

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III**

1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In The Matter of:

**Mr. Michael Costello
Mr. Ronald Carter
d/b/a Carter and Costello Tree
Professionals**

3724 West Neck Road
Virginia Beach, VA 23456-3821

Respondents

Docket No. CWA-03-2006-0104

INITIAL DECISION AND ORDER OF DEFAULT

By Motion for Default Order Against Respondents ("Motion") filed January 7, 2008, and as supplemented on August 31, 2009, the United States Environmental Protection Agency, Region III ("EPA") moved for a default judgment against Respondents Ronald Carter and Michael Costello d/b/a Carter and Costello Tree Professionals ("Respondents") for liability under Section 309(g) of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1319(g). In its Motion, the EPA seeks an assessed penalty of Five Thousand (\$5,000) Dollars, which is one-half of the amount of the penalty in the Administrative Complaint and Notice of Hearing ("Complaint") that the EPA filed on May 1, 2006.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. pt. 22, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Decision on Penalty

Amount, the EPA's Motion for Default Order Against Respondents is hereby GRANTED in part and DENIED in part. The Respondents Michael Costello and Carter and Costello Tree Professionals are hereby found in default, and a civil penalty is assessed against them in the amount of \$5,000. Complainant's Motion for Default Order against Respondent Ronald Carter is hereby denied.

I. BACKGROUND

This civil administrative action arises under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). This proceeding is also governed by the Consolidated Rules of Practice. 40 C.F.R. pt. 22.

A. The EPA's Demand for Information and the Subsequent Complaint

Section 308(a) of the Clean Water Act authorizes the EPA to, among other things, require any owner or operator of a point source to make reports and provide other such information as the EPA may reasonably require to carry out the requirements of the Clean Water Act. 33 U.S.C. § 1318(a). The EPA sent Mr. Costello, Mr. Carter, and Carter and Costello Tree Professionals a single Demand for Information letter, pursuant to Section 308(a) of the Clean Water Act, to obtain information regarding Respondents' use of equipment to discharge fill material into wetlands located on a property owned by Cody Bedford ("Bedford Site"). Compl. ¶¶ 6, 9: The Bedford Site, located at 1315-1317 Mill Landing Road, Virginia Beach, Virginia, contains wetlands that meet the definition of "waters of the United States" as defined in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7). Compl. ¶ 5.

Mr. Costello had emptied at least three large truckloads of timber onto the site. Motion Ex. 6 ¶ 4. Section 502 of the Clean Water Act defines a point source as "any

discernible, confined and discrete conveyance, including but not limited to any . . . container[and] rolling stock” that may discharge any pollutant. 33 U.S.C. § 1362(14). Several courts have held that vehicles discharging their loads could be point sources, including manure spreading vehicles, bulldozers, dump trucks, and back hoes. See *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118-19 (2d Cir. 1994) (ruling on manure spreading vehicles and collecting cases on other types of vehicles). Among the categories within the statutory definition for a pollutant are “solid waste,” “garbage,” “biological materials,” and “agricultural waste.” 33 U.S.C. § 1362(6). The discharge of a pollutant occurs from the “addition of any pollutant into navigable waters from any point source,” id. § 1362(12), and navigable waters are “the waters of the United States,” id. § 1362(7).

The EPA sent the Demand for Information on August 5, 2005, to obtain information concerning a suspected violation of the effluent limitations in 33 U.S.C. § 1311. Compl. ¶ 9, Ex. A. Service was completed on September 16, 2005, Compl. Ex. F, but Respondents failed to answer within the 14-day time period, Compl. ¶¶ 15-17. Mr. Costello eventually replied more than seventeen months later in a letter received at the EPA on January 10, 2007. Motion ¶ 11, Ex. 6.

Section 308 of the Clean Water Act, 33 U.S.C. § 1318, does not set a deadline for responses to demands for information. Instead, the timeframe for complying with an information request depends on the discretion of EPA. The determination of whether a respondent has complied with a Section 308 request in a timely manner should consider EPA’s interest in carrying out its enforcement authority under the Clean Water Act without unnecessary delays, and it should also consider a respondent’s interest in being

afforded a reasonable amount of time to comply with a request. The words of one district court judge are instructive: “[T]he factual circumstances will dictate what is a reasonable time period in which a response can be expected in a given case.” United States v. Hartz Constr. Co., 2000 U.S. Dist. LEXIS 12405, at *12 (N.D. Ill. Aug. 17, 2000) (discussing the reasonableness of a thirty-day deadline for a request for information made under Section 308 of the Clean Water Act).

