement, both Parties agree that each party's obligations under this CAFO constitute sufficient consideration for the other party's obligations.

51. By signing this Consent Agreement, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and continues to be, true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.

52. EPA also reserves the right to revoke this CAFO and settlement penalty if and to the extent that EPA finds, after signing this CAFO, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to EPA. If such false or inaccurate material was provided, EPA reserves the right to assess and collect any and all civil

penalties for any violation described herein. EPA shall give Respondent notice of its intent to revoke, which shall not be effective until received by Respondent in writing.

53. Unless specifically stated otherwise in this CAFO, each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.

54. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.

55. 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.

IX. EFFECTIVE DATE

56. This CAFO shall become effective after execution of the Final Order by the Regional Judicial Officer, on the date of filing with the Hearing Clerk.

The foregoing Consent Agreement In the Matter of Mr. Floyd Davis, **Docket No.** CWA-04-2020-0503(b), is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT:

Floyd C Davis Sr 8-21-2020

Signature Date

Printed Name: FLOYD C DAVIS

Title: OWNER

Address: 3825 HWY 9

HEFLIN, AL 36264

The foregoing Consent Agreement In the Matter of Mr. Floyd Davis, Docket No. CWA-04-2020-0503(b)**,** is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

_____

Mary Jo Bragan, Chief
Water Enforcement Branch
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

In the Matter of: Mr. Floyd Davis**,** Respondent.	Docket No. CWA-04-2020-0503(b) FINAL ORDER

The Regional Judicial Officer is authorized to ratify this Consent Agreement which memorializes a settlement between Complainant and Respondent. 40 C.F.R. § 22.4(b) and §22.18(b)(3). The foregoing Consent Agreement is, therefore, hereby approved, ratified and incorporated by reference into this Final Order in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22.

The Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Final Order disposes of this matter pursuant to 40 C.F.R. §§ 22.18 and 22.31.

BEING AGREED, IT IS SO ORDERED.

_____
Tanya Floyd
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify that the foregoing "Consent Agreement" and "Final Order," in the Matter of Mr. Floyd Davis, Docket No. CWA-04-2020-0503(b), were filed and copies of the same were emailed to the parties as indicated below.

Via email to all parties at the following email addresses:

To Respondent: Mr. Floyd Davis
c/o: J. Alan Truitt, Esq.
Kazmarek Mowrey Cloud Laseter LLP
3008 7th Avenue South
Birmingham, Alabama 35233

To EPA: Mr. Zach Schlachter
Water Enforcement Branch
Surface Water and Groundwater Section
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
schlachter.zachary@epa.gov

Ms. Natalie Beckwith
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
beckwith.natalie@epa.gov

