UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	
Atkinson Developers, LLC Francis M. Atkinson, Jr. Aynor, South Carolina,	Docket No.: CWA-04-2010-5511 Proceeding to Assess Class II Penalty Section 309(g) of the Clean Water Act 33 U.S.C. § 1319(g)
Respondents.	

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of section 309(g) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1319(g). This proceeding is governed by the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits" (hereinafter "Consolidated Rules of Practice" or Part 22), codified at 40 C.F.R. Part 22. Complainant has moved for a Default Order finding Respondents Atkinson Developers, LLC, and Francis M. Atkinson Jr. (hereinafter "Atkinson" or Respondents) liable for violations of sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342. Complainant requests assessment of a civil penalty in the full amount of $157,500.00 as proposed in the Administrative Complaint.

Pursuant to the Consolidated Rules of Practice, and based upon the record in this matter and the following Findings of Fact and Conclusions of Law and Determination of Penalty, Complainant's Motion for Default, is hereby **GRANTED**. The Respondents are hereby found in default and a civil penalty is assessed against them in the amount of $157,500.00.

I. BACKGROUND

The Complainant, Director of the Water Protection Division, U.S. Environmental Protection Agency (EPA), Region 4, filed the original Administrative Complaint (Complaint) against Respondents in this matter on June 4, 2010. In its Complaint, Complainant alleged that Respondents, or those acting on behalf of Respondents, violated Section 404 of the CWA, 33 U.S.C. § 1344, by discharging dredged and/or fill material into jurisdictional wetlands without a permit authorizing such activities and that each discharge by Respondents of pollutants into navigable waters without the required permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Section VI of the Complaint, entitled "Hearing" provides information concerning Respondents' obligations with respect to responding to the Complaint. Paragraph 22 of Section IV of the Complaint specifically states that:

> As provided under Section 309(g) of the CWA, 33 U.S.C. § 1319(g). Respondents have the right to request a hearing to contest any material fact contained in this Complaint, or to contest the appropriateness of the amount of the proposed penalty. If Respondents wish

to avoid being found in default, Respondents must file a written Answer to this Complaint and a Request for Hearing within 30 days of service of this Complaint ... .

Paragraph 23 of Section VI. of the Complaint advises that:

> The Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which Respondents have any knowledge, or clearly state that Respondents have no knowledge as to particular factual allegations in the Complaint. The Answer also must state:
>
> a. the circumstances or arguments that are alleged to constitute grounds of defense, and
> b. the facts which Respondents intend to place at issue.

Paragraph 24 of Section VI. of the Complaint advises that:

> Failure to deny any of the factual allegations in this Complaint constitutes admission of the undenied allegations. ... .

Paragraph 16 of Section IV of the Complaint warns that:

> If Respondents fail to file a written Answer within 30 calendar days of receipt of this Complaint, a Default Order may be issued against Respondents by the Regional Administrator. Issuance of a Default Order will constitute a binding admission of all allegations made in the Complaint and a waiver of Respondents' right in this case to a hearing under the CWA, pursuant to 40 C.F.R. § 22.17. The civil penalty proposed in this Complaint will then become due and payable without further proceedings 60 days after the Default Order becomes the Final Order of the Administrator pursuant to 40 C.F.R. § 22.31. ... .

The Certificate of Service attached to the Complaint shows that a copy of the Complaint was sent by certified mail return receipt requested on June 4, 2010, addressed to Mr. Francis M. Atkinson, Jr., 4368 Green Sea Road South, Aynor, South Carolina 29511. A certified mail return receipt bearing the docket number of this case and the record "Complaint" filed with the Regional Hearing Clerk shows that an article was signed-for at the address indicated in the Certificate of Service on June 7, 2010. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Complaint may be presumed under the Consolidated Rules of Practice.

