

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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

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MOTION FOR DEFAULT

COMES NOW the Complainant, Director of the Clean Water Protection Division of the U.S. Environmental Protection Agency (EPA) Region 4, and moves for a finding of default and issuance of a default order against Respondents pursuant to 40 C.F.R. § 22.17(a) - (c). Through this Motion, Complainant seeks resolution of this proceeding and requests that Respondents be assessed a civil penalty.

According to 40 C.F.R. § 22.17(a), "[a] party may be found to be in default... after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.15 requires that an answer be filed with the Regional Hearing Clerk (RHC) within thirty (30) days after service of the complaint. Respondents have not timely filed an answer to an Administrative Complaint (Complaint) filed by the EPA on June 4, 2010, and served on Respondents on June 7, 2010. Nor have Respondents filed an answer to the Complaint that EPA re-filed on June 22, 2010, and served on Respondent on June 25, 2010.

In support of this Motion are the following exhibits: Exhibit A, a copy of the Complaint and 40 C.F.R. Part 22, which was attached to the Complaint; Exhibit B, a copy of the cover letter for the Complaint and a copy of the Certified Mail Receipt; Exhibit C, a copy of the re-filed

Complaint; Exhibit D, a copy of the cover letter for the re-filed Complaint and a copy of the Certified Mail Receipt; Exhibit E, Penalty Justification Memorandum; Exhibit F, a copy of the Public Notice of Proposed Issuance of an Administrative Complaint, which was published within 30 days following service of the Complaint as required by 40 C.F.R. § 22.45(b); and 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. There are additional documents discussed below that are also included as exhibits in support of this Motion.

Pursuant to 40 C.F.R. § 22.17(b) Complainant is required to specify the factual and legal grounds for the assessment of a penalty and other relief against a defaulting party. The factual and legal grounds for relief, and the relief requested, are as follows:

I. LEGAL BACKGROUND

Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319 (g)(1)(A) provides that, “[w]henever, on the basis of any information available - the Administrator finds that any person has violated [Section 301 of the CWA, 33 U.S.C. § 1311], . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)].”

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states “[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful.” Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (COE), to issue permits for the discharge of dredged or fill material into navigable waters. To establish a *prima facie* case that Respondent violated § 301(a) of the CWA, 33 U.S.C. § 1311(a), Complainant must show that:

(1) Respondent is a “person” within the meaning of § 502(5) of the CWA, 33 U.S.C. § 1362(5);

(2) Respondent “discharged a pollutant” within the meaning of Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12);

(3) Respondent's discharge of a pollutant was from a “point source” within the meaning of § 502(14) of the CWA, 33 U.S.C. § 1362(14);

(4) Respondent's discharge of a pollutant was to “navigable waters” within the meaning of § 502(7) of the CWA, 33 U.S.C. § 1362(7); and

(5) Respondent did not have a permit issued pursuant to § 404(a) of the CWA, 33 U.S.C. § 1344(a).

II. BACKGROUND AND FACTUAL ALLEGATION

Respondent Atkinson Developers, LLC, is a company duly organized under the laws of South Carolina and 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 into navigable waters in violation of the CWA.

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

Commencing in late June 2005, Respondents, or those acting on behalf of Respondents, discharged dredged and/or fill material into 19 acres of jurisdictional wetlands on the Site using earth moving equipment, during unauthorized activities associated with clearing and filling of jurisdictional wetlands for the establishment of a horse farm.

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.

The COE sent a Notice of Violation (NOV) to Respondents ordering them to cease filling the wetlands and to submit a plan to restore the wetlands. Respondents failed to respond to the COE's NOV and continued the unauthorized activities.

On January 3, 2008, the COE referred this action to the EPA for enforcement. The COE referred the case because the Respondents had failed to respond to the COE's NOV, the area was threatened by over development, and because the wetlands impacted by the Respondents' unauthorized activities were highly functional wetlands.

On October 21, 2008, the EPA sent a Compliance Order and 308 Information Request to Respondents via Certified Mail. (Exhibit H) The Respondents did not accept service.

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

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

On March 12, 2010, the EPA sent a second Compliance Order and 308 Information Request to the Respondents via Certified Mail. (Exhibit J)

The EPA received the signed green card back proving service of the Order and Information Request on Respondents. (Exhibit K) Respondents did not comply with the Order nor reply to the Information Request.

