UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

In the Matter of	
Mario Loyola, M.D. P.O. Box 3576 Mayaguez, Puerto Rico 00681	
Respondent.	Docket No. CWA-02-2000-3604
Proceeding Pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g):	

INITIAL DECISION AND DEFAULT ORDER

By Order on Default as to Liability, the undersigned, as Presiding Officer in this matter, found Mario Loyola, M.D. (the "Respondent"), liable for the violation of Section 308 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1318. By Motion for an Accelerated Decision on Penalty, the Complainant, the Director of Environmental Planning and Protection of Region 2 of the United States Environmental Protection Agency ("EPA"), has moved for an Accelerated Decision on Penalty, requesting assessment of a civil penalty in the full amount of Eleven Thousand Dollars ($11,000) proposed in the Administrative Complaint.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules" or "CROP"), 40 C.F.R. Part 22, and based upon the

record in this matter and the following Findings of Fact, Discussion, Conclusions of Law and Penalty Calculation, the Respondent is hereby assessed a civil penalty in the amount of $11,000.

BACKGROUND

This is a proceeding under Section 309(g)(2)(A) of the CWA, 33 U.S.C. §1319(g)(2)(A) and is governed by the Consolidated Rules. Complainant initiated this proceeding by filing a Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") on August 31, 2000 against Respondent. In its Complaint, the Complainant alleged that Respondent violated Section 308 of the Clean Water Act ("CWA"), 33 U.S.C. § 1318.

The Complaint explicitly stated on page 5, in the section entitled *Filing an Answer*, that

> 1. If Respondent wishes to avoid being found in default, he must file a written Answer to this Complaint with the Regional Hearing Clerk no later than thirty (30) days from the date of receipt of this Complaint. EPA may make a motion pursuant to § 22.17 of the CROP seeking a default order thirty (30) days after Respondent's receipt of the Complaint unless Respondent files an Answer within that time. If a default order in entered, the proposed penalty, in its entirety, may be assessed without further proceedings."....
>
> 3. Failure of Respondent to admit, deny, or explain any material factual allegations in this Complaint shall constitute admission of the allegation.

On June 25, 2002, Complainant moved for an Order on Default finding Respondent liable for violations alleged in the Complaint. Complainant's Motion for a Default Order as to Liability was granted on July 8, 2004, pursuant to the Consolidated Rules at 40 C.F.R. Part 22, the record

in this matter and the Findings of Fact and Conclusions of Law set forth in the Order on Default as to Liability. The Order on Default as to Liability is incorporated herein.

On August 5, 2004, Complainant filed a Motion for an Accelerated Decision as to Penalty. It was served on Respondent by certified mail, return receipt requested on August 18, 2004. To date, the Respondent had failed to file a Response to this Motion. Although the Complainant sought an Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a), the undersigned issues this Initial Decision and Default Order pursuant to 40 C.F.R. § 22.17(c), based on the factors enumerated herein. As stated above, Complainant's initial motion in this matter was a Motion for Default as to Liability pursuant to 40 C.F.R. § 22.17(b), and the Respondent continues to be in default on this matter for failure to answer the Complaint, or respond to any of the subsequent motions or Orders to Show Cause. An Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a), sought by the Complainant, is more appropriate in those instances where the Respondent has answered the Complaint.

Based upon a reading of 40 C.F.R. § 22.17, together with pertinent portions of the preamble to the revisions contained in that section, as well as the administrative case law, there is an expectation that a Motion for Default on Liability and Order granting same contemplates a second Motion for Penalty pursuant to 40 C.F.R. § 22.17(b). 64 Fed. Reg. 40155 (July 23, 1999); *In the Matter of Harold Gallager,* EPA Docket No. SDWA-02-2001-8293 (July 2, 2004); *In the Matter of Leroy's Trailer Park Water System,* EPA Docket No. SDWA-04-2001-0513.

In addition, the relief sought by a Complainant in its Motion for Accelerated Decision is similar to that sought by a motion for penalty under 40 C.F.R. § 22.17(b), and Complainant's Motion for Accelerated Decision, which included a Memorandum in Support of Complainant's

Motion for an Accelerated Decision as to Penalty as well as an Affidavit in Support of Motion for an Accelerated Decision ("Affidavit") executed by the person who calculated the penalty, together with Complainant's earlier motions for Default as to Liability and Motion to Enter Default Order as to Liability, specified the penalty sought and the legal and factual grounds therefore, satisfying the requirements of 40 C.F.R. § 22.17(b) as to information to be included in a default motion requesting assessment of a penalty. Therefore, in this instance, it is preferable and within the discretion of the undersigned to issue an Initial Decision and Default Order pursuant to C.F.R. § 22.17(c), rather than an Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a), as requested by Complainant.

