

CERTIFICATE OF SERVICE

I hereby certify that the **Default Order and Initial Decision** by Regional Judicial Officer Helen S. Ferrara in the matter of **Albert Azarian d/b/a Tanama Community, Docket No. SDWA-02-2003-8262**, was served on the parties as indicated below:

Federal Express -

*Nestor Lugo Sanabria
Carretera 526, Km. 8
Adjuntas, Puerto Rico 00601*

*Certified Mail -
Return Receipt Requested*

*Nestor Lugo Sanabria
HC 01 Box 3492
Adjuntas, Puerto Rico 00601*

Federal Express -

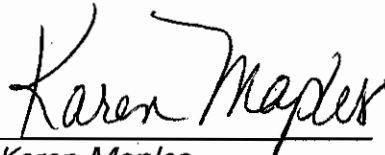
*Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G. Street, N.W.
Washington, D.C. 20005*

Pouch Mail -

*Assistant Administrator for
Enforcement & Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2201A)
Washington, D.C. 20460*

Regular Mail -

*Lourdes del Carmen Rodriguez, Esq.
Office of Regional Counsel
USEPA - Region II
Caribbean Field Division
Centro Europa Building, Suite 417
1492 Ponce de Leon Avenue
San Juan, Puerto Rico 00907*



*Karen Maples
Regional Hearing Clerk
USEPA - Region II*

Dated: April 12, 2006

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 Broadway
New York, NY 10007

RECEIVED
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ENVIR. APPEALS BOARD

In the Matter of:

IN THE MATTER OF:

Tanama Community

Nester Lugo Sanabria
HC 01 Box 3492
Adjuntas, Puerto Rico 00601
PWS-ID No. PR0401164

Respondents.

Docket No. SDWA-02-2003-8262

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 for Region 2 of the United States Environmental Protection Agency ("EPA"), has moved for a Default Order finding the respondent, Tanama Community, through its representative Nester Lugo Sanabria, liable for the violation of an Administrative Order ("AO") 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 filing a Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") on June 2, 2003 against Respondent. In its Complaint, the Complainant alleged that Respondents violated an Administrative Order 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 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.

Service of the Complaint upon Respondent was attempted on June 5, 2003. However, on July 7, 2003, the unclaimed Complaint was returned to Complainant. Thereafter, on September 16, 2003, an EPA employee visited the residence of the Respondent's named representative, Nestor Lugo Sanabria for the purpose of serving the Complaint and delivered a copy of the Complaint, together with other documents. To date, an Answer has not been filed by the Respondent.

On July 12, 2004, Complainant filed a Motion for Entry of Default. It was served on Respondent via certified return receipt requested and by Federal Express. 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" which is an owner and /or operator of a "public water system," Tanama, located at State Road 526 Km 6.4, Adjuntas, 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, composed of community members served by the Tanama Public Water System, is represented by one of its members, Nestor Lugo Sanabria.
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 Tanama 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 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 disinfection criteria as outlined 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 January 12, 1995, EPA issued an Administrative Order, Docket No. PWS-PR-AO-342F 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.

9. Respondent failed to provide the filtration to the Tanama system by the January 12, 1998 deadline ordered in the 1995 Administrative Order.
10. Respondent continues to be in non-compliance and has failed to comply with the filtration requirements specified in 40 C.F.R. Part 141 Subpart H and the 1995 Administrative Order.
11. As set forth above, Complainant found that Respondent has violated the Administrative Order, 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 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).
12. Respondent was served with a copy of the Complaint, a copy of the Consolidated Rules and an Administrative Order (Docket No. SDWA 02-2003-8041) by an employee of Complainant on September 16, 2003; the Declaration of Complainant's employee as to service of the complaint, together with the Certification of Service, is appended to the Motion for Entry of Default as Exhibit 2
13. Respondent has failed to answer the Complaint.
14. On July 12, 2004, Respondent was served by certified mail return receipt requested and Federal Express with a Motion for Entry of Default.
15. 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 an Administrative Order 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. § 1300g-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 June 5, 2003 memorandum to file entitled *Issuance of Penalty Order to Non-PRASA System SDWA-02-2003-8262*. 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 continued failure to comply with the Act and the Administrative Order has placed a population of approximately 35 people at risk of infectious diseases.
2. The Respondent violated the Act and the SWTR by failing to install filtration by June 23, 1993, and has continued to violate the Act and the SWTR for a significant period of time. EPA issued an Administrative Order to Respondent in 1995 requiring compliance with the filtration and disinfection requirements of the SWTR within three years. Respondent never complied with the ordered provisions of the above referenced Administrative Order. Furthermore, from 1995 through 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, the Respondent remained in non-compliance.
3. Respondent was made aware of the requirements of the Act and the SWTR, as well as the deadlines contained in the Administrative Order, and yet willfully remained in noncompliance. The Respondents had an obligation under the law to provide disinfection and filtration to the surface water source to reduce the risk of waterborne disease outbreaks. However, the Tanama Community is a non-profit organization, and the EPA has determined that the Respondent has received no economic benefit from its non-compliance.

4. Respondent is not an organized community. It is not known whether the Respondents collect a maintenance and operation fee to defray the costs to operate the system. Therefore, it appears that the \$500 penalty is a reasonable amount in light of the pattern of non-compliance 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 Order. 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:

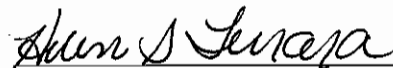
Regional Hearing Clerk
EPA Region 2
290 Broadway, 16th Floor
New York, New York 10007

(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: April 11, 2006



Helen S. Ferrara
Presiding Officer