Here, the EPA’s fourteen-day deadline does not seem unreasonable. The EPA sought information concerning issues entirely within the Respondents’ knowledge and pertaining to the Respondents’ own dealings. Nothing about the questions suggests that the Respondents would have to conduct lengthy inquiries to obtain the information necessary to answer them, and no other facts appear in the record to justify a seventeen-month delay in replying to the demand. Moreover, Respondents neither requested an extension of the fourteen-day deadline nor attempted to excuse its significant delay by citing the difficulty of obtaining the requested information.

On May 1, 2006, the EPA filed a Complaint alleging violation of Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a), due to Respondents’ failure to submit information to the EPA. Compl. at 1-2. The EPA proposed a civil penalty of \$10,000. Id. ¶ 2.

The Complaint states that “[f]ailure to file an Answer may result in entry of a default judgment against Respondents. Upon issuance of a default judgment, the civil penalty proposed herein shall become due and payable.” Compl. ¶ 32. The Complaint further states that “[f]ailure to admit, deny, or explain any of the factual allegations in the Complaint constitutes admission of the undenied allegations.” Id. ¶ 33.

B. Identity of the Complaint's Respondents

On its face, the Complaint initially appears to name only a business entity. The Complaint states that it is "against Carter and Costello Tree Professionals ('Respondents' or 'Carter and Costello')." Compl. ¶ 2. However, the Complaint consistently portrays multiple respondents through the use of the plural (see, for example, "Respondents are 'persons,'" id. ¶ 4, and "Respondents are owners and/or operators of a point source," id. ¶ 8) and the plural possessive (see, for example, the "Respondents' answering machine," id. ¶ 17, and the "Respondents' continued failure," id. ¶ 18). Further, the Complaint individually identifies Michael Costello as a Respondent. Id. ¶¶ 13, 14.

It appears that the Complaint names two entities, Michael Costello individually and Carter and Costello Tree Professionals. The only reference to Ronald Carter is in the Complaint's caption, and the only references to "Carter" occur within the name of the entity "Carter and Costello." In each plural instance in the Complaint, the reader can fairly interpret the multiple parties to be Michael Costello as an individual and the Carter and Costello Tree Professionals as an entity. Reading the Complaint's language to include Ronald Carter as a respondent, despite the use of his name in the caption, is not a fair interpretation because the Complaint clearly does not name him, describe him, or provide any connection between him and the other two respondents, Michael Costello and Carter and Costello Tree Professionals.

The lack of clarity in the Complaint is in contrast to what appears in the EPA's August 5, 2005, Information Request, which refers multiple times to "Messrs. Michael Costello and Ronald Carter and/or Carter & Costello Tree Professionals." Compl. Ex. A.

Instead, the Complaint ignores Ronald Carter entirely and focuses only on Michael Costello and the entity Carter and Costello Tree Professionals.

On May 1, 2006, the EPA filed its Complaint and sent it by certified mail, return receipt requested, to "Michael Costello and Ronald Carter, d/b/a Carter and Costello Tree Professionals" at a single address, Motion ¶ 1, but it appears that service was ineffectual. On July 20, 2006, the EPA sent the Complaint using FedEx, but FedEx failed to procure a signature for the package. Id. ¶ 4. On August 22, 2006, U.S. Army Corps of Engineers Enforcement Officers attempted to hand-deliver the Complaint, but they were also unsuccessful. Id. ¶ 7. However, on December 6, 2006, Ryan Driskell, Driskell Services, Inc., personally served the Complaint to Michael Costello. Id. ¶ 8. The record contains no indication that Ronald Carter was served the Complaint.

Michael Costello and Carter and Costello Tree Professionals failed to file an Answer to the Complaint within the thirty-day period following completion of service, and the EPA mailed a single letter to "Mr. Michael Costello, Mr. Ronald Carter, d/b/a/ Carter and Costello Tree Professionals" on January 10, 2007,¹ which included an Affidavit of Service, and notifying them that the Answer to the Complaint was then due. Motion ¶ 10, Ex. 5. On that same day, the EPA received answers to the questions it had asked in the EPA's Section 308 Demand for Information from Mr. Costello. Motion ¶ 11, Ex. 6. In this letter, Mr. Costello acknowledged that in the winter of 2004 and in connection to the incident that gave rise to the Demand for Information, he had what he called "my residential tree service Carter & Costello." Motion Ex. 6 ¶ 3. Mr. Costello