FINDINGS OF FACT

Based on a review of the record in this proceeding and pursuant to 40 C.F.R. § 22.27(a), I make the following findings of fact:

1. Mario Loyola is a "person" as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

2. Fill material is a "pollutant" within the meaning of 40 C.F.R. § 232.2 and Section 502(6) of the Act, 33 U.S.C. § 1362(6).

3. Mechanized machinery, including construction equipment, is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

4. Respondent was formerly the owner of the Joyuda Plaza Hotel (formerly Antibes Hotel) on Route 102, in the Joyuda community, Miradero Ward, Municipality of Cabo Rojo, Puerto Rico, where fill material was discharged by means of construction equipment into wetlands for the purpose of expanding the hotel parking lot.

5. The wetlands are a "navigable water" within the meaning of 40 C.F.R. § 122.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

6. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of fill material into navigable waters of the United States, except in compliance with a permit issued by the Department of the Army under Section 404 of the Act.

7. At no time was a permit issued for the discharge described in Paragraph 4, above.

8. The discharge described in Paragraph 4, above, is a violation of Section 301(a) of the Act.

9. Section 308(a) of the Act, 33 U.S.C. § 1318(a), provides that whenever required to carry out the objectives of the Act, including determining whether or not a person is in violation of the Act, the Administrator of the EPA shall require that person to provide such information as may reasonably be required to make such a determination.

10. On October 29, 1998, EPA spoke with Respondent via telephone regarding this matter. Respondent claimed that he had been owner of the subject hotel, and had subsequently sold it to Salvador Ribas, Esq.

11. At Respondent's request, on December 22, 1998, EPA sent a letter to Respondent memorializing this telephone conversation. In this letter, EPA informed Respondent that it might, in the future, send him another more formal letter, pursuant to Section 308 of the Act, requiring that he answer further questions and provide additional information on this matter.

12. On January 15, 1999, EPA issued a Request for Information letter to Respondent, pursuant to Section 308 of the Act, on the grounds that he may have directed the discharge of fill described in Paragraph 4, above. This letter included a request that Respondent provide

information necessary for EPA to determine whether or not Respondent was in violation of the Act. The letter informed Respondent of his legal responsibility to respond to the information request within thirty (30) days of receipt of the letter. The letter was mailed on January 20, 1999 by certified mail with return receipt requested. The Domestic Return Receipt was subsequently delivered to EPA by the U.S. Postal Service, indicating a delivery date of January 26, 1999.

13. EPA sent a second letter to Respondent, dated April 13, 1999, via certified mail with return receipt requested. It informed Respondent that EPA had sent an information request letter to him on January 15, 1999, and forwarded a copy of the Section 308 letter to him as an attachment. It informed Respondent that EPA had not received a response from him, and advised him that a response had been required by February 26, 1999. It requested that he respond immediately, and that he fax a copy of his response to EPA if he had already submitted a response, which EPA had not received. The Domestic Return Receipt postcard indicated that this letter was delivered by the U.S. Postal Service on April 21, 1999.

14. On August 16, 1999, EPA mailed a third letter to Respondent via certified mail with return receipt requested. This letter was dated August 13, 1999. It informed Respondent that EPA had issued a Request for Information letter to him on January 15, 1999, and forwarded a copy of the Section 308 letter to him as an attachment. It informed Respondent that EPA had not received a response from him, and advised him that failure to respond might result in an enforcement action against him pursuant to Section 309 of the Act. The return receipt postcard was subsequently delivered to EPA by the U.S. Postal Service with a delivery date of August 19, 1999.

15. On March 2, 2000, EPA filed an Administrative Order, Docket No. CWA-02-2000-

3503, requiring that Respondent reply to the Section 308 letter within seven days of the effective date of the Administrative Order. The order was served on Respondent by certified mail with return receipt requested; the return receipt postcard was subsequently delivered to EPA by the U.S. Postal Service with a delivery date of March 13, 2000. The Respondent did not respond to the Administrative Order.

