

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II

2007 MAY -9 PM 2:38

REGIONAL HEARING
CLERK

IN THE MATTER OF:

Wyndham El Conquistador Resort & Country
Club; Avenida El Conquistador #1000
Fajardo, Puerto Rico 00738

**Palomino Island Reverse Osmosis Plant
NPDES Permit No. PR0026051**

Respondent.

Docket No. CWA-02-26073409

Proceeding Pursuant Section 309(g)
of the Clean Water Act, 33 U.S.C.
§1319(g) to Assess Class II Civil
Penalty

**COMPLAINT, FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY, AND NOTICE OF
OPPORTUNITY TO REQUEST A HEARING**

I. STATUTORY AUTHORITY

1. This Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act (the "Act"), 33 U.S.C. §1319(g)(2)(B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Caribbean Environmental Protection Division ("CEPD") of EPA, Region 2 ("Complainant").
2. Pursuant to Section 309(g)(2)(B) of the Act, and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("CROP"), 40 Code of Federal Regulations (CFR) Part 22 (July 1, 2001), a copy of which is attached, Complainant hereby requests that the EPA Regional Administrator assess a civil penalty against the Wyndham El Conquistador Resort & Country Club ("Respondent" or "El Conquistador") for discharging without a NPDES permit from the Palomino Reverse Osmosis Plant, ("Palomino RO Plant") in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a).

II. FINDINGS OF VIOLATION

1. El Conquistador is a person within the meaning of Section 502 (5) of the Act, 33 U.S.C. §1362(5).
2. El Conquistador owns and operates the Palomino RO Plant. The Palomino RO Plant is located at Palomino Island Fajardo, Puerto Rico. The El Conquistador is best described by the Standard Industrial Classification Code 7011.
3. The Palomino RO Plant uses an engineering technology to desalinate sea water producing a (brine) wastewater discharge after the process.
4. The Palomino RO Plant discharges pollutants through a point source into the Atlantic Ocean, a water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. §1362. Respondent is subject to the provisions of the Act, 33 U.S.C. §1251 et seq. On January 14, 2004, El Conquistador submitted a NPDES permit application for the Palomino RO Plant.
5. The permitting process was not completed by El Conquistador and up to the date of issuance of this Complaint the NPDES permit has not been issued.
6. Section 301(a) of the Act, 33 U.S.C. §1311(a), provides, in part, that "except as in compliance with this Section and Sections ...402, and 404 of the Act, the unauthorized discharge of any pollutant by any person shall be unlawful."
7. On December 8, 2004, an inspector from the Puerto Rico Environmental Quality Board (PREQB) visited the facility in order to verify the information in the NPDES permit application submitted by El Conquistador on January 14, 2004. At the time of the visit the PREQB inspector informed El Conquistador representatives that the ongoing discharges from the Palomino RO Plant were illegal discharges in violation of the Clean Water Act.
8. On April 26, 2006, a duly authorized EPA inspector conducted a Reconnaissance Inspection ("RI") of the Palomino RO Plant. The purpose of the RI was to evaluate the facility's compliance with the NPDES permit application regulations and the Clean Water Act. At the time of the RI the Palomino RO Plant was not in operation, nevertheless, EPA concluded from the inspector's observations and PREQB's information, that El Conquistador had been illegally discharging by operating the Palomino RO Plant, at least, from January 14, 2004 to April 6, 2006, when the RO Plant was shut down, for a total of 814 days.
9. As described in the above paragraphs, Respondent violated Section 301(a) of the Act, 33 U.S.C. §1311(a), by: discharging without a NPDES permit from January 14, 2004 to April 6, 2006.
10. EPA has notified the Commonwealth of Puerto Rico regarding this proposed action

by mailing a copy of this Complaint and Notice and offering an opportunity for the Commonwealth to confer with EPA on the proposed penalty assessment.

III. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. §1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a penalty of **\$85,000**. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). EPA has taken into account the nature, circumstances, extent and gravity of the violations, and Respondent's prior compliance history, degree of culpability, economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty.

