

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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IN THE MATTER OF:)
)
Atkinson Developers, LLC) ADMINISTRATIVE COMPLAINT
Francis M. Atkinson, Jr.) FOR CLASS II PENALTY
Aynor, South Carolina) UNDER SECTION 309(g)
) OF THE CLEAN WATER ACT,
) 33 U.S.C. § 1319(g)
RESPONDENTS) Docket No.: CWA-04-2010-5515

ADMINISTRATIVE COMPLAINT

I. Statutory Authority

1. This is an Administrative Complaint (“Complaint”) issued under the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and 40 C.F.R. Part 22, the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits.” The Administrator has delegated this authority to the Regional Administrator of EPA, Region 4, who has duly delegated this authority to the Director of the Water Protection Division, Region 4, who hereby issues this Complaint and Notice.

2. This Order is issued to Atkinson Developers, LLC (Atkinson Developers) and Francis M. Atkinson (Atkinson), hereinafter collectively referred to as Respondents.

II. Statutory and Regulatory Background

3. Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A), states “[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)].”

4. 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.

5. 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”

6. 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.”

7. 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.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. Part 232.2 and 33 C.F.R. Part 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.”

III. Allegations

10. Respondent Atkinson Developers, LLC, is a company duly organized under the laws of the State of South Carolina, and at all times relevant to this Complaint, was the owner and operator of the parcels of land located on Huckleberry Road, near the city of Aynor in Horry County, South Carolina (the Site) that contained the Discharge Area. Respondent Francis M. Atkinson, Jr., at all times relevant to this Complaint, was the Chief Executive Officer and President of Atkinson Developers, LLC.

11. Respondents are persons within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

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

13. Respondents’ unauthorized activities impacted approximately 19 acres of forested wetlands lying adjacent to Loosing Swamp, which connects to Lake Swamp, which feeds into the Little Pee Dee River, a navigable water of the United States.

14. The discharged dredged and/or fill material, including earthen material deposited at the Site, are “pollutants” as defined under the CWA § 502(6).

15. Prior to Respondents’ activity described above, the Discharge Area was a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. Section 1362 (7) and associated regulations.

16. The earth moving machinery employed by Respondents to deposit the dredged and/or fill material at the Site are "point sources" as defined under the CWA § 502(14).

17. Respondents' placement of the dredged and/or fill material at the Site constitutes a "discharge of pollutants" as defined under the CWA § 502(12).

18. 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, authorizing the activities performed by Respondents. 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).

19. Each day the material discharged by Respondents remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

IV. Notice

20. As required under the CWA § 309(g), EPA has consulted with the South Carolina Department of Health and Environmental Control regarding this proposed action by mailing a copy of this document to the appropriate official of the State of South Carolina and offering an opportunity for the State to consult with EPA on the proposed penalty assessment. EPA, within 30 days following proof of service of the complaint on Respondents, shall publish a public notice regarding this proposed action on the EPA website at the following internet address:
<http://www.epa.gov/region4/water/wpeb>.

V. Penalty

21. Based on the above Findings of Violation and under Section 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, not to exceed a maximum of \$137,500, for violations of Section 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344. Consistent with the 2004 Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004), based on the above Findings of Violation and under Section 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, not to exceed a maximum of \$157,500, for violations of Section 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344 that occurred after March 15, 2004, through January 12, 2009. Based upon the facts alleged in this Complaint, and based upon the nature, circumstances, extent, and gravity of the violations alleged, as well as Respondents' ability to pay, prior history of such violations, and such other matters as justice may require, EPA Region 4 hereby proposes to issue a Final Order Assessing Administrative Penalties to Respondents for violations alleged in this

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta Federal Center
Atlanta, Georgia 30303-3104

23. 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.

24. Failure to deny any of the factual allegations in this Complaint constitutes admission of the undenied allegations. A copy of Respondents' Answer and any subsequent documents that Respondents file with the Regional Hearing Clerk in this action should be sent to:

Ms. Wilda Cobb
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta Federal Center
Atlanta, Georgia 30303-3104

Ms. Cobb represents EPA in this matter and is authorized to receive service for EPA in this proceeding. She may be telephoned at (404) 562-9530.

25. Any hearing that Respondents request regarding this Complaint will be held and conducted in accordance with the provisions of 40 C.F.R. Part 22. 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. Respondents' failure to fully pay the proposed penalty, as assessed by the Final Order, by its due date will result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty under section 309(g)(9)(B) of the CWA, 33 U.S.C. § 1319(g)(9)(B).

26. Should Respondents request a hearing on the proposed penalty amount, members of the public who have exercised their right to comment, and to whom EPA is obligated to give notice of this proposed action, will have a right under section 309(g)(4)(B), 33 U.S.C. § 1319(g)(4)(B), to present evidence on the appropriateness of the penalty assessment. If Respondents do not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who commented on this proposal during the 30-day period following Respondents' receipt of this document will have an additional 30 days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. EPA will grant the petition and hold the hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

VII. Settlement Conference

27. Whether or not Respondents request a hearing, an informal conference may be requested in order to discuss the facts of this case and to arrive at a settlement. To request a settlement conference, please contact:

Ms. Mara Lindsley
Wetlands Enforcement Section, 15th Floor
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta Federal Center
Atlanta, Georgia 30303-3104

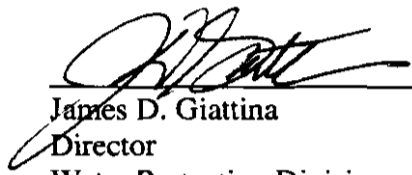
She may be telephoned at (404) 562-9296.