16. On August 31, 2000, Complainant, pursuant to Section 309 of the CWA, issued a Complaint against Respondent for violation of Section 308 of the CWA by failing to respond to a Request for Information letter. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), as amended by the Debt Collection Act of 1996, implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, in effect as of December 31, 1991, Respondent is liable for the administrative assessment of civil penalties in an amount not to exceed $11,000 per violation, up to a maximum of $27,500. The Complaint proposed to assess a penalty of $11,000. Pursuant to 40 C.F.R. § 22.5(b)(1), Respondent was served, by certified mail, return receipt requested, a true and correct copy of the Complaint. The U.S. Postal Service return receipt postcard for this Complaint was received by the Regional Hearing Clerk on October 31, 2000, indicating that the copy of this Complaint was properly served upon Respondent on September 20, 2000.

17. On November 16, 2000, Complainant sent a letter to Respondent by facsimile requesting that Respondent reply to the Complaint no later than November 30, 2000. The letter also stated that if Complainant received an answer to its Section 308 letter by that date, Complainant would negotiate with Respondent for a reduced penalty.

18. Respondent sent a letter dated February 2, 2001 to Complainant's Attorney at the

time, Matthew Garamone. The letter denied ownership of the subject property during the time of the violations alleged by EPA or knowledge of the operations in question, and failed to specifically answer the questions posed in EPA's 308 letter. This letter was not served on the Regional Hearing Clerk and was not received within thirty (30) days after service of the Complaint.

19. Complainant filed its initial Motion for Default Order on Liability against Respondent on June 25, 2002. The Motion was sent by certified mail, return receipt requested, and the Domestic Return Receipt indicated that it was delivered on July 6, 2002.

20. Respondent sent a letter dated August 3, 2002 to the Regional Hearing Clerk of Region 2, setting forth specific answers to the questions proposed in EPA's Section 308(a) letter.

21. Based on its belief that Respondent had not responded to Complaint's initial motion in a timely manner, Complainant filed a Motion to Enter an Order on Default as to Liability against the Respondent on August 21, 2002. The Motion was sent by certified mail, return receipt requested, and it was delivered on September 3, 2002.

22. When Complainant became aware of Respondent's letter dated August 3, 2002, Complainant, by letter dated June 11, 2003, sent a letter, together with a proposed Consent Agreement and Final Order (CA/FO) to Respondent. Respondent never responded to Complainant's letter, and Complainant renewed its prior Motion to Enter an Order on Default as to Liability on July 22, 2003. This Motion was sent by certified mail, return receipt requested and the Domestic Return Receipt indicated that it was delivered on July 31, 2003.

23. The Presiding Officer, without ruling on Complainant's second Motion for Default as to Liability, issued an order dated September 18, 2003, scheduling a status telephone

conference for September 30, 2003, stating therein "that it would be in the best interest of the parties to participate in a telephone conference to explore any further possibility of settlement."

24. At the Complainant's request, the Presiding Officer issued an order dated September 29, 2003, rescheduling the status telephone conference for October 21, 2003.

25. The Respondent never contacted the Presiding Officer to advise her as to where to contact him for the conference, and attempts to contact him for the conference were unsuccessful.

26. The Presiding Officer made numerous additional attempts to contact the Respondent by telephone, including a call later in the day on October 21, 2003 and one on November 10, 2003. These attempts were unsuccessful.

27. On December 9, 2003, the undersigned, as Presiding Officer in this matter, issued an Order to Show Cause directing Respondent to show cause no later than January 6, 2004 why the Presiding Officer should not order entry of Respondent's liability under 40 C.F.R. § 22.17. The Respondent never filed a response to this Order to Show Cause. However, it came to the attention of the Presiding Officer that this Order was served on Respondent by first class mail only, with no proof of service upon Respondent.

28. On May 28, 2004, the undersigned issued a Second Order to Show Cause to be served by U.S. Postal Service Overnight Mail with proof of service on Respondent. Delivery to the Respondent on June 1, 2004 was confirmed by the U.S. Postal Service.

29. On July 8, 2004, an Order on Default as to Liability was filed and served upon Respondent by Overnight Mail. The U.S. Postal Service provided Complainant with a receipt indicating the Order was served on Respondent on July 14, 2004.

