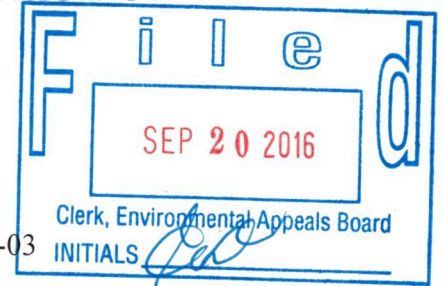


**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



In re:)
)
Atkinson Developers, LLC &)
Francis M. Atkinson, Jr.)
)
Docket No. CWA-04-2010-5515)
_____)

CWA Appeal No. 16-03

ORDER ELECTING TO EXERCISE *SUA SPONTE* REVIEW

The Acting Regional Judicial Officer for the United States Environmental Protection Agency Region 4 (“Region”) issued a Default Initial Decision and Order (“Default Order”) in this matter on August 4, 2016. The Default Order assesses a penalty of \$157,500 against Respondents – Atkinson Developers, LLC and Francis M. Atkinson, Jr. – for alleged violations of the Clean Water Act section 309(g), 33 U.S.C. § 1319(g). For the reasons that follow, the Environmental Appeals Board (“Board”) elects to exercise *sua sponte* review, pursuant to 40 C.F.R. §§ 22.27(c)(4) and 22.30(b).¹

The Certificate of Service accompanying the Default Order states that the Default Order was served on Respondents via certified mail, with return receipt requested. The Certificate was signed by the Regional Hearing Clerk and was dated August 9, 2016. However, when asked to provide the Board with proof of service, the Regional Hearing Clerk’s office submitted a copy of

¹ Under the regulations governing the administrative assessment of civil penalties, 40 C.F.R. part 22, the Board has 45 days after service of an initial decision to elect to exercise its authority to conduct *sua sponte* review. 40 C.F.R. § 22.27(c). As the Default Order was served on August 9, 2016, the Board has until September 23, 2016, to so decide.

a United Parcel Service Next Day Air Shipping Document and tracking number, addressed to Respondents' address of record. The Clerk's office also submitted a Proof of Delivery notice from UPS indicating that the package was delivered to the city and state corresponding to Respondents' address of record on August 10, 2016, at 5:46 p.m. and that it was received by "Atkinson" at a residential address. While service of the Default Order using a commercial delivery service is proper under 40 C.F.R. § 22.6, the Default Order's Certificate of Service inaccurately certifies a method of service that did not take place.

That discrepancy between the Certificate of Service and the actual method of service may appear to be an insignificant matter such that a correction is unnecessary. It is not insignificant, and the Board has previously granted *sua sponte* review to address service concerns. *See, e.g., In re Ikegwu*, TSCA Appeal No. 14-01, at 2 (EAB May 15, 2014) (Order Electing to Exercise Sua Sponte Review) (providing Regional Hearing Clerk opportunity to serve respondents at other addresses in light of Clerk's concerns about service). It is useful to remind all parties that an accurate certificate of service is important. For example, the Consolidated Rules of Practice that govern here, 40 C.F.R. part 22, establish different methods for computing various deadlines based on the method of service. "Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed * * * for the filing of a responsive document." 40 C.F.R. § 22.7(c). Thus, an inaccurate certificate of service creates ambiguity in the record and may create unnecessary questions as to whether a document was timely filed.


The Board therefore directs the Regional Hearing Clerk to amend the Certificate of Service to reflect the actual method of service of the Default Order. The Region shall provide a copy of the amended certificate of service to Respondents and provide a status report to the

Board by **Thursday, October 20, 2016**. Notwithstanding any inaccuracies in the original Certificate of Service, the Board finds that the Default Order was properly served via overnight commercial delivery service on August 9, 2016. Thus, amendment of the Certificate of Service will not reopen the appeal period, which has already expired under 40 C.F.R. § 22.30(a). The Board will decide whether to review the merits of the Default Order *sua sponte* after the Region submits its status report. This order constitutes notice, required under 40 C.F.R. § 22.30(b), of the Board's intent to review the Default Order. The Board does not require briefing from the parties at this time but may issue a subsequent order requesting briefing if appropriate.

So ordered.²

ENVIRONMENTAL APPEALS BOARD

Dated: 09/20/16

By: 
Aaron P. Avila
Environmental Appeals Judge

² The three-member panel deciding this matter is comprised of Environmental Appeals Judges Aaron P. Avila, Kathie A. Stein, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **Order Electing to Exercise *Sua Sponte* Review** in the matter of *Atkinson Developers, LLC & Francis M. Atkinson, Jr.*, CWA Appeal No. 16-03, were sent to the following persons in the manner indicated:

Via EPA Pouch Mail:

Ms. Wilda Cobb
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303


Ms. Patricia A. Bullock
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303

Via Certified First Class U.S. Mail, return receipt requested:

Mr. Francis M. Atkinson, Jr.
Atkinson Developers, LLC
4368 Green Sea Road, South
Aynor, SC 29511

Dated: _____

9/20/2016


Annette Duncan, Secretary
U.S. Environmental Protection Agency
Environmental Appeals Board