¹ It appears that the date on the actual letter contained in the record incorrectly provides the date "January 10, 2006," instead of the correct date of "January 10, 2007." The letter's reference to the EPA's service on Michael Costello on December 6, 2006, provides assurance that the letter's true date is not January 10, 2006.

also acknowledged that he dumped at least three loads of timber from two different vehicles at the Bedford Site. Id. ¶ 4. The EPA replied by letter confirming receipt of Mr. Costello's answers to the Section 308 Demand for Information letter, and the EPA further clarified that an Answer to the Complaint was immediately due to avoid the possibility of an entry of a Default Order imposing the proposed penalties without further proceedings. Motion ¶ 12. To date, neither he nor any other party has filed an Answer to the Complaint.

As noted above, the EPA filed Complainant's Motion for Default Order Against Respondents on January 7, 2008. The Motion seeks a Default Order against "Michael Costello and Ronald Carter d/b/a/ Carter and Costello Tree Professionals." Motion at 1. Unlike the Complaint, the Motion contains numerous textual references to Ronald Carter as one of the "Respondents." It also contains relevant averments not included in the Complaint, such as the allegation that Michael Costello and Ronald Carter are co-owners of Carter and Costello Tree Professionals, id. ¶¶ 8, 10, and that both were "actively engaged in business as Carter and Costello Tree Professionals," id. ¶ 24.

The Presiding Officer issued an Order to Supplement on August 6, 2009, to clarify those parties from whom the EPA seeks a penalty. The EPA filed Complainant's Supplement to Its Motion for Default Order Against Respondents ("Supplement") on August 31, 2009. The EPA claims in this Supplement that both its Complaint and Motion were against Michael Costello and Ronald Carter as individuals and also against the entity known as Carter and Costello Tree Professionals. Supplement at 3. The Supplement also includes a reference to information provided by an eye witness and neighbor to support its allegation that Ronald Carter used the trade name of Carter and

Costello Tree Professionals with Michael Costello. Id. at 2. This information tying Ronald Carter to Carter and Costello Tree Professionals, however, is not averred in the EPA's Complaint. The Consolidated Rules of Practice provide that a respondent's default constitutes "an admission of all facts alleged in the complaint," 40 C.F.R. § 22.17(a) (emphasis added), not those facts ignored in the complaint but later averred in a motion for default order.

Further, the Consolidated Rules of Practice require service to be made on each party. The Consolidated Rules of Practice identify that service to individuals must be made "on respondent, or a representative authorized to receive service on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i). The EPA never made service personally on Ronald Carter, and the EPA's Complaint makes no averments that Michael Costello is authorized to receive service on Ronald Carter's behalf. The EPA's identification in the caption of "Mr. Michael Costello, Mr. Ronald Carter, d/b/a Carter and Costello Tree Professionals" does not change this result. A similar result is manifest in another EPA decision, In the Matter of Nancy Allen and Russell Zook d/b/a Haskins Recycling. No. CAA-7-2000-0003, 2002 WL 317665 (E.P.A. 2001). There, the EPA had filed a complaint against "Nancy Allen and Russell Zook d/b/a Haskins Recycling" for failure to respond to a request for information about compliance with the Clean Air Act. Id. The EPA was able to serve Zook, but it did not succeed in serving Allen. Id. The EPA's Regional Judicial Officer found that service on Zook could not also encompass Allen as an individual absent specific averment that he was authorized to receive service on her behalf. This same conclusion is appropriate here. Service on Michael Costello as an individual does not constitute service on Ronald Carter.

However, the Consolidated Rules of Practice also state that if "respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii). Carter and Costello Tree Professionals may fall within the category of an unincorporated association, so in theory, service on Michael Costello as an officer, partner, agent, or person authorized to receive service could extend to Ronald Carter if Ronald Carter were shown to be connected to the unincorporated association as an owner, partner, or other principle. Here, the EPA does connect Michael Costello to Carter and Costello Tree Professionals through Mr. Costello's admission that he has a business by that name, but nowhere in its Complaint does the EPA identify or claim that Ronald Carter is connected to it or to Costello. Because the EPA makes no averments in its Complaint that Ronald Carter is connected with the Carter and Costello Tree Professionals entity, its service on Michael Costello is ineffectual in serving Ronald Carter, either individually or regarding a possible connection he may have with Carter and Costello Tree Professionals.

II. FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of fact:

1. In the winter of 2004, Mr. Costello owned or operated a residential tree service called Carter and Costello Tree Professionals. Compl. ¶ 2; Motion Ex. 6 ¶ 3.
2. Both Michael Carter and Carter and Costello Tree Professionals meet the definition of a "person," as defined in Section 502(5) of the Clean Water Act, 33

U.S.C. § 1362(5), to be “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”

3. On at least three occasions in the late months of 2004 and the early months of 2005, Mr. Costello operated at least two vehicles to dump timber at the Bedford Site. Motion Ex. 6 ¶ 4.
4. The Bedford Site, located at 1315-1317 Mill Landing Road, Virginia Beach, Virginia, contains wetlands that meet the definition of “waters of the United States” as defined in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7). Compl. ¶ 5.
5. Each vehicle Mr. Costello operated at the Bedford Site, as a “discernible, confined and discrete conveyance,” was a point source as defined in Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14).
6. Each load of timber Mr. Costello dumped at the Bedford Site, as solid waste, garbage, biological materials, and/or agricultural waste, was a discharged pollutant as defined in Sections 502(6) and (12) of the Clean Water Act, id. §§ 1362(6), (12).
7. Section 308(a) of the Clean Water Act provides that “[w]henver required to carry out the objective of this chapter . . . the Administrator shall require the owner or operator of any point source to . . . (ii) make such reports . . . and (v) provide such other information as he may reasonably require.” Id. § 1318(a).

8. On August 5, 2005, the EPA sent Mr. Costello, Mr. Carter, and Carter and Costello Tree Professionals, a single Demand for Information letter to a single address requiring a response within 14 days. Compl. ¶ 9, Ex. A.
9. On September 16, 2005, Mr. Costello signed for the Demand for Information letter signifying completed service. Compl. ¶ 14, Ex. F.
10. Mr. Costello, Mr. Carter, and Carter and Costello Tree Professionals failed to respond to the EPA's Demand for Information letter within the allotted 14-day time period. Compl. ¶ 17.
11. Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)(1), authorizes the EPA to assess civil penalties for a violation of Section 308.
12. Section 309(g)(2) of the Clean Water Act, *id.* § 1319(g)(2), provides that the penalty for violation of Section 308 may not exceed \$10,000 per violation or \$25,000 per administrative action. The inflation-adjusted penalty, pursuant to 40 C.F.R. Part 19, is \$11,000 per violation and \$27,500 per administrative action.
13. On May 1, 2006, the EPA filed its Complaint against Michael Costello and Carter and Costello Tree Professionals, alleging violation of Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a), and seeking an administrative penalty of Ten Thousand (\$10,000) Dollars. Compl. ¶ 2.
14. The EPA did not name Ronald Carter as a Respondent in its Complaint.
15. Both Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)(1), and Section 22.38(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.38(b), require the EPA to consult with the state where the violation occurred prior to assessing a civil penalty.

16. On May 1, 2006, the EPA invited the Virginia Department of Environmental Protection to consult with the EPA about the proposed civil penalty. Compl. ¶ 20, letter following Compl. Ex. G.
17. On December 6, 2006, Michael Costello was personally served with the Complaint by Ryan Driskell, Driskell Services, Inc., after initial attempts to serve him by mail were unsuccessful. Motion Ex. 1-2, 4.
18. The EPA filed a Praecipe to Enter Affidavit of Service on January 10, 2007, indicating service of the Complaint on "Michael D. Costello, Co-Owner of Carter and Costello Tree Professionals." Motion Ex. 4.
19. The EPA did not serve the Complaint on Ronald Carter.
20. The EPA has not shown, and the Complaint contains no averments, that Ronald Carter's involvement with Carter and Costello Tree Professionals is of the nature that service upon Michael Costello would suffice as service upon Ronald Carter.
21. To date, no party has filed an Answer to the Complaint.
22. The EPA avers compliance with the public notice requirements of 33 U.S.C. § 1319(g)(4)(A) and 40 C.F.R. § 22.45, which must occur within 30 days following proof of service for any Section 309(g) civil penalty. Motion ¶ 22.
23. On January 7, 2008, the EPA filed Complainant's Motion for Default Order Against Respondents, and the EPA included with this Motion a certificate of service, noting that the EPA sent via regular mail a single copy of the Motion to "Mr. Michael Costello, Mr. Ronald Carter, d/b/a Carter and Costello Tree Professionals."