30. On August 5, 2004, and pursuant to 40 C.F.R. § 22.5(b)(2), Respondent was

served, by certified mail, return receipt requested, with a Motion for an Accelerated Decision as to Penalty.

31. A signed Domestic Return Receipt was received by Complainant, indicating that Respondent received the Motion on August 18, 2004.

32. To date, the Respondent has not filed a response to the Second Order to Show Cause, the Motion for an Accelerated Decision as to Penalty, an Answer to the Complaint, or submitted payment of the civil penalty proposed in the Complaint.

DISCUSSION

Respondent's Untimely Response to Complainant's Request for Information is a Significant Violation of Section 308 of the CWA

As stated above, on January 15, 1999, EPA issued a Request for Information letter to Respondent pursuant to Section 308 of the CWA. This letter requested that Respondent provide EPA with information necessary for EPA to determine whether or not Respondent was is in violation of the Act. The letter informed Respondent of his legal responsibility to respond to the information request within thirty (30) days of receipt of the letter. The letter was mailed on January 20, 1999, via certified mail with return receipt requested; the return receipt postcard indicated that Respondent received this letter on January 26, 1999. Therefore, a response from Respondent was due by February 26, 1999. As set forth in the **FINDINGS OF FACT** above, Complainant then made numerous formal and informal attempts to obtain the information from Respondent.

Respondent finally sent a letter dated February 2, 2001 to Complainant's Attorney at the time, Matthew Garamond. The letter denied ownership of the subject property during the time of

the violations alleged by EPA or knowledge of the operations in question. This letter did not contain a complete response to the 308 letter; moreover, it was sent nearly two years after the response was due.

As set forth above, Respondent sent a second letter, dated August 3, 2002, to the Regional Hearing Clerk of Region 2, setting forth specific answers to the questions proposed in EPA's Section 308(a) letter. While this letter was responsive to the Complainant's 308 letter, it was sent three and one half years after the requested information was due.

EPA relies on Section 308 of the CWA to obtain information to carry out its mandate to protect public health and the environment. Respondent's untimeliness in responding to a Request for Information compromises the purpose and goal of the CWA. Despite Respondent's ultimate response to the Section 308 letter, he ignored a number of formal and informal attempts by EPA to obtain his response. It is unacceptable for EPA to wait such a lengthy period of time for a response to a Section 308 letter.

In *In the Matter of H. Craig Higgins*, EPA Docket Number CWA-1-I-91-1088 (February 14, 1992), the Presiding Officer discussed at length the respondent's untimely response to a Section 308 letter. In that case, EPA issued a Section 308 letter on September 26, 1990, which respondent received on September 29, 1990. According to the Section 308 letter, respondent's reply was due by October 15, 1990. Respondent did not reply by that date, and on November 2, 1990, EPA verbally granted to respondent an extension until November 13, 1990. Respondent did not reply by that date either; on December 12, 1990, EPA sent respondent a letter soliciting his response to the Section 308 letter within 10 days of receipt of the December 12th letter. Respondent received this letter on January 14, 1991, but claimed that he mailed his response on

November 19, 1990. Respondent did not reply to EPA's December 12, 1990 letter, and EPA did not receive the response respondent allegedly sent on November 12, 1990. EPA filed a complaint which respondent received on June 28, 1991. On July 24, 1991, respondent mailed to EPA a copy of the November 19, 1990 letter and his Answer. EPA filed a Motion for Summary Determination on Liability.

The Presiding Officer granted EPA's Motion for Summary Determination on Liability for those periods of time between the time the response was due and when it was sent by Respondent, excluding those periods of time for which EPA had granted the Respondent an extension of time during which to answer the 308 letter. Noting that Respondent's failure to respond to the Section 308 letter was a significant violation, the Presiding Officer stated:

> I find that Respondent's failure to respond in a timely manner to the Section 308 request is not trivial or inconsequential as he has suggested. . . .EPA's ability to obtain timely and accurate information regarding discharges under the Clean Water Act is central to the administration and enforcement of limits on discharges under the Act. . . Failure to respond in a timely manner to a request for information risks damaging or irreparable environmental consequences. Reporting requirements under the federal environmental statues, including Section 308 of the Clean Water Act, are enforceable requirements for which penalties may be assessed. . .
>
> Accordingly, I find that respondent's failure to respond to the Section 308 request is a significant violation of the reporting requirements of the Clean Water Act and that the de minimis principle is not applicable.

