CERTIFICATE OF SERVICE

I hear by certify that the **Default Order and Initial Decision** by Regional Judicial Officer Helen Ferrara in the matter of **Guardarraya Community, Docket No. SDWA-02-2003-8269** is being served on the parties because the respondent's mail was returned unclaimed by the post office. This order is being reserved on the parties as indicated below:

Certified Mail Return Receipt and Regular Mail	Carlos Figueroa Lebron Guardarraya Community HC 764 Box 8327 Patillas, Puerto Rico 00723
Overnight Mail -	Environmental Appeals Board U.S. Environmental Protection Agency Colorado Building, Suite 600 1341 G. Street, N.W. Washington, D.C. 20005 (w/copy of official file)
Pouch Mail -	Assistant Administrator for Enforcement & Compliance Assurance U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, N.W. (2201A) Washington, D.C. 20460
Regular Mail -	Lourdes del Carmen Rodriguez, Esq. Office of Regional Counsel USEPA - Region II Caribbean Field Division Centro Europa Bldg. 1492 Ponce de Leon Avenue, Suite 417 San Juan, Puerto Rico 00907

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: June 27, 2008

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 Broadway

New York, NY 10007

IN THE MATTER OF: **Guardarraya Community** Carlos Figueroa Lebrón HC 764 Box 8327 Patillas, Puerto Rico 00723 PWS-ID No. PR0556095 Respondent	Docket No. **SDWA-02-2003-8269** Proceeding Pursuant to §1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. §300g-3(g)(3)(B)

DEFAULT ORDER AND INITIAL DECISION

By Motion for Default, the Complainant, the Director of the Caribbean Environmental Protection Division ("CEPD") for Region 2 of the United States Environmental Protection Agency ("EPA"), has moved for a Default Order finding the Respondent, Guardarraya Community, through its representative Carlos Figueroa Lebrón, liable for the violation of Administrative Orders issued pursuant to Section 1414(g) of the Safe Drinking Water Act ("SDWA" or "Act"), 42 U.S.C. § 300g-3(g) and the Surface Water Treatment Rule, promulgated under the SDWA. The Complainant requests assessment of a civil penalty in the amount of Five Hundred Dollars ($500), as proposed in the Complaint.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 40 CFR Part 22, and based upon the record in this matter and the following Findings of Fact, Discussion, Conclusions of Law and Determination of Penalty, Complainant's Motion for Entry of Default is hereby GRANTED. The Respondent is hereby found in default and a civil penalty is assessed against it in the amount of $500.

BACKGROUND

This is a proceeding under Section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. § 300g-3(g)(3)(B) governed by the Consolidated Rules. Complainant initiated this proceeding by issuing a Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") on September 30, 2003 against Respondent. In its Complaint, the Complainant alleged that Respondent violated Administrative Orders issued pursuant to Section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g), requiring compliance with the applicable requirements of the SDWA and the regulations promulgated there under, including the filtration requirements specified in 40 CFR Part 141 Subpart H. The Complaint explicitly stated on page 5, in the section entitled *Failure to Answer*, that

> If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 CFR § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 CFR § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 CFR § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all of the facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 CFR § 22.17(a). Following a default by Respondent for failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 CFR § 22.17(c).
>
> Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 CFR § 22.27(c). 40 CFR § 22.17(d). If necessary, EPA may then seek to enforce such Final Order of

Default against Respondent, and to collect the assessed penalty amount, in federal court.

Respondent was served with a copy of the Complaint, by certified mail return receipt requested.[1] To date, an Answer has not been filed by the Respondent.

On March 8, 2007, Complainant filed a Motion for Entry of Default. It was served on Respondent via certified mail return receipt requested. To date, the Respondent has not filed a response to the Motion for Entry of Default.

FINDINGS OF FACT

Pursuant to 40 CFR § 22.17(c) and based upon the entire record, I make the following findings:

1. Respondent is a "person" as defined in Section 1401(12) and (13)(A) of the SDWA, 42 U.S.C. § 300f(12) and (13)(A) and 40 CFR § 141.2.