24. The EPA's service of its Motion complied with the service requirements in the Consolidated Rules of Practice, 40 C.F.R. §§ 22.5(b)(2), 22.16(a).
25. Respondents were required to file a response to the Motion within fifteen (15) days of service. Id. § 22.16(b).
26. To date, no party has filed a response to the Motion.
27. Respondents' failure to respond to the Motion for Default is a waiver of any objection to the granting of the Motion for Default. Id. § 22.16(b).

III. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Michael Costello in accordance with 40 C.F.R. § 22.5(b)(1)(i).
2. The Complaint in this action was also lawfully and properly served upon Carter and Costello Tree Professionals in accordance with 40 C.F.R. § 22.5(b)(1)(ii).
3. Service upon Mr. Costello and Carter and Costello Tree Professionals did not constitute service upon Ronald Carter.
4. Ronald Carter was never served with the Complaint, and thus, personal jurisdiction over Ronald Carter is not shown.
5. Transmittal of the Complaint and a letter to the Virginia Department of Environmental Protection inviting their consultation on the proposed penalty satisfied the consultation requirement of 40 C.F.R. § 22.38(b).
6. The EPA complied with the public notification requirements of 33 U.S.C. § 1319(g)(4)(A) and 40 C.F.R. § 22.45.

7. Mr. Costello and Carter and Costello Tree Professionals were required to file an Answer to the Complaint within thirty (30) days of service of the Complaint.
40 C.F.R. § 22.15(a).
8. The failure of Mr. Costello and Carter and Costello Tree Professionals to file an Answer or to otherwise respond to the Complaint within thirty (30) days constitutes an admission, for purposes of the pending proceeding only, of all facts alleged in the Complaint and a waiver of Mr. Costello's and Carter and Costello Tree Professionals' rights to contest such factual allegations. Id. § 22.17(a).
9. The failure of Mr. Costello and Carter and Costello Tree Professionals to file an Answer to the Complaint constitutes grounds for issuing the present order finding Respondents Mr. Costello and Carter and Costello Tree Professionals in default.
10. Respondents were required to comply with Section 308 of the Clean Water Act, and by failing to comply, Respondents violated the requirements of Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a), and they are rendered liable for civil penalties pursuant to Section 309 of the Clean Water Act, id. § 1319.

IV. DECISION ON PENALTY AMOUNT

In arriving at a penalty amount, the Presiding Officer is to consider the statutory factors set forth in Section 309(g)(3) of the Clean Water Act. Id. § 1319(g)(3). The statutory factors include "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." Id.

The Presiding Officer shall also consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). Although the EPA has not issued an administrative penalty policy for litigation of Clean Water Act violations, the EPA has issued, and the Presiding Officer here considers, a penalty policy concerning settlements of Clean Water Act violations ("Settlement Policy"). See Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Clean Water Act Section 404 Settlement Penalty Policy (2001); Motion Ex. 10.² This result is in accord with In re: General Motors Corporation CPC--Pontiac Fiero Plant, where in a similar situation the administrative law judge found it appropriate to use the EPA's general penalty policy in combination with the statutory factors. Docket No. CWA-A-O-001-93, 1996 EPA ALJ LEXIS 3 at *13-14 (Oct. 31, 1996).

In accordance with 40 C.F.R. § 22.17(c), which requires that the Presiding Officer order the relief proposed in a motion for default unless the record shows good cause why a default order should not be issued, I have followed Complainant's analysis in determining the penalty.

A. Nature, Circumstances, Extent, and Gravity of the Violation and the Violator's Prior Compliance History and Culpability

Section 309 of the Clean Water Act requires consideration of "the nature, circumstances, extent and gravity of the violation, or violations, . . . any prior history of such violations, [and] the degree of culpability." 33 U.S.C. § 1319(g)(3). The Settlement Policy addresses these using two sets of factors and a multiplier.

² The Settlement Policy applies not only to violations of Section 404 of the Clean Water Act, but also to related violations, including Section 308 and Section 309 violations. Settlement Policy at 4.

The first set of factors measures the violation's environmental significance, and it considers specifically harm to human health or welfare, the extent of aquatic environment impacted, severity of impacts to the aquatic environment, the uniqueness or sensitivity of the affected resource, secondary or off-site impacts, and the duration of the violation.