Based on the Findings set forth above, Respondent has been found to have violated the NPDES regulations and therefore, the Act, from January 14, 2004 to April 6, 2006, for a total of 814 days. Respondent obtained an economic benefit as a result of its non compliance. Respondent has no prior history of violations under the NPDES program. Respondent is responsible for the violations.

IV. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, 40 CFR Part 22. A copy of these rules accompanies this Complaint.

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint, and such Answer must be filed within thirty (30) days after service of the Complaint. 40 CFR §22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 CFR §22.15(a). Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which

Respondent has any knowledge. 40 CFR §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so state in its Answer, the allegation is deemed denied. 40 CFR §22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intend to place at issue in the proceeding), (3) the basis for opposing the proposed relief, and (4) whether Respondent requests a hearing. 40 CFR §22.15(b).

Respondent's failure to affirmatively raise in the Answer facts that constitute, or that might constitute, the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. 40 CFR §22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 CFR §22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 CFR §22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 CFR §22.21(d). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§551-59, and the procedures set forth in Subpart D of 40 CFR Part 22.

Should Respondent request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. §1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondent not request a hearing, EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order.

C. Failure To Answer

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 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 a 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). 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.

V. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 CFR §22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that they believe is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business, and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 CFR §22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to the EPA attorney named in Section VII, Paragraph 2, below.

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 CFR §22.18(b)(1). Respondent's request for a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 CFR §22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 CFR §22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement. 40 CFR §22.18(b)(2). In accepting the Consent Agreement, Respondent waives its right to contest the allegations in the Complaint and waive their right to appeal the Final Order that is to accompany the Consent

Agreement. 40 CFR §22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 CFR §22.18(b)(3).

Respondent entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VI. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address noted above), a copy of the check or other instrument of payment. 40 CFR §22.18(a). A copy of the check or other instrument of payment should be provided to the EPA attorney named in Section VII, Paragraph 2, below. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "**Treasurer, United States of America**," in the full amount of the penalty assessed in this Complaint to the following addressee:

**Regional Hearing Clerk
U. S. Environmental Protection Agency, Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251**

Pursuant to 40 CFR §22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within thirty (30) days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order in accordance with 40 CFR §22.18(a)(3). In accordance with 40 CFR §22.45(c)(3), no Final Order shall be issued until at least ten (10) days after the close of the comment period on this Complaint. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 CFR §22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VII. FILING OF DOCUMENTS

1. The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, New York 10007


2. A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Silvia Carreño, Esq.
U.S. Environmental Protection Agency, Region 2
1492 Ponce de Leon Ave Suite 417
San Juan, Puerto Rico 00907-1866
Tel.: (787) 977- 5818
Fax: (787) 729-7748

VIII. General Provisions

1. Respondent has a right to be represented by an attorney at any stage of these proceedings.
2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated thereunder, or any applicable permit.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondent's continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a), for the violations alleged herein.

ISSUED THIS 3rd DAY OF MAY, 2007.


Carl-Axel P. Soderberg, P.E., Director
Caribbean Environmental Protection Division
U. S. Environmental Protection Agency, Region 2
1492 Ponce de Leon Ave, Suite 417
San Juan, Puerto Rico 00907-1866

**To: Ing. Gerardo Ortiz
Engineering Director
Wyndham El Conquistador Resort & Country Club
Avenida El Conquistador #1000
Fajardo, Puerto Rico 00738**

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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**Palomino Island Reverse Osmosis Plant
NPDES Permit No. PR0026051**

Respondent

Docket No. CWA-02-2007-3409

Proceeding Pursuant Section 309(g)
of the Clean Water Act, 33 U.S.C.
§1319(g) to Assess Class II Civil
Penalty

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I caused to be mailed, by certified mail, return receipt requested, a copy of the foregoing "ADMINISTRATIVE COMPLAINT" and a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits," 40 CFR Part 22 (July 1, 2001) to the following person at the address listed below:

**Ing. Gerardo Ortiz
Engineering Director
Wyndham El Conquistador Resort & Country Club
Avenida El Conquistador #1000
Fajardo, Puerto Rico 00738**

I mailed the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Date:

May 7, 2007


San Juan, Puerto Rico