On June 22, 2010, the Complainant re-filed the Complaint against Respondents in this matter. Counsel for the Complainant was concerned that while the cover letter to the original June 4, 2010, Complaint had been stamped filed, that the Complaint itself had not. Paragraphs 22, 23, and 24, of Section VI ("Hearing") of the re-filed Complaint, provide the same information, advice and warnings concerning Respondents' obligations with respect to responding to the re-filed Complaint and the potential ramifications if an Answer is not filed as noted in the June 4, 2010, Complaint referenced above.

The Certificate of Service attached to the re-filed Complaint shows that a copy of the re-filed Complaint was sent by certified mail return receipt requested on June 23, 2010, addressed to Mr. Francis M. Atkinson, Jr., 4368 Green Sea Road South, Aynor, South Carolina 29511. A certified mail return receipt bearing the docket number of this case filed with the Regional Hearing Clerk shows that an article was signed-for at the address indicated in the Certificate of Service on June 25, 2010. A properly executed return receipt constitutes proof of service of the re-filed Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the re-filed Complaint may be presumed under the Consolidated Rules of Practice.

Respondents were clearly on notice of the requirements to file an Answer as early as June 7, 2010. Respondents have not filed an answer to the Complaint or to the re-filed Complaint as of the date of this order.

On May 2, 2014, Complainant filed a Motion for Default in this matter.[1]

II. DEFAULT ORDER

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22. Section 22.17 of the Consolidated Rules of Practice provides, in part:

> **(a) Default.** A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondents constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant

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[1]. In support of Complainant's Motion for Default, there were several exhibits:
- Exhibit A, copy of the Complaint and 40 C.F.R. Part 22,;
- Exhibit B, copy of the cover letter and signed Certified Mail Receipt for the Complaint;
- Exhibit C, copy of the re-filed Complaint;
- Exhibit D, copy of the cover letter and signed Certified Mail Receipt for the re-filed Complaint;
- Exhibit E, Penalty Justification Memorandum;
- Exhibit F, copy of the Public Notice for the Administrative Complaint;
- Exhibit G, Affidavit of Patricia A. Bullock, RHC, stating that neither an answer to the Complaint nor any other document has been filed by Respondents.
- Exhibit H, copy of October 21, 2008, Compliance Order and 308 Information Request to Respondents;
- Exhibit I, copy of the Compliance Order and Information Request, as served on Respondents by Horry County Sheriff's Office; and
- Exhibit J, copy of March 12, 2010, Second Compliance Order and 308 Information Request to the Respondents and Certified Mail Receipt (Exhibit K).
- Exhibit L, copy of May 4, 2010, Complainant's letter to Respondents concerning restoration of the impacted wetlands and signed Certified Mail Receipt signed green card back proving service of the letter on Respondents. (Exhibit M).

constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) Motion for default. A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds tor the relief requested.

(c) Default order. When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions. Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

It is appropriate at this juncture for this court to rule on the Default Motion.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the record in this proceeding, I make the following findings of fact and conclusions of law:

Respondent Atkinson Developers, LLC, is and was, at all relevant times, a limited liability corporation incorporated under the laws of the State of South Carolina doing business in South Carolina.

Respondent Francis M. Atkinson, Jr., at all relevant times, was the Chief Executive Officer and President of Atkinson Developers, LLC.

Respondent, Atkinson Developers, LLC, is therefore a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. §1362(5) and 40 C.F.R. § 122.2. Respondent Francis M. Atkinson, Jr., also is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

Respondent Atkinson Developers, LLC, at all relevant times, was the owner and operator of a 60 acre parcel of land located on Huckleberry Road near the city of Aynor in Horry County, South Carolina (the "Site") that includes the area where dredged and/or fill material was placed (the "Discharge Area").

Commencing in late June 2005, Respondents, or those acting on behalf of Respondents, discharged dredged and/or fill material into wetlands on parcels of land located on Huckleberry Road near the city of Aynor in Horry County, South Carolina (the "Site") using earth moving machinery while engaged in unauthorized activities associated with clearing and filling of wetlands for the establishment of a farm.