The *Higgins* case is similar to the case before me because of the numerous attempts which the Complainant made to contact the Respondent, as well as the countless opportunities which the Complainant gave to Respondent to satisfy the request for information in both

instances. In fact, the Presiding Officer in the *Higgins* matter responds to the respondent's argument that EPA should have given him a reminder call by stating: "Mr. Higgins as the recipient of a written Section 308 request had an affirmative obligation to respond to the request, whether or not EPA gave him a "reminder call'; indeed, he should have felt fortunate that EPA called him once in this case and then sent him a second letter." In the instant case, despite numerous attempts to remind the Respondent of his obligations under Section 308 of the CWA, the Respondent's attempts to comply were far fewer and much more untimely, supporting a summary determination of liability based on the Complainant's motions for default. While the content of the second letter was adequate as a Section 308 response, the Respondent failure to respond to the Section 308 letter for over three years was a significant violation of the CWA.

Neither of Respondent's Letters Constitute an Answer Pursuant to 40 CFR § 22.15

According to 40 C.F.R. § 22.15(b), the Answer to a complaint "shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular allegation and so states, the allegation is deemed denied." Neither of Respondent's untimely responses to the Section 308 letter set forth this required information. Based upon the regulations and decisions discussed below, the undersigned concludes that neither letter constitutes an Answer.

As stated above, Respondent sent a letter dated February 2, 2001 to Complainant's Attorney at the time, Matthew Garamone, which letter merely denied involvement or knowledge of the information requested in EPA's 308 letter. This letter was not considered by Complainant to constitute an answer to the Complaint, as it did not purport to respond to the Complaint but rather, to EPA's 308 letter. More importantly, it did not include the information required to be

included in an answer by 40 C.F.R. § 22.15(b). Finally, the letter was not served on the Regional Hearing Clerk and was not received within thirty (30) days after service of the Complaint. 40 C.F.R. § 22.15(a).

The second letter sent by Respondent, dated August 3, 2002, to the Regional Hearing Clerk of Region 2, set forth specific answers to the questions proposed in EPA's Section 308(a) letter. However, it did not constitute an answer because the letter did not include the information required to be included in an answer by 40 C.F.R. § 22.15(b) and was received almost two years after the Complaint was issued.

Prior RJO decisions support the fact that an answer must contain some form of admission or denial of the allegations in the complaint; under most circumstances, a letter is insufficient. For example, in *In the Matter of S&S Auto Sales, Inc.*, EPA Docket No. CAA-5-99-026 (March 15, 2001), the Presiding Officer determined that a letter purporting to be from a representative of respondent did not qualify as an answer, stating "The letter is not an 'Answer", as it does not clearly admit deny or explain each of the factual allegations in the complaint with regard to which the Respondent has any knowledge." Similarly, Respondent in the case before me did not adequately admit, deny or explain the allegations in the Complaint.

Region 7 followed similar logic in *In the Matter of Randy Roling*, EPA Docket No. FIFRA-07-2002-0147 (February 27, 2003). In that case, the Presiding Officer determined that the letters respondent sent to complainant after the complaint was filed did not qualify as answers or responses to the complaint. The first letter just noted that respondent's name was trademarked and copyrighted, and EPA sent a letter to respondent indicating that this letter did not constitute an answer to the complaint. The second letter asked a series of questions, but did not address any

of the allegations in the complaint. The Presiding Officer held as a matter of law that respondent's failure to file an answer constituted an admission of the facts alleged in complaint.

In *In the Matter of Gulfstream Development Corp.*, EPA Docket No. CWA-III-070 (June 15, 1992), respondent's untimely letter requesting a hearing did not constitute an answer. EPA issued a complaint against respondent on April 17, 1992. On May 29, 1992, respondent filed a letter dated May 5, 1992, requesting a hearing on the civil penalties assessed in the complaint. The Presiding Officer entered an Order Directing Entry of Default as to Liability against respondent, as his answer was due on May 26, 1992. The Presiding Officer also determined that even if respondent had filed his response in time, it would still be in default as to liability because the respondent did not deny liability, dispute any allegation of fact or conclusions of law, or specify any defenses.

