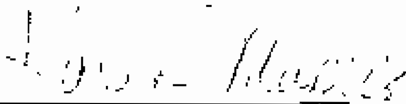
CERTIFICATE OF RESERVICE

I hearby certify that the **Default Order and Initial Decision** by Regional Judicial Officer Helen Ferrara in the matter of **Bosque Toro Negro Community, Docket No. SDWA-02-2003-8263** is being RESERVED on the parties because the certificate of service had the incorrect case name and docket number. This order is being served on the parties as indicated below:

Certified Mail - Return Receipt Requested	Magna Collazo Bosque Toro Negro Community HC 01 Box 3475 Villalba, Puerto Rico 00766
Overnight Mail -	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
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: December 15, 2005

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

In the Matter of:

IN THE MATTER OF:

Bosque Toro Negro Community
Orocovis, Puerto Rico

Magna Collazo
HC 01 Box 3475
Villalba, Puerto Rico 00766
PWS-ID No. PR0455064

Respondents.

Docket No. SDWA-02-2003-8263

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 of Region 2 of the United States Environmental Protection Agency ("EPA"), has moved for a Default Order finding the Respondent, Bosque Toro Negro Community, through its representative Magna Collazo, 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, Discussion 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 Respondent 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 completed no later than June 4, 2003, as indicated by a return receipt, which was signed but not dated.[1] 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 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" which is an owner and /or operator of a "public water system," Bosque Toro Negro, located in Orocovis, 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 Bosque Toro Negro Public Water System, and is represented by one if its members, Magna Collazo.

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

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 Bosque Toro Negro 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 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 January 25, 1995, EPA issued an Administrative Order, Docket No. PWS-PR-AO-311F, to Gil Collazo Ortiz, owner/operator of the Bosque Toro Negro system at that time,

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. Mr. Collazo Ortiz was the representative of the Bosque Toro Negro Community at that time.

9. On September 29, 2000, EPA issued an Amended Administrative Order, Docket No. SDWA-02-2000-8730, to the current community representative of the Bosque Toro Negro Community, Magna Collazo, granting the community an additional period of two years to obtain compliance.

10. Respondent failed to provide the filtration to the Bosque Toro Negro system by the deadline ordered in the 2000 Amended Administrative Order.

11. 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 2000 Amended Administrative Order.

12. 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).

13. Respondent was served with a copy of the Complaint, appended to the Motion for Entry of Default as Exhibit 1, together with a copy of the Consolidated Rules and an

Administrative Order (Docket No. SDWA-02-2003-8042) by certified mail return receipt requested. As discussed in the following section of this Default Order and Initial Decision, the receipt was returned to EPA signed but not dated. In light of the fact that the Complaint was mailed on June 2, 2003, and that EPA received the return receipt with a June 4, 2003 postmark, the assumption on the part of EPA that the Complaint was received by Respondent no later than June 4, 2003, as set forth in its Motion, is reasonable.

14. Respondent has failed to answer the Complaint.

15. On July 12, 2004, Respondent was served by certified mail return receipt requested with a Motion for Entry of Default.

16. As indicated by a return receipt signed by Respondent's representative, Magda Collazo, Respondent received the Motion for Entry of Default on July 13, 2004.

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 person signing for the Respondent did not fill in

the date when signing the return receipt.

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

[2] Although *Katzson Brothers* analyzed the former version of the Consolidated Rules, the minor differences between

service of the Complaint.

The Complainant, in its Motion of Entry of Default at page 4, alleges that service upon the Respondent was completed no later than June 4, 2003, and that an answer was therefore due no later than July 5, 2003. The facts indicate that the Complaint was signed on June 2, 2003 by the Director of the Caribbean Environmental Protection Division for Region 2 of the EPA, and was mailed shortly thereafter. The stamp of the post office, or "postmark," on the return receipt indicating a specific date of June 4, 2003 is clearly visible (Exhibit 2, Motion for Entry of Default). From this, it appears that the Complaint was in fact received by the Respondent no later than June 4, 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 one year 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 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

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the applicable sections of the Consolidated Rules and the former version is insignificant for purposes of the current analysis.

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. § 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 June 5, 2003 memorandum to file entitled *Issuance of Penalty Order to Non-PRASA System SDWA-02-2003-8263*. 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:

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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.

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 60 individuals at risk of infectious diseases.

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 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. An Amended Administrative Order was issued on September 29, 2000, granting Respondent an additional two-year period to comply. 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 Administrative Order, yet willfully remained in noncompliance. From 1995 through 2001, EPA inspected the system and sent compliance letters to the Respondent in an effort to provide compliance assistance.

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. However, the

Bosque Toro Negro Community is a non-profit organization, and the EPA has determined that the Respondent has received no economic benefit from its non-compliance.

5. Respondent is not an organized community. It is not known whether the Respondent collects 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 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

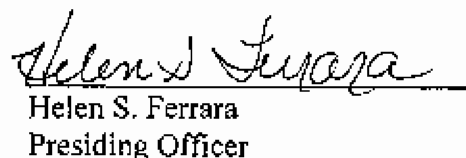
A copy of the payment shall be mailed to:

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: December 13, 2005



Helen S. Ferrara
Presiding Officer