Respondents' unauthorized activities impacted approximately 19 acres of forested wetlands lying in a tidal marsh adjacent to Loosing Swamp. Loosing Swamp is adjacent to Lake Swamp, which is a permanent water that flows into the Little Pee Dee River, a traditional navigable water of the United States.

The impacted wetlands are jurisdictional "waters of the United States" within the meaning of 40 C.F.R. § 122.2 and section 502(7) of the CWA, 33 U.S.C. § 1362(7).

Fill material is a "pollutant" within the meaning of 40 C.F.R. § 232.2 and Section 502(6) of the Act, 33 U.S.C. § 1362(6).

Mechanized machinery, including earth moving equipment, is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

Respondents' placement of the dredged and/or fill material at the Site constitutes a "discharge of pollutants" as defined under the Act, 33 U.S.C. § 502(12).

Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of dredged and/or fill material into navigable waters of the United States, except in compliance with a permit issued by the Department of the Army under section 404 of the Act.

At no time during the discharge of dredged and/or fill material at the Site did Respondents possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344.

The discharges described above are violations of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

In September 2005 The Charleston District of the Core of Engineers (COE) was notified of the Respondents' activities and conducted a site investigation.

The COE determined that wetlands were being filled, that they were jurisdictional wetlands, and that no CWA Section 404 permit had been issued for the Respondents' activities.

On October 3, 2005, the COE referred this action to the EPA for enforcement. The COE referred the case because the area was threatened by over development and because the wetlands

impacted by the Respondents' unauthorized activities were highly functional wetlands. Mike Wylie Declaration, Exhibit E.

On October 21, 2008, the Complainant sent a Compliance Order and 308 Information Request to Respondents via certified mail return receipt requested. (Motion for Default, Exhibit H). The Respondents did not accept service.

On July 24, 2009, the Complainant had the Horry County sheriff serve Respondents with a copy of the Compliance Order and the Information Request. (Motion for Default, Exhibit I). Respondents did not comply with the Order nor reply to the Information Request.

On February 4, 2010, the Complainant contacted Respondent Francis M. Atkinson, Jr. by phone; Respondent indicated that he would work with the Complainant to restore the Site. The Complainant tried numerous times to contact Respondent again and schedule dates to meet. The Respondent did not return any of the calls.

On March 12, 2010, the Complainant sent a second Compliance Order and 308 Information Request to the Respondents via certified mail return receipt requested. (Motion for Default, Exhibit J). The Complainant received the signed green card back proving service of the Order and Information Request on Respondents. (Motion for Default, Exhibit K). Respondents again did not comply with the Order (to restore the Site) or reply to the Information Request.

On May 4, 2010, the Complainant sent a letter to Respondents via certified mail return receipt requested requesting that the Complainant be contacted concerning the restoration of the wetlands. (Motion for Default, Exhibit L). The Complainant received the signed green card back proving service of the letter on Respondents. (Motion for Default, Exhibit M). Respondents did not reply to the letter.

On June 4, 2010, the Complainant filed a Complaint in this matter, alleging that Respondents, or those acting on behalf of Respondents, violated Section 404 of the CWA, 33 U.S.C. § 1344, by discharging dredged and/or fill material into jurisdictional wetlands without a permit authorizing such activities in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). On the same date, Complainant served a copy of the Complaint on Respondents via certified mail return receipt requested. The Complainant received the signed green card back proving proper service on Respondents. (Motion for Default, Exhibit B).

On June 22, 2010, the Complainant re-filed the Complaint. Counsel for the Complainant was concerned that the cover letter to the original Complaint had been stamped filed but the Complaint itself had not. On June 25, 2010, the Complaint was re-delivered to the Respondents via certified mail return receipt requested. The Complainant received the signed green card proving proper service of the re-filed Complaint on Respondents. (Motion for Default, Exhibit D).

The Complaint and re-filed Complaint in this proceeding were lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

EPA notified the South Carolina Department of Health and Environmental Control of the issuance of the Complaint and afforded the State an opportunity to consult with EPA regarding the assessment of an administrative penalty against Respondent as required by Section 309(g)(l) of the CW A, 33 U.S.C. § 1319(g)(l).