2. Respondent is a "supplier of water" who is the owner and/or operator of a "public water system," Guardarraya Community, located in Patillas, Puerto Rico, within the meaning of Section 1401(4) and (5) of the SDWA, 42 U.S.C. § 300f(4) and (5), and 40 CFR § 141.2. The Respondent is composed of those community members served by the Guardarraya Public Water System, and is represented by one if its members, Carlos Figueroa Lebrón.

3. Respondent is a "person" subject to an Administrative Order issued under Section 1414(g)(1) of the SDWA, 42 U.S.C. § 300g-3(g)(1).

4. The Guardarraya Public Water System is supplied by a surface water source, and provides piped water for human consumption and regularly

[1] The date of service of the Complaint upon Respondent is discussed in more detail in the Discussion section, below.

serves at least 15 service connections used by year-round residents and/or a population of at least 25 individuals, and is, therefore, a "community water system" within the meaning of Section 1401(15) of the SDWA, 42 U.S.C. § 300f (15), and 40 CFR § 141.2.

5. The Puerto Rico Department of Health (PRDOH) administers the Public Water Supply Supervision in Puerto Rico pursuant to Section 1413 of the SDWA, 42 U.S.C. § 300g-2 and the delegation of primary enforcement authority from EPA dated March 1, 1980.

6. On June 29, 1989, EPA promulgated the Surface Water Treatment Rule (SWTR) as required by Section 1412(b)(7)(C) of the SDWA, 42 U.S.C. § 300g-1(b)(7)(C) and regulated by 40 CFR Part 141 Subpart H. The SWTR is intended to reduce the risk of waterborne disease outbreaks in public water systems utilizing a surface water source.

7. 40 CFR Part 141 Subpart H requires public water systems using a surface water source, and currently not filtering, to filter their water in accordance with 40 CFR § 141.73 by June 29, 1993, or within 18 months of the State's determination that the system must filter, whichever is later, unless the system can meet certain avoidance criteria as outlined in 40 CFR § 141.71(a) and (b) and the disinfection criteria in 40 CFR § 141.72(a).

8. The Respondent is required to filter in accordance with 40 CFR § 141.73 and has failed to do so, creating the risk of infection and waterborne disease among the population that is served from the system.

9. On January 12, 1995, EPA issued an Administrative Order, Docket No. PWS-PR-AO-333F, to Respondent under the authority of Section 1414(g)

of the SDWA, 42 U.S.C. § 300g-3(g), addressing violations of the SDWA and the regulations promulgated there under.

10. On September 24, 2001 EPA issued an amended Administrative Order, Docket No. SDWA-02-20 01-8026, to Respondent, granting the community an additional two (2) years to obtain compliance.

11. Respondent failed to provide the filtration to the Guardarraya system by the September 24, 2003 deadline ordered in the 2001 Administrative Order.

12. Respondent continues to be in noncompliance and has failed to comply with the filtration requirements specified in 40 CFR Part 141 Subpart H and Paragraph 13 of the 2001 Administrative Order.

13. As set forth above, Complainant found that Respondent has violated the Administrative Orders issued pursuant to Section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g), and the SWTR, promulgated pursuant to Section 1412(b)(7)(C) of the SDWA, 42 U.S.C. § 300g-1(b)(7)(C), and regulated by 40 CFR Part 141 Subpart H. For these violations, Complainant filed a Complaint against Respondent, appended to the Motion for Entry of Default as Exhibit 1, pursuant to Section 1414(g)(3)(B) of the SDWA, 42 U.S.C. § 300g-3(g)(3)(B), seeking an administrative penalty of Five Hundred Dollars ($500).

