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ENVIR. APPEALS BOARD

CERTIFICATE OF SERVICE

I hereby certify that the **Default Order and Initial Decision** by Regional Judicial Officer Helen Ferrara in the matter of **Israel Justiniano Perichi Community**, Docket No. **SDWA-02-2002-8255** 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

Mr. Isreal Justiniano
Perichi Community
P.O. Box 557
San German, Puerto Rico 00683

Overnight Mail -

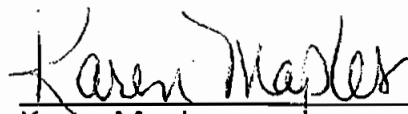
Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G. Street, N.W.
Washington, D.C. 20005
(w/copy of official file)

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 -

Silva Carreno, 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: January 18, 2007

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, NY 10007

IN THE MATTER OF:

**Israel Justiniano
Perichi Community
San German, Puerto Rico**

Respondent

Docket No. **SDWA-02-2002-8255**

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 Regional Administrator of Region 2 of the United States Environmental Protection Agency ("EPA"), has moved for a Default Order finding the Respondent, Perichi Community, through its representative Israel Justiniano, 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 C.F.R. Part 22, and based upon the record in this matter and the following Findings of Fact, 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 August 30, 2002 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 C.F.R. 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 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 22.27(c). 40 C.F.R. § 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 on September 13, 2002. To date, an Answer has not been filed by the Respondent.

On November 8, 2006, 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 C.F.R. § 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 C.F.R. § 141.2.
2. Respondent is a "supplier of water" who is the owner and/or operator of a "public water system," Perichi Community, located in San German, Puerto Rico, within the meaning of Section 1401(4) and (5) of the SDWA, 42 U.S.C. § 300f(4) and (5), and 40 C.F. R. § 141.2. The Respondent is composed of those community members served by the Perichi Public Water System, and is represented by one of its members, Israel Justiniano.
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 Perichi Public Water System is supplied by a surface water source, and provides piped water for human consumption and regularly 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 C.F.R. § 141.2.

5. 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 C.F.R. 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.
6. 40 C.F.R. 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 C.F.R. § 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 C.F.R. § 141.71(a) and (b) and the disinfection criteria in 40 C.F.R. § 141.72(a).
7. The Respondent is required to filter in accordance with 40 C.F.R. § 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.
8. On March 13, 1996, EPA issued an Administrative Order, Docket No. PWS-PR-AO-369F, 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. In an attempt to achieve compliance, Respondent drilled a well, but the well output that resulted was too low to service the Perichi Community.
9. On August 3, 1999 EPA issued an Amended Administrative Order, placing Respondent on a revised, enforceable schedule to address violations of the filtration requirements or in the alternative requiring elimination of the surface source by August 3, 2001. During this time, the Respondent's efforts to achieve compliance were unsuccessful.
10. Respondent failed to provide the filtration to the Perichi System by the August 3, 2001

deadline, and, by letter dated March 11, 2002, had requested an extension of time to the deadline set forth in the Amended Administrative Order to achieve compliance by drilling another well and eliminating its surface water source.

11. Respondent continues to be in noncompliance and has failed to comply with the filtration requirements specified in 40 C.F.R. Part 141 Subpart H and Section 13 of the 1999 Amended Administrative Order.
12. 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 C.F.R. 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).
13. Respondent was served with a copy of the Complaint and a copy of the Consolidated Rules by certified mail return receipt requested on September 13, 2002. The return receipt is appended to the Motion for Entry of Default as Exhibit 2.
14. Respondent has failed to answer the Complaint.
15. On November 8, 2006, Respondent was served by certified mail return receipt requested with a Motion for Entry of Default.
16. To date, the Respondent has failed to respond to the Motion for Entry of Default.

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 C.F.R. 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 C.F.R. § 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 C.F.R. § 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 C.F.R. §§ 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 C.F.R. § 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)¹ and in accordance with the Agency's Policy on Civil Penalties (#GM-21),² as outlined in the Motion for Entry of Default and Exhibit 3 thereto, the August 21, 2002 memorandum to file entitled *Issuance of Penalty Order to Non-PRASA System PWS-PR-CFP-SDWA-02-2002-8255*. 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.

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

¹ 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.

² 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.

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 1,100 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 March 13, 1996 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. In order to achieve compliance, the Respondent drilled a well, but the well output that resulted was too low to service the community. An Amended Administrative Order was issued on August 3, 1999, granting Respondent an additional two-year period to comply. I note that, during this time, the Respondent made additional efforts to achieve compliance, but all efforts were unsuccessful, and as of the date of the issuance of the Complaint the Respondent remained in noncompliance.
3. Respondent was made aware of the requirements of the Act and the Administrative Orders, yet remained in noncompliance. As set forth herein, Respondent had been responsive but has been unable to comply with the requirements of the Act and the Administrative Orders, and remained in noncompliance.

4. 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 Perichi Community is a non-profit organization, EPA did not assess an amount for economic benefit in calculating its proposed penalty.
5. Respondent collect a maintenance and operation fee to defray the costs to operate the system; therefore, it is in a position to pay the proposed penalty. It appears that the \$500 penalty is a reasonable amount in light of the significant period of noncompliance and the health risks involved.
6. 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 C.F.R. Part 22, including 40 C.F.R. § 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 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

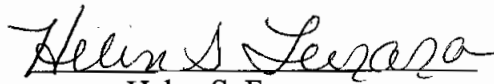
A copy of the payment shall be mailed to:

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: January 11, 2007


Helen S. Ferrara
Presiding Officer