

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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HEARING CLERK

IN THE MATTER OF:)
)
Atkinson Developers, LLC)
Francis M. Atkinson Jr.)
Aynor, South Carolina)
)
)
RESPONDENTS)
_____)

Proceeding under Section 309(g)
of the Clean Water Act, 33 U.S.C.
§ 33 U.S.C. § 1319(g)

Docket No.: CWA-04-2010-5515

RESPONSE TO ORDER TO SUPPLEMENT RECORD

COMES NOW the Complainant, Director of the Clean Water Protection Division of the U.S. Environmental Protection Agency (EPA) Region 4, and responds to the Regional Judicial Officer's (RJO) Order to Supplement the Record, dated October 29, 2014. The RJO has ordered the Complainant pursuant to Section 22.16, of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.16, to present an affidavit or declaration, by December 1, 2014, of the person calculating the proposed penalty requested in Complainant's Motion for Default, filed on May 2, 2014. Complainant respectfully requests that the RJO grant an extension to January 15, 2015, to provide the requested information. In the alternative, Complainant respectfully requests that the RJO reconsider the specific request to provide an affidavit or declaration.

In support of the request for an extension of time Complainant offers the following. It will be extremely difficult for Complainant to meet the December 1, 2014 deadline. When Complainant filed its Motion for Default, it provided a Penalty Justification Memorandum ("Memo") Exhibit E specifying a proposed penalty of \$157,500, with a showing of how the

penalty was determined based on the statutory factors set out in CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3), and the EPA policy and guidelines. The Memo described how the statutory factors were weighed in the light of the CWA violation that occurred at the Site including: the nature, circumstances, extent and gravity of the violation; prior enforcement history of the Respondents; degree of culpability; economic benefits or savings to Respondents for not complying with the law; the Respondents' ability to pay and any such other matters as justice requires. To comply with the RJO's Order, EPA will have to have someone at EPA sign an affidavit or declaration supporting the calculation of the proposed penalty identified in the Memo. That Memo was prepared by Constance Tallman of the Wetlands Enforcement Section of Region 4, who no longer works for the EPA. Although Ms. Tallman would be available for trial, at this time as a former employee, she cannot attest to the Memo.

In addition, The Water Protection Division just reorganized and the manager, Molly Davis, who was actively involved in this case and is familiar with the penalty justification has moved to a new branch with new responsibilities that does not include wetlands enforcement. Lastly, the senior wetlands enforcement person who does have the knowledge of the site and the penalty factors, who after review of the Memo and case file could sign a declaration as to how the penalty calculation was prepared, is unavailable until early January 2015.

Complainant recognizes that Section 22.7(b) of the Consolidated Rules, 40 C.F.R. § 22.7(b), requires that "any motion for an extension of time shall be filed sufficiently in advance of the due date to allow other parties reasonable opportunity to respond and allow the Presiding Officer reasonable opportunity to issue an order." However, in this case, Complainant's counsel was on travel for the government the first week in November and was out of the office for the holiday the following week and did not receive the Order until November 15, 2014. Complainant

immediately began seeking help from the Wetlands Enforcement Office. As stated above, the program was in a state of influx and it was difficult to find the enforcement staff currently responsible for this case. Finally, a wetlands expert with the knowledge and experience agreed to provide a declaration as to the penalty calculation in this case. Unfortunately he was working in the field, and then taking leave, not returning to the office until early January 2015. Complainant does not believe that an extension in this case will in any way prejudice the Respondent. And based on the facts this motion for an extension of time does not violate the spirit of Section 22.7(b) of the Consolidated Rules, 40 C.F.R. § 22.7(b).

In support of its request for reconsideration, Complainant believes that it has met the requirements set out in Sections 22.16 and 22.17 of the Consolidated Rules, 40 C.F.R. §§ 22.16 and 22.17, regarding a motion for default. The Standard in Section 22.17(b) of the Consolidated Rules, 40 CFR §22.17(b), requires the movant to “specify the penalty or other relief sought....” The relevant regulation related to filing motions, Section 22.16(a)(4) of the Consolidated Rules, 40 CFR § 22.16(a)(4), requires the motion to “[b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.” The Default Motion was accompanied by the Memo, Exhibit E, as evidence to support its claim for the penalty sought. Complainant has reviewed the case cited by the RJO, Katzson Bros., Inc. v. U.S. Environmental Protection Agency, 839 F. 2d 1396, and believes it can be clearly distinguished from the case at hand. The Plaintiff in that case had arguably not been properly served and the Plaintiff put forth other arguments as to why the penalty sought by the EPA was not fair. Here Complainant has provided evidence that the Complaint as well as numerous other correspondence and orders sent to the Respondents by the Complainant were properly served on, signed for, and apparently ignored by the Respondents.

Additionally, in Katzson, the Court was reviewing a default order issued by a Regional Administrator in a FIFRA case, which was seven lines long, and merely stated there that there was not “good cause” to vacate the default order, and a subsequent order issued by the Administrator of the EPA who had ruled that the civil penalty amount had been properly calculated by EPA. Mr. Katzson’s motion for reconsideration was denied. In its opinion, the Court in Katzson stated that;

The Regional Administrator did not mention the penalty amount at all in his denial of Katzson Brothers’ motion to vacate and the Chief Administrator simply agreed with the Regional Administrator’s conclusory finding in the default order that the penalty comported with EPA guidelines. This complete absence of inquiry into the factual basis for the penalty is troubling. Id. at 1400

Complainant in this case provided the RJO with a seven page penalty memo, Exhibit E, discussing the facts of the case and how those facts apply to each of the relevant statutory penalty factors. Complainant believes this Memo meets the requirements of Section 22.16 of the Consolidated Rules, 40 CFR § 22.16, as evidence supporting the Motion for Default and applicable case law regarding civil penalties. The civil penalty amount should be determined by applying a “thoughtful and well-reasoned balancing of each of the civil penalty factors”. Tull v. United States, 481 U.S. 412, 427. The RJO states in her Order that Complainant has in Exhibit E to its motion addressed the factual and legal request for a civil penalty in the amount of \$157,500.

Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), provides, “[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 relief requested by

Complainant is consistent with the record of this proceeding and the underlying federal laws and regulations.

Therefore, Complainant respectfully requests that the RJO reconsider her Order to Supplement the Record with an affidavit or declaration, and pursuant to of the Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), find that default has occurred, issue a default order against the defaulting party as to all parts of the proceeding and issue an Order for Default and \$157,500 civil penalty against Respondents.

In conclusion, Complainant respectfully requests the RJO grant until January 15, 2015 in order to allow for appropriate time to prepare an affidavit or declaration. In the alternative, Complainant respectfully requests the RJO reconsider her Order to Supplement the Record with an affidavit or declaration, and pursuant to Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), find that default has occurred, issue a default order against the defaulting party as to all parts of the proceeding and issue an Order for Default and \$157,500 civil penalty against Respondents.

Respectfully submitted,



Wilda Watson Cobb
Associate Regional Counsel
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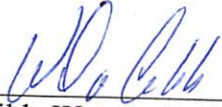
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and a copy of the forgoing Response to Order to Supplement the Record with accompanying Exhibits were hand delivered to the Region 4 Regional Hearing Clerk, and that a true and accurate copy was served via U.S. Mail, Return Receipt Requested on the Respondent as follows:

Original by Hand-Delivery: Ms. Patricia Bullock
Regional Hearing Clerk
U.S. EPA Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Copy by U.S. Mail: Mr. Francis M. Atkinson, Jr.
Atkinson Developers, LLC
4368 Green Sea Road South
Aynor, South Carolina 29511

Date: 11/25/2014



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