14. Compliant mailed a copy of the Complaint and the Consolidated Rules by certified mail return receipt requested on September 30, 2003 according to a Certificate of Service signed by an EPA employee, Cristina Maldonado. As discussed in the following section of this Default Order and Initial Decision, the United States Postal Service (USPS) Domestic Return Receipt ("return receipt") was returned to EPA signed but not dated. In

addition, the copy of the return receipt, appended to the Motion for Entry of Default as Exhibit 2, does not include a copy of the reverse side of the return receipt with a postmark indicating when the return receipt was mailed back to EPA. However, in light of information provided in response to an Order to Supplement the Record, it is reasonable to assume that the Complaint was received by Respondent no later than October 6, 2003, as explained below.

15. Respondent has failed to answer the Complaint.

16. On March 8, 2007, Respondent was served by certified mail return receipt requested with a Motion for Entry of Default.

17. To date, the Respondent has failed to respond to the Motion for Entry of Default.

DISCUSSION

Before proceeding to the findings of a violation, it is necessary to determine whether service of process was proper and effectual, for if service was invalid then default cannot enter. I note that there has been no challenge by the Respondent to service of process of the Complaint in this matter. However, default judgments are not favored by modern procedure (*See In the Matter of Rod Bruner and Century 21 Country North*, EPA Docket No. TSCA-05-2003-0009, May 19, 2003), and an entry of default may be set aside for good cause shown (40 CFR § 22.17(c)). Therefore, I will briefly consider the fact that the named representative of Respondent community did not fill in the date when signing the return receipt on behalf of Respondent community.

The Federal Rules of Civil Procedure are not binding on administrative agencies, and such agencies are free to fashion their own rules for service of process so long as these rules satisfy the fundamental guarantees of fairness and notice. *See Katzson Bros.*,

Inc. v. U.S. EPA, 839 F.2d 1396, 1399 (10th Cir. 1988)[2]. The court in the *Katzson Brothers* decision concluded that the Consolidated Rules and the requirements of due process alone determine whether EPA's service of process is proper. See *In the Matter of C.W. Smith, Grady Smith, & Smith's Lake Corporation, Respondent*, Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7 (ALJ, February 6, 2002). EPA has established its own rules of procedure in its Consolidated Rules.

The Consolidated Rules of Practice provide that the "[s]ervice of the complaint is complete when the return receipt is signed." 40 C.F.R. § 22.7(c). Nothing in the Rules specifies that, for service to be effective, the return receipt must be dated. As stated in *Katzson Brothers*, the mails may be used to effectuate service of process if the notice reasonably conveys the necessary information and affords a reasonable time for response and appearance.

Therefore, it is only necessary for me to determine whether the Respondent has been afforded a reasonable time to file an Answer to the Complaint. According to 40 C.F.R. § 22.15(a) and the Complaint at pages 4 and 5 (Exhibit 1 to the Motion for Entry of Default), the Respondent is required to file an Answer with the Regional Hearing Clerk within 30 days after service of the Complaint.

The Complainant, in its Motion of Entry of Default at page 3, states that Respondent should have filed its answer to the Complaint on or about October 31, 2003. However, as noted above, examination of Exhibit 2 to the Motion for Entry of Default, the return receipt indicates that Carlos Figueroa Lebrón signed the receipt, but did not fill in the line titled "Date of Delivery". In addition, the record does not include a copy of

[2] Although *Katzson Brothers* analyzed the former version of the Consolidated Rules, the minor differences between the applicable sections of the Consolidated Rules and the former version are insignificant for purposes of the current analysis.

the USPS postmark on the return receipt, or any other indication of when the return receipt, signed by Respondent's representative, was returned to the offices of Complainant. In fact, on page 3 of the Motion, Attorney for Complainant, in Footnote 1, states "The receipt has respondent's signature but not the date it was received. However, the certificate of receipt was returned to Complainant and received in EPA's offices on _____." Unfortunately, it appears as if this footnote was not completed before the Motion was filed, and no date is indicated therein.

While one could assume that the Complaint was served within a reasonable time of the date of filing the Complaint, and certainly before the Complainant filed its Motion for Entry of Default, and therefore, that the Respondent has been afforded sufficient time, in accordance with the applicable regulations, to file an Answer, it is preferable that the record supporting a Motion for Entry of Default be as complete and correct as possible.