In Region 6, respondent's Notice of Automatic Stay in Bankruptcy was not considered an answer to the complaint. In *In the Matter of Solv-Ex Corporation*, EPA Docket No. VI-97-1632 (October 12, 1998), respondent filed the Notice within 30 days of the filing of the complaint. The Presiding Officer determined that the notice did not constitute an answer because it did not admit, deny or otherwise responds to allegations in the complaint, noting that according to the relevant regulations, each uncontested allegation in the complaint is deemed admitted by the respondent. Respondent was given an opportunity to file an Amended Response but failed to do so, and an Order of Default as to Liability was entered.

In the instant case, the Respondent, in his first letter, merely denied ownership of the property and knowledge of the operations thereon, and answered the request for information in his second letter. However, in neither letter did he address the issue of his liability for violating

Section 308 of the CWA, or the other allegations of fact and conclusions of law set forth in the Complaint, and therefore, neither letter constituted an Answer.

According to the Complaint, Respondent had thirty (30) days in which to respond to the Complaint. While the Respondent received a copy of the Complaint on or around September 20, 2000, the first letter was dated February 2, 2001 and the second was dated August 3. 2002. Even if the Respondent in the case before me were to argue that either of these letters contained information sufficient to constitute an answer, his inexcusable delay in complying with the procedural requirements of Part 22 warrants a finding of default on the part of the Respondent. See *In the Matter of Gulfstream Development Corp., supra.*

In *In the Matter of Rod Bruner and Century 21 Country North*, EPA Docket No. TSCA-05-2003-0009, May 19, 2003), the Presiding Officer refused to grant complainant's Motion for Default Order, noting that there was no attempt by respondents to delay the proceedings or any indication of bad faith when they filed a Motion to Strike in lieu of an answer. The decision included a quote from Moore's *Federal Practice*, § 55.05[2], p.54-24 (1991):

> Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is reason to believe that the defendant's default resulted from bad faith in his dealings with the court or opposing party the district court may properly enter default and judgment against defendant as a sanction."

However, in the instant case, Respondent's failure to file an document that would suffice as an answer for years after the complaint was filed can hardly be considered de minimus or technical, nor could his failure to respond to motions and orders, discussed below, be considered

a trivial failure to comply with the regulations. Therefore, although modern procedure does not favor findings of default (*In the Matter of Rod Bruner and Century 21 Country North, supra),* the passage of time would render both of Respondent's letters unacceptable as an answer even if either contained the information required by Section 22.15 of the CROP.

Respondent's Failure to Comply with Orders of the Presiding Officer Also Constitutes a Default

Beside the fact that Respondent is in default for failure to provide an adequate and timely answer to the Complaint, Respondent also failed to respond to the various motions for default. As provided in 40 CFR § 22.16(b) of the CROP, a party who fails to respond to a motion, including a motion for default order, within 15 days of service of same, waives its objections to the granting of the motion. See *In the Matter of Napoleon Elevator Co.*, EPA Docket No. FIFRA-07-2003-0027 (August 3, 2004); *In the Matter of Hoops Agri Sales Company*, EPA Docket No. FIFRA-07-2003-0055 (June 29, 2004).

Respondent also failed to participate in the status conference on October 21, 2003, scheduled by the undersigned by order dated September 29, 2003. Most importantly, the Respondent ignored the second Order to Show Cause issued by the undersigned[1]. The second Order specifically provided as follows:

> This ORDER directs Respondent to show cause why the Presiding Officer should not order entry of Respondent's liability under 40 C.F.R. § 22.17(c), and direct Complainant to submit written argument regarding assessment of an appropriate civil penalty under 40 C.F.R. § 22.17. Respondent may file and serve no later than June 18, 2004, a showing of cause for Respondent's

1 I issued the second order because, as noted therein, it came to my attention that there was no proof that the first Order to Show Cause was served on Respondent. Thereafter, the second Order to Show Cause was served on Respondent by overnight mail with proof of service indicating receipt by Respondent on June 1, 2004.

> failure to file a timely response to the administrative complaint and failure to respond to the Presiding Officer's order scheduling a status teleconference in this matter, as outlined above. Counsel for Complainant may respond to this filing no later than June 28, 2004. Failure of Respondent to respond to this Order will result in Respondent being found in default pursuant to 40 C.F.R. § 22.17.

In relevant part, 40 CFR 22.17(a) and (c) states:

> A party may be found in default: after motion, . . .upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or **an order of the Presiding Officer; or upon failure to appear at a conference or hearing.** (Emphasis added).