_____
Patricia A. Bullock, Regional Hearing Clerk
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

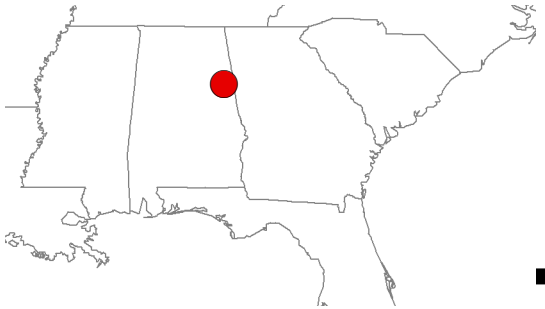
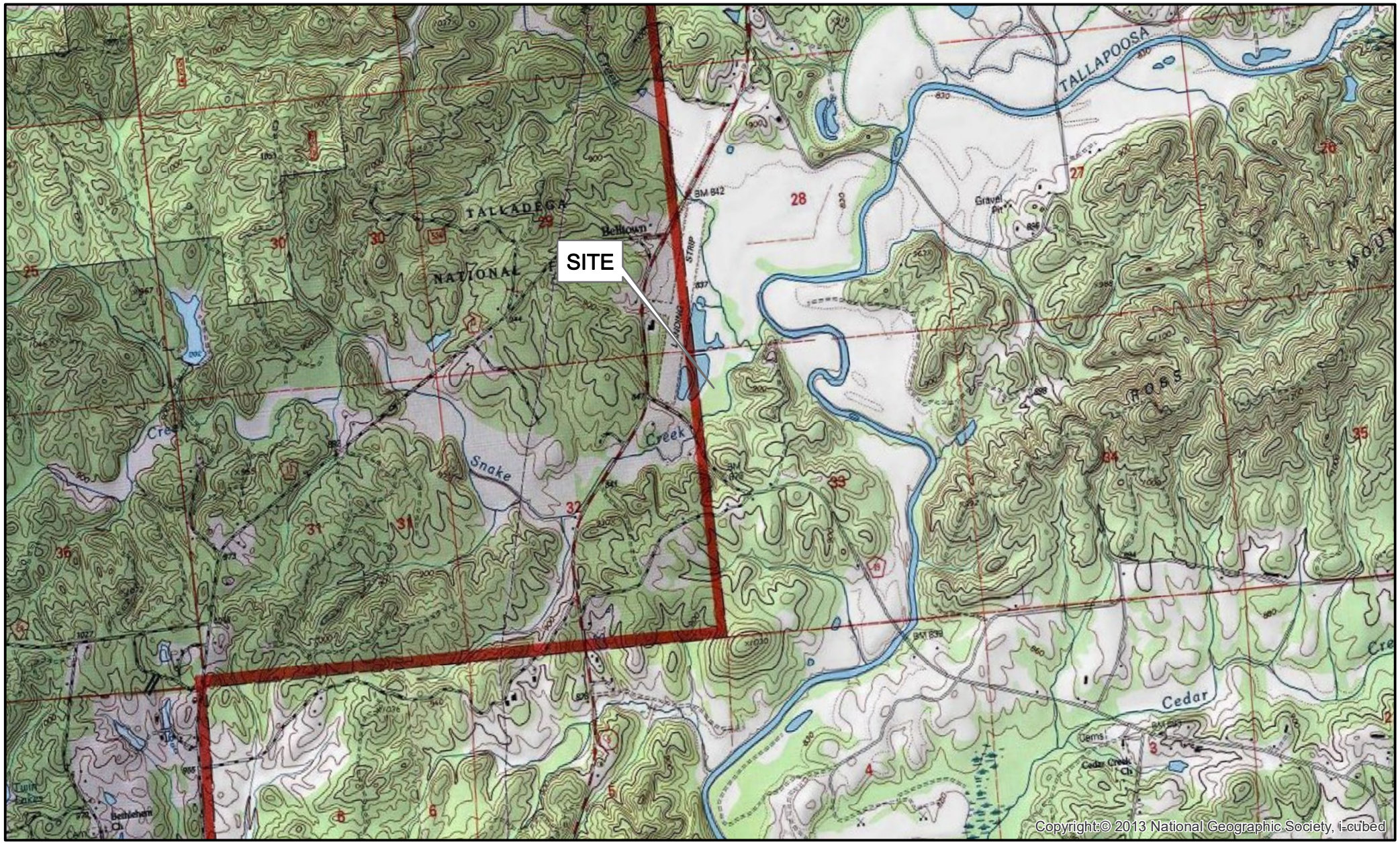


EXHIBIT A
Davis Site Location
Wedowee, Alabama

0.25 0.5 1 Miles

N



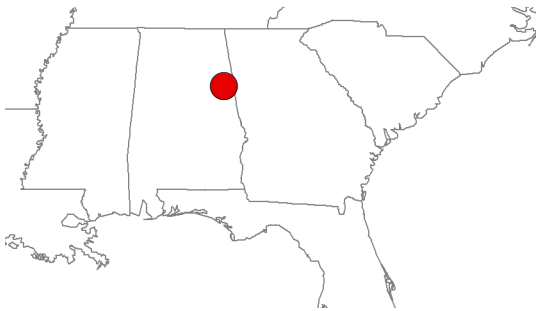


EXHIBIT B
Davis Site Location
Wedowee, Alabama

0 0.5 1 2 Miles

N