

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REGION 2  
2009 APR -1 AM 11:07  
REGIONAL HEARING  
CLERK

In the Matter of:

**MUNICIPALITY OF LOÍZA**  
P. O. Box 508  
Loíza, Puerto Rico 00772-0508

**RESPONDENT**

Proceeding pursuant to Section 309(g)(2)(B) of  
the Clean Water Act, 33 U.S.C. § 1319(g)

**PROCEEDING TO ASSESS A  
CLASS II CIVIL PENALTY**

**DOCKET NUMBER  
CWA-02-2009-3457**

**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 Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative 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" or "CWA"), 33 U.S.C. § 1319(g)(2)(B). The Administrator of EPA 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 of EPA, Region 2 ("Complainant").
2. Pursuant to Section 309(g)(2)(A) 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 CFR § 22, a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against the Municipality of Loíza ("Respondent"), as a result of Complainant's determination that the Respondent is in violation of Sections 402 and 308 of the Act, 33 U.S.C. §§ 1318 and 1342, for its failure to apply for a National Pollutant Discharge Elimination System (NPDES) permit for the discharges of pollutants from the Loíza municipal separate storm sewer system into waters of the United States.

3. 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 discharge of any pollutant by any person shall be unlawful."
4. Section 308 of the Act, 33 U.S.C. § 1318, provides, in relevant part, that the Administrator of EPA may require the owner or operator of any point source to, among other things: maintain such records; make such reports; install, use and monitor such equipment; sample such effluents; and provide such other information as may reasonably be required in order to carry out Section 402 of the Act, 33 U.S.C. § 1342.
5. Section 402 of the Act, 33 U.S.C. § 1342, authorizes the Administrator of EPA to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of any pollutant, or combination of pollutants, subject to certain requirements of the Act and such conditions as the Administrator determines are necessary.
6. The Act and its implementing regulations contain the following definitions:
  - a) "Navigable waters" means the waters of the United States and territorial seas, pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7).
  - b) "Pollutant" means, but is not limited to, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge, and industrial, municipal and agricultural waste discharged into water, pursuant to Section 502(6) of the Act, 33 U.S.C. § 1362(6).
  - c) "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged, ..." pursuant to Section 502(14) of the Act, 33 U.S.C. § 1362(14).
  - d) "Discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, pursuant to Section 502(12) of the Act, 33 U.S.C. § 1362(12).
  - e) "Person" means, but is not limited to, an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. § 1362(5).
  - f) "Owner or Operator" means the owner or operator of any facility or activity subject to regulation under the NPDES program.

- g) "Municipality" means, among other things, a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or a designated and approved management agency under Section 208 of the Act.
- h) "NPDES" means a National Pollutant Discharge Elimination System pursuant to Section 402 of the Act, 33 U.S.C. § 1342.
- i) "Municipal separate storm sewer" means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)..., pursuant to 40 CFR § 122.26(b)(8).
- j) "Small municipal separate storm sewer system" means all separate storm sewers, pursuant to 40 CFR § 122.26(b)(16), that are:
  - i. Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the United States.
  - ii. Not defined as "large" or "medium" municipal separate storm sewers pursuant to paragraphs 40 CFR §§ 122.26(b)(4) and (b)(7), or designated under paragraph 40 CFR § 122.26(a)(1)(v).
  - iii. This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

## **II. JURISDICTIONAL BASIS**

- 7. Respondent is a person pursuant to Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
- 8. Respondent owns and operates a Small Municipal Separate Storm Sewer System ("Small MS4").
- 9. The MS4 is a point source pursuant to 502(14) of the Act, 33 U.S.C. § 1362(14).

10. Respondent's MS4 is located in an urbanized area of Loíza, Puerto Rico.
11. The MS4 discharges into Río Grande de Loíza.
12. Río Grande de Loíza is a water of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7).
13. Section 402(p)(6) of the Act, 33 U.S.C. § 1342(p)(6), authorized EPA to issue storm water regulations and permits to Small MS4s.
14. On December 9, 1999, EPA promulgated the Phase II storm water regulations under Section 402(p)(6) of the Act.
15. EPA promulgated regulations at 40 CFR §§ 122.26(a)(9)(ii), 122.26(b)(16) and 122.33, which require certain municipalities to apply for and obtain a NPDES permit for the discharges from Small MS4s.
16. Regulations found at 40 CFR §§ 122.26(e)(9) and 122.33 require Respondent to submit a permit application before March 10, 2003.
17. On November 6, 2006, EPA Region 2 issued and published the NPDES General Permit for Discharges from Small MS4s (the "permit").
18. The permit became effective on November 6, 2006, and will expire on November 6, 2011.
19. The permit established application requirements through a Notice of Intent ("NOI") filing process and application deadlines.
20. Municipalities who intended to obtain coverage should have submitted the NOI form on or before February 5, 2007.
21. The permit also established that permittees must submit to EPA a hard and electronic copy of the Storm Water Management Program ("SWMP") by August 6, 2007.

### **III. FINDINGS OF VIOLATIONS**

22. Complainant re-alleges and incorporates by reference paragraphs 1-21 above.
23. By letter dated February 12, 2003, EPA informed Respondent of the NPDES storm water permit application requirements for Small MS4s.
24. On July 10, 2007, EPA sent a Request for Information letter ("RFI") to Respondent pursuant to Section 308 of the CWA, 33 U.S.C. § 1318.