In *In the Matter of RM Oil & Gas Company*, EPA Docket No. CWA-6-00-1615 (May 1, 2001), the Presiding Officer found the respondent in default on three grounds: for failure to file an answer to the complaint, failure to submit a prehearing exchange of information, and failure to appear at a hearing, stating "Respondent's failure to comply with 40 CFR Part 22 hearing procedures are inexcusable."

In the instant case, the Respondent's failure to file an answer responsive to the factual allegations in the Complaint, failure to respond to the second Order to Show Cause, and failure to participate in the scheduled status teleconference, as well as the Respondent's failure to respond to the numerous other orders, motions and less formal attempts at communication by the Complainant and the undersigned, constitute inexcusable failures to comply with the hearing procedures set forth in the CROP. The procedures governing Class I civil penalty actions are clear concerning the failures of Respondent as identified above.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred by Section 309 of the CWA, 33 U.S.C. § 1319.

2. Section 309(g) of the Act, 33 U.S.C. § 1319(g), as amended by the Debt Collection Act of 1996, implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, provide that any person who violates Section 308 of the Act shall be liable to the United States for a civil penalty of up to $11,000 per violation up to a maximum of $27,500.

3. The Complaint in this action was served upon Respondent in accordance with 40 C.F.R. § 22.5(b) (1) of the Consolidated Rules.

4. Respondent's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Respondent pursuant to 40 C.F.R. § 22.17(a)

5. Respondent's failure to file a timely response, or otherwise comply with, the Second Order to Show Cause, constitutes a default by Respondent pursuant to 40 C.F.R. § 22.17(a).

6. Respondent's default constitutes an admission of the allegations and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

7. Respondent's failure to file a timely Answer to the Complaint, as well as Respondent's failure to file a timely response, or otherwise comply with, the Second Order to Show Cause were grounds for the entry of a Default Order as to Liability against the Respondent. 40 C.F.R. § 22.17. However, it must be noted that the earlier Default Order as to Liability did not constitute an Initial Decision in accordance with 40 C.F.R. § 22.17(c). A Default Order that does not determine remedy along with liability is not an initial decision, unless it resolves "all issues and claims in the proceeding." Based upon a reading of the regulation along with pertinent portions of the preamble, there is an expectation that a Motion for Default on Liability and Order granting same contemplates a second Motion for Penalty.

8. Complainant filed a Motion for Accelerated Decision on Penalty pursuant to 40 C.F.R.

§ 22.20(a). As set forth above, this Motion is being treated as a Motion for Penalty pursuant to 40 C.F.R. § 22.17(b).

9. Respondent's failure to file a timely answer or otherwise respond to the Complaint, subsequent motions, and the Orders to Show Cause are grounds for entry of a default order against Respondent assessing a civil penalty for the aforementioned violations pursuant to 40 C.F.R. § 22.17(a).

10. As described in the penalty calculation below, I find that the Complainant's proposed civil penalty of $11,000 is properly based on the statutory requirements of Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

PENALTY CALCULATION

Section 309(g) of the CWA, 33 U.S.C. § 1319(g), provides that in a case in which the Administrator is authorized to bring a civil action with respect to any applicable requirement, the Administrator also may assess a penalty. Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), as amended by the Debt Collection Act of 1996, implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, in effect as of December 31, 1991, provide that any person who violates Section 308 of the Clean Water Act, 33 U.S.C. § 1318 shall be liable to the United States for a civil penalty up to $11,000 per violation, up to a maximum of $27,500.

In both its Complaint and Motion for Acceleration Decision on Penalty, Complainant seeks a civil penalty of $11,000 by applying the statutory factors used to assess penalties under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and in accordance with the Agency's Policy on Civil Penalties (#GM-21), as outlined in the Memorandum in Support of

Complainant's Motion for Accelerated Decision as to Penalty and the accompanying Affidavit.

The statutory factors under Section 309(g)(3) of the CWA include the nature, circumstances, extent and gravity of the violation(s), and, with respect to the violator, ability to pay, any prior history of such violations, degree of culpability, economic benefit or savings resulting from the violation and such other matters as justice may require. In finding that the proposed penalty is reasonable, the undersigned took the following findings into consideration.