EPA notified the public of the filing of the Complaint and afforded the public thirty (30) days in which to comment on the Complaint and the proposed penalty as required by Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A).

Respondent did not file an Answer to the Complaint within 30 days of receipt of the Complaint, or re-filed Complaint, and has not filed an Answer as of the date of this order.

Respondents' failure to file an Answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondents' right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

On May 2, 2014, Complainant filed a Motion for Default. The Certificate of Service attached to the Motion for Default indicates that a copy of the Motion for Default was served on Respondents by certified mail return receipt requested on May 2, 2014.[2]

Pursuant to 40 C.F.R. § 22.5(b)(2), Complainant has demonstrated that it has complied with the service requirements.

Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b).

Respondent did not file a response to Complainant's Motion for Default within 15 days of service and has not filed a response to the Motion for Default as of the date of this order.

On October 29, 2014, the then Presiding Officer issued an "Order to Supplement the Record," ("First Order") for the Complainant to supplement the record by providing an affidavit or declaration of the person calculating the proposed penalty that would provide factual grounds for the relief sought in the May 2, 2014, Motion for Default. The supplemental information was due on or before December 1, 2014.

On November 25, 2014, Complainant filed a Response to the Order to Supplement the Record requesting that the then Presiding Officer reconsider her Order or, in the alternative, grant an extension of time for Complainant to comply with the Order.

On a finding of good cause, on December 4, 2014, the then Presiding Officer issued an "Order Granting Extension of Time" ("Second Order"). The Second Order provided that the

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[2]. While this court was unable to locate a copy of the signed green card for the Motion for Default, green cards indicating service of subsequent documents, including the December 2014 "Order Granting Extension of Time" (to reply to "Order to Supplement Record") and Complainant's January 2015 "Response to the Order to Supplement Record," which include references to the Motion for Default, are in the file.

Complainant had until January 15, 2015, to provide the requested supporting documentation for Complainant's Motion for Default.

On January 15, 2015, Complainant filed its response to the Presiding Officer's October 29, 2014, "Order to Supplement the Record" including a Declaration of Mike Wylie, which provided the factual grounds for the Complainant's proposed penalty and the additional documents Mr. Wylie relied on in his calculation of the proposed penalty.

On February 28, 2015, the previous Presiding Officer in this matter resigned and on March 31, 2015, a new acting Presiding Officer (Presiding Officer) was appointed.

On May 19, 2015, this Presiding Officer issued an Order to Show Cause (Show Cause Order) to Respondents to show cause as to why they had not submitted an Answer in this matter and as to why the Complainant's Motion for Default Order should not be granted. The original copy of the Show Cause Order sent to Respondents on May 19, 2015, was returned on June 9, 2015, as undeliverable. A second copy of the Show Cause Order was sent to Respondents via United Parcel Service (UPS) on June 11, 2016. The UPS tracking form shows that the Show Cause Order was delivered on June 12, 2015. No response to this Order has been received from Respondents.

On March 10, 2016, Complainant filed a Motion to Supplement the Record, to provide additional information in response to the Order to Supplement the Record.

40 C.F.R. § 22.17(a) provides that "a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing."

A default constitutes an admission, by Respondent, of all facts alleged in the Complaint and a waiver, by Respondent, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

Respondents' failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

As of the date of this Order, Respondents have not filed an Answer to the Complaint, a response to the Motion for Default, or a response to the Order to Show Cause issued by the Presiding Officer, with the Regional Hearing Clerk.

Respondents are in default for failure to file a timely Answer to the Complaint or a response to the Order to Show Cause issued by the Presiding Officer. 40 C.F.R. § 22.17(a).