28. Respondents' request for an informal settlement conference does not extend the 30-day period during which a written Answer and Request for Hearing must be submitted. However, Respondents may pursue the informal conference procedure simultaneously with the

adjudicatory hearing procedure. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. EPA, however, will not reduce the penalty simply because such a conference is held. Any settlement that may be reached as a result of such conference will be embodied in a Final Order. Respondents' consent to a Final Order will constitute a waiver of the right to request a hearing on any matter stipulated to therein.

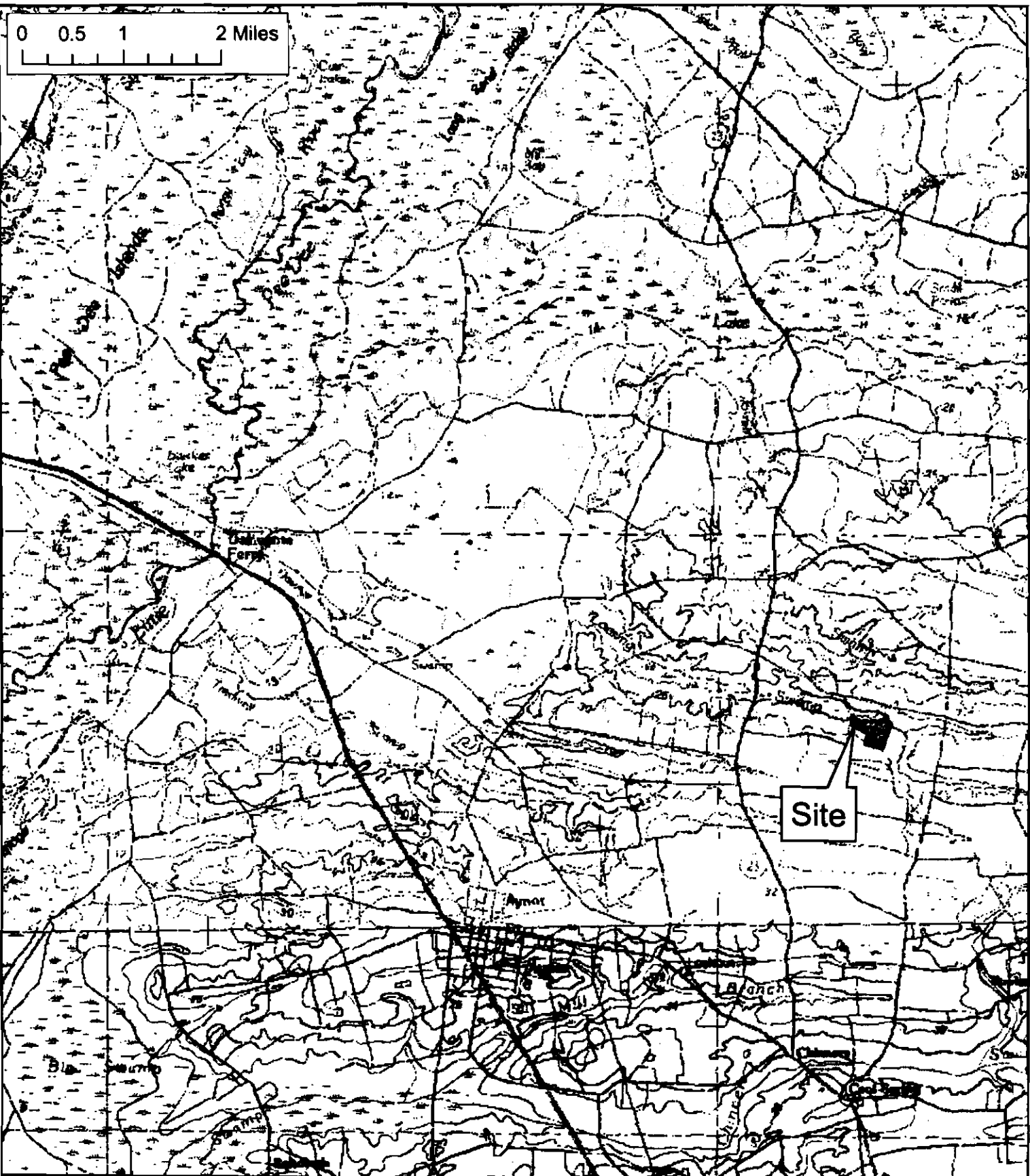
29. Neither assessment nor payment of an administrative civil penalty under this section of the CWA will affect Respondents' continuing obligation to comply with the CWA, or any other Federal, State or local law or regulation.