On May 4, 2010, the EPA sent a letter to Respondents via Certified Mail requesting that the EPA be contacted concerning the restoration of the highly valuable wetlands. (Exhibit L)

The EPA received the signed green card back proving service of the letter on Respondents. (Exhibit M) Respondents did not reply to the letter.

On June 4, 2010, the EPA served a Complaint on Respondents via Certified Mail; the EPA received the signed green card back proving service of the Complaint on Respondents. (*See, Exhibits A & B*)

Respondents have failed to file an answer to the EPA's Complaint.

On June 22, 2010, the EPA re-filed the Complaint. (*See, Exhibit C*) The EPA counsel 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 EPA served the re-filed Complaint on Respondents via Certified Mail; the EPA received the signed green card proving service of the re-filed Complaint on Respondents. (*See, Exhibit D*)

Respondents have failed to file an answer to the EPA's re-filed Complaint.

III. LEGAL BASIS FOR RELIEF

1. Respondents are Persons

As set out in Paragraph 11 of the EPA's Complaint, Respondents are persons within the definition of a "person" set forth at § 502(5) of the CWA, 33 U.S.C. § 1362(5). Francis M. Atkinson, Jr., meets the definition of a "person" within the meaning of § 502(5) of the CWA, 33 U.S.C. § 1362(5). The definition of person includes an "individual" and Francis M. Atkinson, Jr., is an individual and is a person as defined by the CWA. Atkinson Developers, LLC, meets the definition of a "person" within the meaning of § 502(5) of the CWA, 33 U.S.C. § 1362(5). The definition of person includes a "corporation" and Atkinson Developers LLC, is a corporation and is a person as defined by the CWA.

2. Respondents Discharged Pollutants

As set out in Paragraph 17 of the EPA's Complaint, Respondents' placement of the dredged and/or fill material at the Site constitutes a "discharge of pollutants" within the meaning of Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12). Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a "discharge of pollutants" as "[a]ny addition of any pollutant to navigable waters from any point source" and "pollutant" at Section 502(6) of the CWA, 33 U.S.C. § 1362(6) includes, among other materials, "dredged spoil, biological materials, rock, sand, [and] cellar dirt." Therefore the Respondents' placement of the dredged and/or fill in the wetland constitutes a "discharge of a pollutants" within the meaning of Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12);

3. Respondents' Discharge of Pollutants Was From a Point Source

As set out in Paragraph 16 of the EPA's Complaint, the earth moving machinery employed by Respondents to deposit the dredged and/or fill material at the Site is a "point source" as defined under the CWA. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" as "[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged". There is ample case law that establishes that equipment and machinery such as bulldozers and earth moving equipment qualify as "point sources." *See, e.g., U.S. v. Tull*, 615 F.Supp. 610 (E.D.Va. 1983) *aff'd*, 769 F.2d 183 (4th Cir.); *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (*Avoyelles III*); *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985) (use of bulldozer to move and spread dirt is discharge of a pollutant from a point source); *United States v. Brace*, 41 F.3d 117, 127-28 (3rd Cir. 1994) (clearing, leveling, and redistributing surface materials with tractor to fill wetland

areas is discharge of a pollutant from a point source). Therefore, the earth moving machinery employed by Respondents to deposit the dredged and/or fill material at the Site is a discharge of pollutants from a “point source” within the meaning of § 502(14) of the CWA, 33 U.S.C. § 1362(14).

4. Respondents’ Discharge of Pollutants Was to Navigable Waters

As set out in Paragraph 15 of the EPA’s Complaint, Respondents’ unauthorized activities in the wetlands on Site was a discharge to “waters of the United States” within the meaning of § 502(7) of the CWA, 33 U.S.C. § 1362(7). Respondents’ unauthorized activities impacted approximately 19 acres of forested wetlands which are part of Loosing Swamp, which connects to Lake Swamp, which feeds into the Little Pee Dee River, a navigable water of the United States.

Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.” Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” The COE and the EPA determined that 19 acres of jurisdictional wetlands were impacted by Respondents’ unauthorized activities.