Therefore, the undersigned issued an Order to Supplement the Record, filed August 24, 2007, directing the parties to clarify the service issue by a declaration of anyone with direct knowledge of the date of service, the date the return receipt was received in the offices of Complainant, or by a copy of the postmark indicating when the return receipt, signed by the Respondent, was mailed back to the Complainant's offices.

On February 1, 2008, the Complainant's Attorney filed a Motion to Supplement the Record indicating that the original return receipt card prepared for the Complaint served in this case was in a file being maintained by the Regional Hearing Clerk. According to this Motion, the date on the original card was clearly October 6 but the year was not legible.

The undersigned inspected the original return receipt card, and although the last digit of the year was not completely legible, the bottom part of the last digit certainly looked like the bottom part of a "3."

In summary, the facts indicate that the Complaint was signed on September 30, 2003 by the Director of CEPD, and was mailed on that date by certified mail return receipt requested as set forth in a Certificate of Service appended to the Complaint. The stamp of the post office, or "postmark," on the return receipt clearly indicates a specific date of October 6 (Attachment to Complainant's Motion to Supplement the Record) with what appears to be "2003" as the year. Finally, Complainant's attorney has stated that this was the card affixed to the Complaint. Therefore, it is reasonable to assume that the year indicated on the postmark on the return receipt postmark was 2003, and that the Complaint was in fact received by the Respondent no later than October 6, 2003. Based on these facts, I conclude that the assumption made by Complainant as to the date of service of the Complaint is reasonable.

I note that prior to the filing of a Motion for Entry of Default, the Respondent had not filed an Answer. At minimum, therefore, over three and one half years had passed with no Answer from the Respondent. This lengthy time clearly meets the requirement of thirty days provided for by the regulations and the Complaint. Therefore, I determine that service of process did indeed occur and that Respondent was given sufficient time to file an Answer.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred by Section 1414 of the SDWA, 42 U.S.C. § 300g-3.

2. Section 1414(g)(3)(A) of the Act, 42 U.S.C. § 300g-3(g)(3)(A), as amended by the Debt Collection Act of 1996, implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 CFR Part 19, in effect as of December 31, 1991, provides that any person who violates, or fails or refuses to comply with, an Administrative Order issued pursuant to the SDWA shall be liable to the United States for a civil penalty up to $27,500 per day of violation.

3. The Complaint in this action was served upon Respondent in accordance with 40 CFR § 22.5(b)(1).

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 CFR § 22.17(a).

5. Respondent's default constitutes an admission of the allegations set forth in the Complaint and a waiver of the Respondent's right to a hearing on such factual allegations. 40 CFR §§ 22.17(a) and 22.15(d).

6. Respondent has failed to comply with the provisions of Administrative Orders issued pursuant to Section 1414(g) of the Act.

7. Pursuant to 40 CFR § 22.17(a), Respondent's failure to file a timely Answer or otherwise respond to the Complaint is grounds for the entry of an Order on Default against the Respondent assessing a civil penalty for the aforementioned violations.

8. As described in the penalty calculation below, I find that the Complainant's proposed civil penalty of $500 is properly based on the

statutory requirements of Section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g).

DETERMINATION OF PENALTY

As set forth above, Section 1414(g)(3)(A) of the SDWA, U.S.C. § 300g-3(g)(3)(A), as amended by the Debt Collection Act of 1996, provides that any person who violates, or fails or refuses to comply with, an Administrative Order issued pursuant to the SDWA shall be liable to the United States for a civil penalty up to $27,500 per day of violation.

In both its Complaint and its Motion for Entry of Default, the Complainant seeks a civil penalty of $500, based upon the statutory factors in Section 1414(b) of the SDWA, U.S.C. § 300g-3(b)[3] and in accordance with the Agency's Policy on Civil Penalties (#GM-21),[4] as outlined in the Motion for Entry of Default and Exhibit 3 thereto, the September 20, 2003 memorandum to file entitled *Issuance of Penalty Order to Non-PRASA System PWS-PR-CFP-SDWA-02-2003-8269*. The statutory factors under Section 1414(b) of the SDWA include the seriousness of the violation, the population at risk, and other appropriate factors, including the prior history of such violations, the degree of willfulness or negligence, the economic benefit accrued to the Respondent through failure to comply, and the ability of the Respondent to pay.