30. Any settlement reached as a result of the informal conference will be finalized by the issuance of a written Consent Agreement and Final Order approved by U.S. E.P.A. Region 4.



James D. Giattina
Director
Water Protection Division

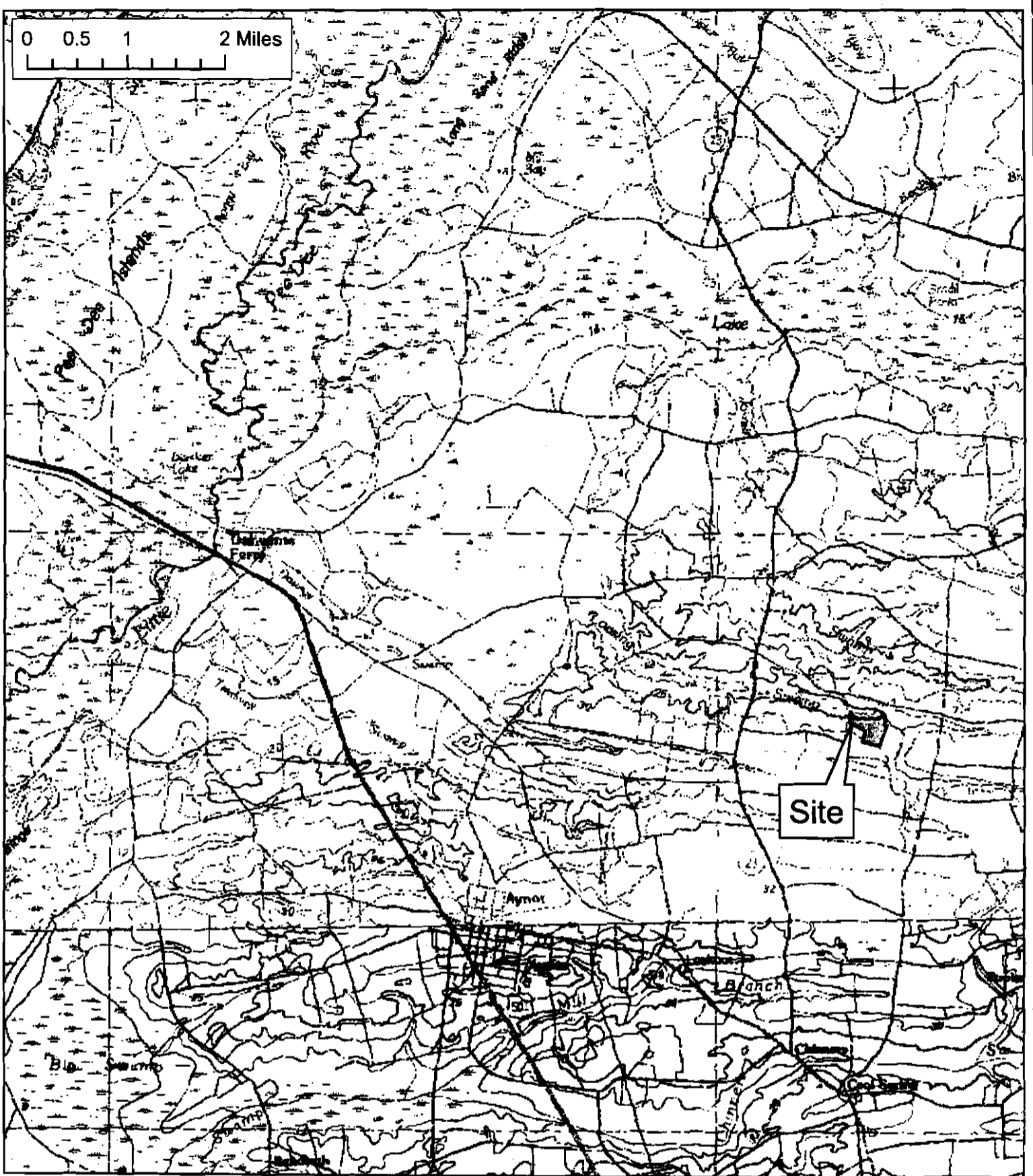
Date: 6/11/10



F.M. Atkinson, Jr.

Exhibit A





F.M. Atkinson, Jr.

Exhibit A





Site
Discharge Area

0 125 250 500 Feet



F.M. Atkinson, Jr.

Exhibit B





F.M. Atkinson, Jr.

Exhibit B



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and a copy of the foregoing, Complaint in the Matter of Atkinson Developers, LLC Docket No. CWA-04-2010- 5515 were hand delivered to the Regional Hearing Clerk, and that a true and accurate copy was served on the parties listed below:

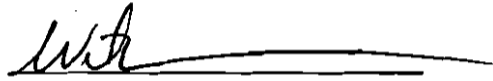
EPA Interna; Mail:

Mara Lindsley
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, GA 30303

By Certified mail
Return receipt requested:

Francis M. Atkinson Jr.
4368 Green Sea Road South
Aynor, South Carolina

DATE: 6/22/10


Wilda W. Cobb
Attorney
U.S. EPA Region 4