Settlement Policy at 10-12. The Settlement Policy provides a range from zero to twenty for each of the six specific factors. Id. As discussed above, the EPA was investigating suspected filling of wetlands in violation of the Clean Water Act. The EPA used the Demand for Information to attempt to obtain information in its investigation of Cody Bedford, against whom the EPA filed a complaint in the matter of U.S. v. Cody Bedford and Bedford Tree Service, Inc., Civil Action No. 2:07cv491 (Oct. 30, 2007).

Respondents failed to respond to the EPA's Section 308 Demand for Information. The EPA asserts that the Respondents' lack of compliance thwarted the investigation of suspected wetlands filling at the Bedford Site. The EPA's penalty calculation provides a score of one out of a maximum of twenty for each of the six specific factors. Motion Ex. 11.

The second set of factors measures the violation's significance as it relates to compliance, and it specifically measures the violator's degree of culpability, history of compliance, and the need for specific or general deterrence. Settlement Policy at 13-14. The Settlement Policy provides a range from zero to twenty for each of the three specific factors. Id. The EPA's penalty calculation provides a score of two out of twenty for culpability and one out of twenty for the other two specific factors. Motion Ex. 11. The slight increase in culpability appears justified in the record, as the Respondents continued

to ignore repeated EPA efforts to obtain information. Taken together, the EPA's calculation of gravity is ten out of a possible one hundred eighty.

Under the Settlement Policy, the EPA multiplies the total gravity score by a multiplier. Settlement Policy at 10. The multiplier is \$500 for minor violations with a low overall environmental and compliance significance; \$1,500 for violations with moderate overall environmental and compliance significance; and a range from \$3,000 to \$10,000 for major violations with a high degree of either environmental or compliance significance. Id. Here, the EPA's penalty calculation uses the lowest multiplier, \$500, to arrive at the base penalty of \$5,000. Motion Ex. 11.

Nothing in the record indicates that the environmental and compliance significance scores or the selected multiplier represent an inappropriate measurement of the gravity of Respondents' noncompliance.

B. Ability to Pay

Section 309 of the Clean Water Act requires consideration of the violator's ability to pay. 33 U.S.C. § 1319(g)(3). The Settlement Policy also includes a provision allowing for a reduction of the penalty when the violator provides adequate documentation, but it requires the violator to raise the issue regarding an inability to pay. Settlement Policy at 16. Here, Respondents have not provided the EPA with an Answer to the Complaint in which they could assert their inability to pay. The record also indicates that the EPA conducted at least a cursory search for published commercial information about Respondents that might inform the EPA of Respondents' financial health. Motion Ex. 9. Nothing in the record is contrary to a finding that Respondents are capable of paying the assessed amount.

C. Economic Benefit

Section 309 of the Clean Water Act requires consideration of any economic benefit or savings the violator may have secured as a result of his violation. 33 U.S.C. § 1319(g)(3). Pursuant to the Settlement Policy, the EPA uses its BEN computer model to calculate the economic benefit the violator gained from having delayed or avoided compliance costs. Settlement Policy at 9. Here, the EPA first determined what actions Respondents should have taken to comply, which here would have been the reporting of business information with regard to the Bedford Site that Respondents had in their possession. Because Respondents could have supplied that information, and indeed did eventually supply that information, without incurring expenses, the EPA reports a BEN calculation of zero. Nothing in the record is contrary to a finding that this is an appropriate determination regarding Respondents' economic benefit.

D. Other Matters as Justice May Require

The last category included in Section 309 of the Clean Water Act is "such other matters as justice may require." 33 U.S.C. § 1319(g)(3). The Settlement Policy notes that "[n]ot every relevant circumstance can be anticipated ahead of time," but it does not provide an exhaustive list of possible matters. Settlement Policy at 16. The EPA asserts that it is not aware of any other factors that may have an impact on the penalty calculation in this case, and nothing in the record indicates such other matters exist.

E. Additional Factors in the Settlement Policy

The Settlement Policy includes additional components, such as recalcitrance, a quick settlement reduction, litigation considerations, and reduction for supplemental environmental projects. *Id.* at 15-20. Most of these factors appear related to settlement

proceedings and not litigation. Regardless, the EPA's penalty calculation does not include any amounts or adjustments within these categories. Motion Ex. 11.