IV. DETERMINATION OF PENALTY

Section 309(g) of the Act, 33 U.S.C. § 1319(g), authorizes the Administrator to bring a civil suit for any violation of sections 301 and 402 of the Act, 33 U.S.C. §§1311 and 1342. The Administrator may seek a Class II civil penalty of up to $10,000 per violation per day with a maximum for all the violations not to exceed $125.000, 33 U.S.C. § 1319(g)(2). Consistent with the Civil Monetary Penalty Inflation Adjustment Rule, the upper limit of such penalties is now $157,500 for violations occurring on or after March 15, 2004. *See*, 69 Fed. Reg. 7121 (Feb.13, 2004); 40 C.F.R. Part 19. The relief proposed in the Complaint and requested in the Motion for Default includes the assessment of a total civil penalty of $157,500.00 for the alleged violations. The Consolidated Rules of Practice, in pertinent part, provide that

> When the Presiding Officer finds that a default has occurred ... . The relief proposed in the Complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.
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> 40 C.F.R. § 22.17(c)

With respect to penalty, the Consolidated Rules provide that the Presiding Officer shall determine the amount of the civil penalty

> ... based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.
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> 40 C.F.R. § 22.27(b).

The statutory factors I am required to consider in determining the amount of the civil penalty are

> ... the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.
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> Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

In considering this case in light of the statutory factors, I have considered the Findings of Fact and Conclusions of Law above, the narrative summary explaining the reasoning behind the penalty requested set forth in Complainant's Penalty Calculation attached to the Motion for Default and the Declaration Mike Wylie attached to Complainant's Response to Supplement the Record, and the record in this case. I reach the following decision regarding the penalty:

Nature, Circumstances, Extent and Gravity of the Violation(s):

The Complaint, the Motion for Default, the Complainant's Penalty Calculation (Default Motion, Exhibit E) and the Declaration of Mike Wylie (or Declaration), contain narratives explaining the nature, circumstances, extent and gravity of the violations considered by Complainant in assessing the proposed penalty. The Motion for Default notes that: the Charleston District of the Army COE conducted a site visit and determined that wetlands were being filled, that they were jurisdictional, but that no CWA Section 404 permit had been issued for the Respondents' activities.[3] Mike Wylie's Declaration at 2 notes:

> The Respondents mechanical land clearing and discharge of fill material into approximately 19 acres of highly functional, forested wetlands that are adjacent to Loosing Swamp ... . In addition, Respondents failed to install or maintain proper Best Management Practices on-site such as silt fencing prior to clearing and filling the forested wetlands. As a result, a substantial amount of unconsolidated sediment was allowed to wash into Loosing Swamp.

The COE referred this action to the EPA expressing concerned because the impacted wetlands had been highly functional wetlands. By not applying for a permit, Respondents bypassed the costs and offsetting environmental benefits associated with mitigating for unavoidable impacts to waters of the U.S., such as onsite mitigation or the purchase of wetland credits from a commercial mitigation bank. Motion for Default, Exhibit E at 2.

The EPA, COE and states rely on permit programs to implement the requirements and controls necessary to prevent water pollution. Respondents' failure to comply with the section 404 permit program, the Act, and it implementing regulations, jeopardizes the integrity of the federal CWA program. As noted in Mike Wylie's Declaration:

> The impacted forested wetlands provided important water quality functions to Loosing Swamp, including: floodwater storage, nutrient and sediment retention, and maintenance of base flows. The wetlands provide habitat for indigenous flora and fauna that populate the swamp and downstream waters. The wetlands transported carbon and nutrients to Loosing Swamp through particulate and dissolved organic and inorganic matter to support the life cycles of the swamp's aquatic flora and fauna. These critical wetland functions have been lost at the Site as a result of the Respondents' activities. Declaration at 2.