Any issue regarding CWA jurisdictional waters must consider the applicability of the June 2006, Supreme Court decision in the consolidated Sixth Circuit wetland cases of Rapanos v. United States and Carabell v. United States Army Corps of Engineers, 547 U.S. 715 (2006). In

the consolidated cases, hereafter referred to as Rapanos, the Supreme Court issued a split 4-1-4 decision interpreting the phrase “waters of the United States.”

Following the decision in Rapanos the COE and the EPA issued the “Joint Memorandum Concerning Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States.” (Joint Memorandum). This Joint Memorandum identifies those waters over which the agencies will assert jurisdiction; (1) categorically, and (2) on a case-by-case basis, based on the reasoning of the Rapanos opinions.

Both the Joint Memorandum and Rapanos provide that jurisdiction exists over traditional navigable waters (TNWs) and all wetlands adjacent to relatively permanent waterways that flow directly into TNWs. Respondents impacted wetlands in a tidal marsh that is part of Loosing Swamp. Loosing Swamp is adjacent to Lake Swamp. Lake Swamp is a permanent water that flows directly to the Little Pee Dee River, which is a TNW. Therefore the Respondents’ discharge of a pollutant was to “navigable waters” within the meaning of § 502(7) of the CWA, 33 U.S.C. § 1362(7). There is clear jurisdiction in this case, under both the Rapanos decision and the Joint Memorandum.

5. Respondents Did Not Have a Permit for the Discharge

As set out in Paragraph 18 of the EPA’s Complaint, at no time during the discharge of dredged and/or fill material at the Site from approximately June 2005 to the present, did Respondents possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344.

Sections 404(a) and (d) of the CWA, 33 U.S.C. §§ 1344(a) and (d), authorize the Secretary of the Army, acting through the Chief of Engineers, to issue permits for discharges of dredge or fill material into the navigable waters at specified disposal sites.

As explained above, Respondents were subject to the jurisdiction of the COE because the Site property contained waters of the United States. As such, Respondents' activities required a permit and no permit was sought.

Therefore, each discharge by Respondents of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

IV. PENALTY

For each violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, under § 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a civil penalty of up to \$11,000 per violation per day. Consistent with the Civil Monetary Penalty Inflation Adjustment Rule, the upper limit of such penalties is \$157,500 for violations occurring after March 15, 2004. 69 Fed. Reg. 7121 (Feb. 13, 2004).

Pursuant to 40 C.F.R. § 22.17(b), Complainant has provided a Penalty Justification Memorandum 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. (*See* Exhibit E).

Based upon the facts alleged above and as described in the Penalty Justification Memorandum, Complainant proposes a penalty of \$157,500.

V. RELIEF REQUESTED

Pursuant to 40 C.F.R. § 22.17(c), "[w]hen the Presiding Officer finds that default has occurred, s/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." 40 C.F.R. § 22.17(c) also states, "[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 requests issuance of a Default Order and \$157,500 civil penalty against Respondents.

Respectfully submitted,



Wilda Watson Cobb
Associate Regional Counsel
U. S. Environmental Protection Agency, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and a copy of the forgoing Motion for Default 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: 5/2/14



Wilda Watson Cobb
Associate Regional Counsel
U. S. Environmental Protection Agency, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

EXHIBIT LIST

- Exhibit A June 4, 2010 Complaint
- Exhibit B Cover letter and Certified Mail Receipt Proving Service of June 4, 2012 Complaint
- Exhibit C June 22, 1010 Complaint
- Exhibit D Cover letter and Certified Mail Receipt Proving Service of June 22, 2010 Complaint
- Exhibit E Penalty Justification Memorandum
- Exhibit F Public Notice of Proposed Issuance of an Administrative Complaint
- Exhibit G Affidavit of Patricia A. Bullock
- Exhibit H October 21, 2008, Compliance Order and Information Request
- Exhibit I Email Showing Service by Sheriff of Compliance Order
- Exhibit J March 12, 2010, Compliance Order and Information Request
- Exhibit K Copy Cover Letter and Certified Mail Receipt Proving Service of Order
- Exhibit L May 4, 2010, the EPA's Letter to Respondents
- Exhibit M Copy of Letter with Certified Mail Receipt Proving Service of Letter