EPA relies on Section 308 of the CWA to obtain information to carry out its mandate to protect public health and the environment, and takes violations of Section 308 very seriously. Respondent's untimeliness in responding to a Request for Information compromises the purpose and goal of the CWA. Despite Respondent's ultimate response to the Section 308 letter, he ignored a number of formal and informal attempts by EPA to obtain his response. It is unacceptable for EPA to wait three and one-half years for a response to a Section 308 letter.

In terms of degree of culpability, Respondent was aware of its duty to respond to the Section 308 letter. As described in the Complaint, Respondent was notified in writing in January 1999, April 1999 and August 1999 of his obligation to reply to the Request for Information. An Administrative Order was issued to the Respondent on March 2, 2000, which also described Respondent's obligation to respond to EPA's Section 308 letter. The Complaint was issued to Respondent on or about August 31, 2000, which again described Respondent's obligation to respond to the request. In November 2000, Respondent was notified in writing of his obligation to respond to the Complaint. On June 25, 2002, EPA filed a Motion for Default Order on Liability against Respondent. Respondent did not reply to this motion. On August 21, 2002, EPA filed a Motion to Enter Order on Default as to Liability against Respondent. In the interim,

on August 3, 2002, Respondent had finally replied to EPA's Section 308 letter. However, Respondent did not address the response to the Section 308 letter to the Complainant, nor did Respondent answer the Complaint at this time. All correspondence from EPA was sent certified mail, return receipt requested or by overnight mail with proof of receipt by Respondent. All receipts were signed and returned to the Agency. Respondent's failure to reply to many formal and informal attempts by EPA to obtain his response to the Request for Information constitutes a high degree of culpability in violating Section 308 of the CWA.

Respondent has a past history of violations of the CWA. On September 13, 1989, the U.S. Army Corps of Engineers ("the Corps") issued a Cease and Desist Order to Respondent for discharge of fill in the exact location which is the subject of the Section 308 Request for Information letter issued by EPA to Respondent on January 15, 1999.

It does not appear that Respondent has benefited economically by providing an untimely response to the Section 308 letter.

I find that the penalty amount sought herein is both appropriate and justified in light of the circumstances surrounding and giving rise to this litigation. The penalty is warranted by the fact that Respondent was aware of the requirement to respond to EPA's Section 308 letter, yet he failed to do so for three and one-half years. Finally, the penalty is reasonable and justified because it is intended to ensure long-term compliance with, and adherence to, the CWA and its implementing regulations.

Evaluating all of the information, I have determined that the proposed civil penalty is appropriate and was calculated in accordance with statutory factors in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) and in accordance with the Agency's Policy on Civil Penalties

(#GM-21). Further, the record supports this penalty. A penalty of $11,000 is hereby imposed against Respondent.

DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, an Initial Decision and Default Order is hereby ISSUED and Respondent is ordered to comply with all the terms of this Order:

(1) Respondent is assessed and ordered to pay a civil penalty in the amount of Eleven Thousand Dollars ($11,000.00).

(2) Respondent shall pay the civil penalty by certified or cashier's check payable to the "Treasurer of the United States of America" within thirty (30) days after this default order has become a final order pursuant to 40 C.F.R. § 22.27(c). The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Such payment shall be remitted to:

Regional Hearing Clerk
EPA Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

A copy of the payment shall be mailed to:

Regional Hearing Clerk
EPA Region 2
290 Broadway, 16th Floor
New York, New York 10007

(3) This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after

its service upon the parties unless (1) a party moves to reopen the hearing, (2) a party appeals the initial decision to the Environmental Appeals Board, (3) a party moves to set aside the default order, or (4) the Environmental Appeals Board chooses to review the initial decision *sua sponte*.

IT IS SO ORDERED.

Dated: February 16, 2005

Helen S. Ferrara
Presiding Officer

CERTIFICATE OF SERVICE

I hearby certify that the Initial Decision and Default Order by Regional Judicial Officer Helen Ferrara in the matter of Mario Loyola, Docket No. CWA-02-2000-3604 was served on the parties as indicated below:

Express Mail - Mario Loyola
P.O. Box 3576
Mayaguez, Puerto Rico 00681

Federal Express - Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G. Street, N.W.
Washington, D.C. 20005

Pouch Mail - Assistant Administrator for
Enforcement & Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2201A)
Washington, D.C. 20460

Inter Office Mail - Kim M. Kramer, Esq.
Office of Regional Counsel
USEPA - Region II
290 Broadway 16th Floor
New York, New York 10007-1866

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: February 16, 2005