The area of the violations is considered to be sensitive because it is located in a coastal area that, at the time of the violations, was experiencing rapid development. The loss of Respondents' 19 forested acres is made more significant by the fact that wetland acreage is a diminishing resource in the increasingly urban environment along the South Carolina coast. Because of the continued loss of wetlands along the coast, federal and state regulatory agencies

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[3]. *See also*, September 6, 2005, letter from Rebecca Harper, Marion County District Conservationist, U.S. Department of Agriculture, notifying Mr. Atkinson that the area of concern contained wetlands. Exhibit D, Complainant's "Response to Order to Supplement Record."

are less willing to allow permits without a rigorous review, particularly applications for such a large impact. These permit reviews can reduce the scope of proposed wetland impacts and compensate for permitted wetland loss. "However, the Respondents circumvented the permit process which would have led to a reduction of wetland impacts, failed to compensate for wetland functional losses and contributed to the loss of important wetland resources critical to the health of aquatic resources along the South Carolina coast." Mike Wylie's Declaration at 3.

After giving consideration to the nature, circumstances, extent and gravity of the violation(s), Mr. Wylie considered the Respondents' actions to be a significant environmental factor in the penalty calculation due to the important functions exhibited by the forested wetlands, the acreage of wetlands impacted, the location of the wetlands, and the duration of the wetland impacts. I find that the record and Complainant's narrative supports the requested penalty amount. I have received nothing to the contrary from Respondent.

Ability to Pay:

The record contains no information regarding Respondent' s financial ability to pay the penalty. Therefore, no adjustment is made to the penalty based on this statutory factor.

Prior History of Violations:

In its Motion for Default, Exhibit E (Complainant's Penalty Calculation, at 4), Complainant notes that this is the first enforcement action EPA has issued to the Respondents.

Degree of Culpability:

In its Motion for Default, Exhibit E and Mike Wylie's Declaration, Complainant also discusses the culpability of the Respondent. Respondents are established developers and real estate buyers in the area and, given the prevalence of wetlands in the county, it may be assumed that they were aware of 404 permitting requirements. Also, Respondents ignored federal agency determinations that they were impacting jurisdictional wetlands and were required to seek a section 404 permit.

In 2005 Respondents sought assistance from the Horry County Natural Resource Conservation Service (NRCS) office, requesting that the NRCS conduct a wetlands determination on the Site to support a request by Respondents for financial assistance for agricultural purposes. NRCS advised Respondents that the area of the Site they were clearing and filling contained wetlands and advised them to seek a section 404 permit from the COE. Declaration by Mike Wylie, Exhibit D. However, Respondents did not contact the COE concerning a permit prior to their clearing and filling activities. Additionally, even after the COE was notified, had conducted a site investigation, and informed Respondents the 404 permitting requirements, Respondents failed to comply. Following the referral of the action from the COE to the EPA, EPA made several attempts to bring the Respondents into compliance with the CWA. Motion for Default at 3.

Economic Benefit or Savings:

Complainant described the primary economic benefit to Respondents as that gained by avoiding the requirements of the CWA 404 permitting program, including the cost savings from failure to purchase mitigation credits for the wetland impacts. As explained in Mike Wylie's Declaration:

> To estimate the avoided mitigation costs associated with the Respondent's unpermitted activities, the EPA used the Charleston Corps District's worksheet for calculating required wetland mitigation credits. EPA calculated that impacts to 19 acres of forested wetlands would have required the Respondents to purchase 218 wetland mitigation credits from a commercial mitigation bank (Exhibit F). Individual mitigation credit purchase in the immediate watershed (Little Pee Dee watershed) at the time of the discharge was approximately $5000 per wetland credit. Consequently, EPA found that the Respondents' avoided wetland mitigations [sic] costs were approximately $1,090,000 dollars. Declaration at 4.