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[3] Section 1414(b) of the SDWA, U.S.C. § 300g-3(b) specifically provides statutory guidelines for a federal district court to consider when determining an appropriate civil penalty. While there are no equivalent statutory criteria for consideration in an administrative matter, EPA has followed the statutory guidelines set forth for courts, as well as written penalty policies, when calculating an appropriate penalty amount. See *In the Matter of Harold Gallagher, Manager, Mansard Apartments*, EPA Docket No. SDWA-02-2001-8293; *In the Matter of Apple Blossom Court*, EPA Docket No. SDWA-10-2001-0147.

[4] Complainant does not have a written penalty policy for calculating the penalty amount it would seek in an administrative or judicial action for violations of the Public Water Supply section of the Safe Drinking Water Act, as it does under other environmental statutes.

In concluding that the proposed penalty is reasonable, the undersigned took the following findings into consideration:

1. The risk to public health in this case is known and could have easily been avoided. EPA's main concern is the risk of waterborne diseases and pathogens, and the construction of a filtration system is necessary to protect the users of the system from waterborne diseases and pathogens. Therefore, Respondent's failure to comply with the Act and the Administrative Orders has placed a population of approximately 120 individuals at risk of infectious diseases over a significant time.

2. The Respondent has continued to violate the Act for a significant period of time. Under EPA regulations, the Respondent was required to comply with the filtration and disinfection requirements no later than June 29, 1993. EPA issued an Administrative Order to Respondent on January 12, 1995 requiring compliance with the filtration and disinfection requirements of the SWTR within three years, and thereby giving Respondent a significant amount of additional time to achieve compliance. A second Administrative Order was issued on September 24, 2001, granting Respondent an additional two-year period to comply. Respondent never complied with the ordered provisions of either of the above referenced Administrative Orders. Furthermore, from 1995 thru 2001, inspections to the system were performed and compliance letters were sent to follow up Respondent's efforts to achieve compliance. All efforts were unsuccessful, and as of the date of the issuance of the Complaint, Respondent continued to be in non-compliance. Respondent was made aware of the requirements of the Act and the SWTR, as well as the deadlines contained in both Administrative Orders, yet

willfully remained in non-compliance.

3. The Respondent had an obligation under the law to provide disinfection and filtration to the surface water source to reduce the risk of waterborne disease outbreaks. By failing to do so the Respondent saved any additional operation and maintenance costs associated with compliance. However, because the Guardarraya Community is a non-profit organization, EPA did not assess an amount for economic benefit in calculating its proposed penalty.

4. The Guardarraya Community is not an organized community. At the time of the issuance of the complaint, the enforcement officer did not know if the users of the system collect a monthly fee to defray maintenance and operation costs of the system. Therefore, the $500 penalty is a reasonable amount in light of the pattern of noncompliance and the health risks involved.

In summary, the Complainant did not propose the maximum penalty ($27,500) allowed under the SDWA for violation of the Administrative Orders. Nevertheless, Complainant makes clear that it takes violations of its Administrative Orders and the SWTR seriously. The penalty sought in the amount of $500 is fully supported by the application of the statutory factors for determining a civil penalty in Section 1414(b) of the SDWA and the Agency Policy on Civil Penalties. Further, the record supports this penalty. Therefore, a penalty of $500 is hereby imposed against Respondent.

DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 CFR Part 22, including 40 CFR § 22.17, a Default Order and Initial Decision 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 Five Hundred Dollars ($500.00).

(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 CFR § 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 CFR § 22.17(c). Pursuant to 40 CFR § 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: June 26, 2008

Helen S. Ferrara

Helen S. Ferrara

Presiding Officer