

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

MUNICIPALITY OF LOÍZA

P. O. Box 508
Loíza, Puerto Rico 00772-0508

RESPONDENT

Proceeding pursuant to Section 309(g)(2)(B) of
the Clean Water Act, 33 U.S.C. § 1319(g)

**PROCEEDING TO ASSESS A
CLASS II CIVIL PENALTY**

**DOCKET NUMBER
CWA-02-2009-3457**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2009 NOV 10 11 3: 10
REGIONAL HEARING
CLERK

MOTION FOR ENTRY OF DEFAULT JUDGMENT

Counsel for Complainant, the United States Environmental Protection Agency (EPA or Complainant), respectfully submits the following Motion for Entry of Default Judgment against the Municipality of Loíza (Respondent).

FACTUAL AND STATUTORY BACKGROUND

1. On March 30, 2009, EPA issued a Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing (Complaint), (CWA-02-2009-3457), against Respondent, pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1319(g). (See Exhibit 1). The Complaint proposed the issuance of a Final Order Assessing Administrative Penalties (Final Order) in the amount of \$47,409.00 for Respondent's failure to comply with the provisions of the Act.
2. Respondent violated Sections 308 and 402 of the Act, 33 U.S.C. §§ 1318 and 1342, by failing to submit a Notice of Intent (NOI) form to obtain coverage under the National Pollutant Discharge Elimination System General Permit for

Discharges from Small Municipal Separate Storm Sewer Systems permit (NPDES Small MS4 Permit). An Administrative Compliance Order (ACO) was previously issued, on February 16, 2008, (CWA-02-2008-3119), ordering Respondent to: (a) submit a NOI within ten (10) calendar days from the receipt of the ACO [March 6, 2008]; (b) develop, submit and implement a SWMP within ninety five (95) calendar days from the receipt of the ACO [May 30, 2008]; and (c) submit a compliance cost report within one hundred and twenty (120) calendar days from the receipt of the ACO [June 24, 2008]. (See Exhibit 2). Respondent also failed to comply with the Ordered Provisions of the ACO.

3. Respondent's non compliance with the Act and the NPDES permit requirements comes as a result of its ownership and operation of a Small Municipal Storm Sewer System (Small MS4) that discharges into the Río Grande de Loíza and is located in an urbanized area of Loíza, Puerto Rico.
4. Respondent is a "municipality," as defined in Section 502(4) of the Act, 33 U.S.C. § 1362(5).
5. Respondent is a "person" as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
6. Respondent is the "owner and operator" of the Small MS4 located in the Municipality of Loíza's urbanized area, as defined in 40 C.F.R. § 122.26(b)(16).
7. Respondent's Small MS4 is a "point source" as defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14).
8. Respondent's Small MS4 "discharges pollutants" into the Río Grande de Loíza, as defined in Sections 502(6) and (12) of the Act, 33 U.S.C. § 1362(6) and 1362(12).

9. The Río Grande de Loíza is a water of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7).
10. On December 9, 1999, EPA promulgated the Phase II storm water regulations, pursuant to Section 402(p)(6) of the Act, 33 U.S.C. § 1342(p)(6), at 40 C.F.R. §§ 122.26(a)(9)(ii), 122.26(b)(16), and 122.33, which requires Respondent to apply for and obtain a NPDES permit for the discharges from its Small MS4.
11. Pursuant to 40 CFR §§ 122.26(e)(9) and 122.33 Respondent was required to submit a NPDES permit application on or before March 10, 2003.
12. On November 6, 2006, EPA Region 2 issued and published the NPDES General Permit for Discharges from Small MS4s (Small MS4 Permit). The permit became effective on such date and will expire on November 6, 2011.
13. The permit established application requirements through the NOI form filing process and application deadlines.
14. Respondent was required to submit a NOI form to obtain coverage under the NPDES Small MS4 Permit on or before February 5, 2007.
15. Respondent continues to be in non-compliance with the Act and the ACO.
16. Respondent acknowledged receipt of the ACO by United States Post Office return receipt dated February 25, 2008, and the acknowledgement of receipt of the ACO, by the Municipality Public Works Director, José Miguel Figueroa Rodríguez, dated March 5, 2008. (See Exhibits 3).

17. Respondent has failed to comply with the ACO and answer the Complaint.

GROUND FOR DEFAULT

18. Pursuant to 40 C.F.R. § 22.15(a), Respondent must have filed its answer to the Complaint within 30 days after service of the Complaint. In the instant case, Respondent's answer to the Complaint was due on May 4, 2009. To date, over four months have elapsed and Respondent has not filed its answer to the Complaint.

19. Respondent was duly notified of its right to file an answer within 30 days after service of the Complaint. Complainant provided notice to Respondents through:

- (a) the cover letter attached to the Complaint;
- (b) the Complaint; and
- (c) a copy 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" (CROP), 40 C.F.R. Part 22 (2003).

RELIEF REQUESTED

20. Pursuant to 40 CFR §22.17(a), "[a] party may be found to be in default: after motion, upon failure to file a timely answer to the complaint[.]"