ORDER

Pursuant to the Consolidated Rules of Practice, Complainant's Motion for Default Order Against Respondents is hereby GRANTED in part and DENIED in part. The Respondents Michael Costello and Carter and Costello Tree Professionals are hereby found in default, and a civil penalty is assessed against them in the amount of \$5,000. Complainant's Motion for Default Order against Respondent Ronald Carter is hereby denied. Respondents Michael Costello and Carter and Costello Tree Professionals are hereby ORDERED as follows:

1. Respondents Michael Costello and Carter and Costello Tree Professionals are hereby assessed a civil penalty in the amount of Five Thousand Dollars (\$5,000) and ordered to pay the civil penalty as directed in this Order.
2. Respondents Michael Costello and Carter and Costello Tree Professionals shall pay the civil penalty by certified or cashier's check payable to the "United States Treasury" within thirty (30) days after this Default Order has become final. See ¶ 6 below.

- a. All payments made by certified or cashier's check and sent by regular mail shall be addressed and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Contact: Natalie Pearson, 314-418-4087

- b. All payments made by certified or cashier's check and sent by overnight delivery service shall be addressed and mailed to:

U.S. Environmental Protection Agency
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson, 314-418-4087

- c. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 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"
(For Customer Service, dial 212-720-5000)

- d. All payments made through the automated clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

PNC Bank
ABA No. 051036706
Transaction Code 22 - Checking
Environmental Protection Agency
Account 310006
CTX Format
808 17th Street, NW
Washington, DC 20074

Contact: Jesse White 301-887-6548
(For Customer Service, dial 800-762-4224)

- e. All payments made online can be made at:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

- f. Additional payment guidance is available at:

http://www.epa.gov/ocfo/finservices/make_a_payment.htm

- g. At the same time that payment is made, Michael Costello and Carter and Costello Tree Professionals shall mail copies of any corresponding check, or written notification confirming any electronic wire transfer to:

Lydia Guy
Regional Hearing Clerk
U.S. EPA Region III (Mail Code: 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

and

Pamela J. Lazos
Senior Assistant Regional Counsel
U.S. EPA Region III (Mail Code: 3RC20)
1650 Arch Street
Philadelphia, PA 19103-2029

A transmittal letter identifying the name and docket number should accompany both the remittance and/or a copy of the check or a copy of Respondent's electronic wire transfer.

3. In the event of failure by Michael Costello and Carter and Costello Tree Professionals to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.
4. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, the EPA is entitled to assess interest and penalties on debt owed to the United States and to assess a charge to cover the cost of processing and handling a delinquent claim.
5. Michael Costello and Carter and Costello Tree Professionals are ordered to pay the civil penalty of Five Thousand Dollars (\$5,000) pursuant to 40 C.F.R. § 22.17(c), thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c).

6. 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 forty-five (45) days after it is served upon the Complainant and Respondent unless (1) a party appeals this Initial Decision to the EPA Environmental Appeals Board in accordance with 40 C.F.R. § 22.30, (2) a party moves to set aside the Default Order that constitutes this Initial Decision, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

IT IS SO ORDERED.

12/30/09
Date

Renée Sarajian
Renée Sarajian
Regional Judicial Officer/Presiding Officer

CERTIFICATE OF SERVICE

This Initial Decision and Default Order was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

Pamela J. Lazos
Senior Assistant Regional Counsel (3RC20)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

**VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED:**

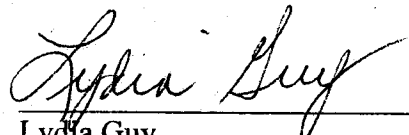
Mr. Michael Costello
Mr. Ronald Carter
d/b/a Carter and Costello Tree Professionals
3724 West Neck Road
Virginia Beach, VA 23456-3821

VIA POUCH MAIL:

Eurika Durr
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

JAN - 4 2010

Date


Lydia Guy
Regional Hearing Clerk
Region III, EPA

CERTIFICATE OF SERVICE

This Initial Decision and Default Order was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

Pamela J. Lazos
Senior Assistant Regional Counsel (3RC20)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED:

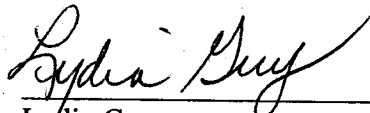
Mr. Michael Costello
Mr. Ronald Carter
d/b/a Carter and Costello Tree Professionals
3724 West Neck Road
Virginia Beach, VA 23456-3821

VIA POUCH MAIL:

Eurika Durr
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-0001

FEB 17 2010

Date



Lydia Guy
Regional Hearing Clerk
Region III, EPA