Many courts start with economic benefit as the base for determining an appropriate penalty. "[T]he base figure used to calculate a CWA penalty is 'economic benefit,' the assessment of which deters violations by removing an incentive to violate the law [and] helps create a level playing field by ensuring that violators do not obtain an economic advantage over their competitors." *Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2007 EPA ALJ LEXIS 21, at 146 (ALJ, Aug. 3, 2007). '[C]ase law has established that [Complainant] need not demonstrate the exact amount of economic benefit, since a tribunal is only required to make a "reasonable approximation" thereof when calculating a CWA penalty.'" *Id.*

Using EPA's General Enforcement Policy #GM 22, I have employed the "rule of thumb" method for evaluating a potential economic benefit of delayed compliance.[4] In this case, treating the mitigation credits cost ($1,090,000) as a one-time capital cost to Respondents for receiving a 404 permit, I applied a multiplier of 5% per year of the value of the delayed one-time capital cost from the date the violation began until the date compliance was or expected to be achieved (in This case, date of the Complaint, five (5) years). Thus, I calculate the economic benefit to have been, at least, $272,500.00.[5]

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[4]. As provided in the EPA' 1984 General Enforcement Policy #GM -22, "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties":

> The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date compliance was or is expected to be achieved.

This methodology is referred to as the "rule of thumb for delayed compliance" method. GM-22 at 7.

[5]. This represents a "rule of thumb" of the delayed costs of compliance. It is recognized by the court that, additionally, the mitigation credits have yet to have been purchased.

Other Matters as Justice May Require:

Complainant apparently made no adjustments to the penalty for other matters as justice may require, other than the consideration that a sizeable penalty would have a deterrent effect for both Respondents and the rest of the development community. The record contains no further facts that would require an adjustment to the penalty based on this statutory factor.

Total Penalty:

Pursuant to 40 C.F.R. § 22.17(c), "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." The Complainant proposes to assess a total civil penalty of $157,500.00 (which includes gravity, economic benefit and litigation considerations) for the violations alleged in the Complaint. After considering the statutory factors, and the record in this case, I find the civil penalty proposed is not inconsistent with the record of this proceeding and the statutory penalty factors of the CWA. Respondents have not presented any information to the court that would warrant any reduction in penalty.

V. DEFAULT ORDER

In accordance with 40 C.F.R. § 22.17(c), "[t]he relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Where Respondents have failed to file an Answer to the Complaint and failed to comply with the Order of this court, that Respondent show cause as to why they had not submitted an Answer in this matter and as to why the Complainant's Motion for Default Order should not be granted, Respondent is found to be in default pursuant to 40 C.F.R. § 22.17(a). Based on the record, the Findings of Fact and Conclusions of Law and Determination of Penalty as set forth above, the statutory factors, and the information in the Declaration of Mike Wylie regarding the penalty factors, this court is awarding the full amount of the penalty proposed in the Complaint. I hereby find that Respondents are liable for a total penalty of $157,500.00

IT IS THEREFORE ORDERED that Respondents shall, within thirty (30) days after this Order becomes final under 40 C..P.R. § 22.27(c), submit by cashier's or certified check, payable to the "Treasurer, United States of America," payment in the amount of $157,500.00 to the following address by U.S. Postal Service:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Financial Center
P.O. Box, 979077
St. Louis, MO 63197-9077

Respondents shall note on the check the title and docket number of this Administrative action. Respondents shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Each party shall bear its own costs in bringing or defending this action.

Should Respondents fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order 45 days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the initial decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the initial decision on its own initiative. Any party may appeal any adverse order or ruling of the Judicial Officer by filing an original and one copy of a Notice of Appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after the Initial Decision is served. 40 C.F.R. § 22.30(a). If a party intends to file a Notice of Appeal, it should be sent to:

U.S. Environmental Protection Agency
Clerk of The Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board, that Initial Decision becomes a Final Order and Respondent shall have waived their right to judicial review. 40 C.F.R. §§ 22.27 and 22.30.

IT IS SO ORDERED:

Dated: 8/4/16

Kevin B. Smith
Acting Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Initial Decision and Default Order, in the Matter of Atkinson Developers, LLC, and Francis M. Atkinson, Jr., Docket No., CWA-04-2010-5515, on the parties listed below in the manner indicated:

Certified Mail - Return Receipt Requested:
Mr. Francis M. Atkinson, Jr
Atkinson Developers, LLC
4368 Green Sea Road South
Aynor, South Carolina 29511

Via Intra-Office Mail:
Ms. Wilda Cobb
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Date: 8-9-16

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