21. In the instant case, Respondent's answer to the Complaint was due on May 4, 2009. Up to and including the date of this Motion, Respondent has not filed its answer to the Complaint, notwithstanding the fact that Respondent has been duly notified of its right to file an answer within 30 days after service of the Complaint.

22. A Default Order resolves all of the instant proceedings because Respondent's failure to file an answer to the Complaint constitutes an admission of all the facts alleged in the Complaint. Pursuant to 40 CFR §22.17(a), "[d]efault by [R]espondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of [R]espondent's right to contest such factual allegations."
23. Pursuant to 40 CFR §22.17(a), Complainant seeks a Default Order against Respondent to resolve the instant proceeding. Complainant also seeks the assessment of the penalty for the full amount of \$47,409.00 proposed in the Complaint.

FACTUAL GROUNDS FOR IMPOSITION OF PENALTY

24. Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g)(2)(B) of Act, 33 U.S.C. § 1319(g)(2)(B), EPA, Region 2, proposed the \$47,409.00 penalty in the Complaint. EPA determined the proposed penalty after taking into account the statutory factors, which include: the nature, circumstances, extent and gravity of the violation (or violations), and Respondent's prior compliance history, degree of culpability, economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty in light of the information available at the time of the issuance of the Complaint. (See Exhibit 4, for a copy of EPA's Penalty Memorandum, dated March 23, 2009).

25. Seriousness of the Violation/Risk to Public Health

EPA had attempted to bring Respondent into compliance with Small MS4 General Permit requirements by way of the ACO as well as numerous

compliance assistance attempts. EPA's main concern is that the stormwater discharges from the Municipality of Loíza's Small MS4 have a high concentration of pollutants. Polluted stormwater runoff is often transported to MS4s and ultimately discharged into local rivers and streams without treatment. Concentrated development in urbanized areas substantially increases impervious surfaces, such as city streets, driveways, parking lots, and sidewalks, on which pollutants from concentrated human activities settle and remain until a storm event washes them into nearby storm drains.

26. Prior History of Violation

The Respondent has a prior history of violations. The Municipality failed to provide information in response to the Request for Information (RFI) letter issued by EPA, which constitutes a violation of section 308 of the CWA. The Municipality has also failed to fully-comply with the ACO.

27. Degree of Willfulness/Negligence of the Respondent

The Municipality did not comply with the related NPDES storm water regulations (it failed to submit the NOI form and it failed to develop and implement an appropriate SWMP), which were developed to ensure prevention and minimization of contamination of storm water by the Small MS4s. The Municipality should have known of its obligations and complied with the RFI letter and the ACO. The Municipality disregarded EPA's enforcement actions and notifications, the NPDES storm water regulations, and the Clean Water Act. The violations are serious and have an indirect effect on human health and the environment.

28. Economic Benefit

EPA has received cost reports from the municipalities of Canóvanas, Peñuelas and San Juan in response to ACO's issued by EPA to bring those municipalities into compliance with the storm water Phase II regulations and the Act. Each

municipality named above provided the cost of developing their NOI form and SWMP. EPA has established in the storm water program the use of the number of households to establish the approximate costs for compliance with the NPDES Small MS4 General Permits, which includes filing of NOI forms. Based on the information provided by the municipalities of Canóvanas, Peñuelas and San Juan, EPA has calculated that the weighted-average cost of filing a NOI for a municipality in Puerto Rico is \$0.23 per household.

29. Ability to Pay

No ability to pay argument is anticipated. Therefore, the proposed penalty has not been reduced for the inability to pay factor.

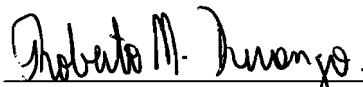
PRAYER

30. The Complainant hereby submits this Motion for Default and requests that this Honorable Court:

1. Find the Respondent in default in the instant proceeding, based on the fact that Respondent's answer to the Complaint was due on May 4, 2009. To this date, over four months have elapsed and Respondent has failed to file its answer to the Complaint.
2. Issue a Default Order against Respondent pursuant to 40 CFR §22.17(a), which adequately resolves the instant proceeding. No good cause exists for which a default order should not be issued.
3. Assess a penalty for the full amount of \$47,409.00 proposed in the Complaint because Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint.

In addition, EPA's application of the statutory factors in Section 309(g) of the Act, 33 U.S.C. § 1319(g), fully support the proposed penalty of \$47,409.00.

Respectfully submitted, in San Juan Puerto Rico this 9th day of November, 2009.



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CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Motion for Entry of Default Judgment**, dated November 9, 2009, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original Federal Express to:


Helen S. Ferrara
Regional Judicial Officer
U.S. EPA, Region 2
290 Broadway - Room 1626
New York, NY 10007-1866
Ph: 212-637-3233; Fax: 212-637-3199

Original and copy by Federal Express to:

Karen Maples
Regional Hearing Clerk
Region 2
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, NY 10007-1866.

Copy by Certified Mail to:

Raúl Santiago-Pérez, Esq.
Santiago-Pérez y Asociados
Counsel, Municipality of Loíza
100 Carretera PR 165, Suite 409
Guaynabo, PR 00968-8048
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A handwritten signature in black ink, appearing to read "Raúl Santiago-Pérez", is written over a horizontal line.