25. The RFI ordered Respondent to produce evidence that it had submitted a NOI for coverage under the permit.
26. Respondent acknowledged receipt of the July 10, 2007 letter by United States Post Office return receipt dated July 17, 2007.
27. Respondent failed to produce evidence that it had submitted a NOI.
28. Respondent failed to apply for a NPDES permit for its storm water discharges from the MS4s into waters of the United States, therefore, the Respondent has been found to have violated the Act.
29. Based on Respondent's failure to submit a NOI or any other NPDES permit application, EPA issued to Respondent an Administrative Compliance Order ("ACO"), Docket Number CWA-02-2008-3119, dated February 16, 2008.
30. Respondent acknowledged receipt of the ACO by United States Post Office return receipt dated February 25, 2008, and the acknowledgement of receipt of the ACO, by the Municipality Public Works Director, José Miguel Figueroa Rodríguez, dated March 5, 2008.
31. The ACO included Ordered Provisions which required Respondent to among others: (a) submit a NOI within ten (10) days from the receipt of the Order [March 6, 2008]; (b) develop, submit and implement a SWMP within ninety five (95) calendar days from the receipt of the Order [May 30, 2008]; and (c) submit a compliance cost report [June 24, 2008]. Respondent also failed to comply with the Ordered Provisions of the ACO.
32. Based on the Findings in Paragraph 23-31 above, Respondent violated Sections 308 and 402 of the Act, 33 U.S.C. §§ 1318 and 1342, by failing to apply for a NPDES permit.

#### **IV. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY**

33. 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 **\$47,409**.
34. 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). They are: the nature, circumstances, extent and gravity of the violation (or 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. Such determination is found in the March 23, 2009 memorandum prepared for this case.

35. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondent's receipt of this Notice unless Respondent, within that time, files an Answer to the Complaint and requests a Hearing on this Notice pursuant to the following section.

**V. PROCEDURES GOVERNING THIS ADMINISTRATIVE ACTION**

36. 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**

37. 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 pursuant to 40 CFR § 22.15(a).
38. The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 17th floor  
New York, New York 10007-1866**

39. Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action pursuant to 40 CFR § 22.15(a).
40. 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 the Respondent has any knowledge pursuant to 40 CFR § 22.15(b).
41. Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied pursuant to 40 CFR § 22.15(b).

42. The Answer shall also set forth:
- a) the circumstances or arguments that are alleged to constitute the grounds of defense,
  - b) the facts that Respondent disputes (and thus intend to place at issue in the proceeding),
  - c) the basis for opposing the proposed relief, and
  - d) whether Respondent requests a Hearing pursuant to 40 CFR § 22.15(b).
43. Respondent's failure to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of a 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**

44. If requested by Respondent in its Answer, a Hearing upon the issues raised by the Complaint and Answer may be held pursuant to 40 CFR § 22.15(c).
45. 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 pursuant to 40 CFR § 22.15(c).
46. Any Hearing in this proceeding will be held at a location determined in accordance with 40 CFR § 22.21(d).
47. 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.
48. 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.
49. 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.
50. 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**

51. If Respondent fails in any Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation pursuant to 40 CFR § 22.15(d).
52. 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 pursuant to 40 CFR § 22.17(a).
53. 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 pursuant to 40 CFR § 22.17(a).
54. 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).
55. 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) and to 40 CFR § 22.17(d).
56. 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.

### **VI. INFORMAL SETTLEMENT CONFERENCE**

57. 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 pursuant to 40 CFR § 22.18(b).
58. 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 is believed to be relevant to the disposition of this matter, including:
  - a) actions Respondent has taken to correct any or all of the violations herein alleged,
  - b) any information relevant to Complainant's calculation of the proposed penalty,
  - c) the effect the proposed penalty would have on Respondent's ability to continue in business, and/or
  - d) any other special facts or circumstances Respondent wishes to raise.



59. 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.
60. 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 82 below.
61. The parties may engage in settlement discussions irrespective of whether Respondent has requested a Hearing pursuant to 40 CFR § 22.18(b)(1).
62. Respondent's requesting a formal Hearing does not prevent Respondent from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure.
63. 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).
64. 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.
65. No penalty reduction, however, will be made simply because an informal settlement conference is held.
66. Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement pursuant to 40 CFR § 22.18(b)(2).
67. In accepting the Consent Agreement, Respondent waives any right to contest the allegations in the Complaint and waive any right to appeal the Final Order that is to accompany the Consent Agreement pursuant to 40 CFR § 22.18(b)(2).
68. In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed pursuant to 40 CFR § 22.18(b)(3).
69. Entering into a settlement through the signing of such Consent Agreement and complying with the terms and conditions set forth in such Consent Agreement and Final Order terminates this administrative litigation and these civil proceedings against Respondent (note that a new enforcement action may be initiated based on continued non-compliance).

70. Entering into a settlement agreement 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. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE**

71. Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty (**\$47,409**) within thirty (30) calendar 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 pursuant to 40 CFR § 22.18(a).
72. A copy of the check or other instrument of payment should be provided to the EPA attorney named in Section VII Paragraph 82 below.
73. 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:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P. O. Box 979077  
St. Louis, MO 63197-9000

74. 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).
75. In accordance with 40 CFR § 22.45(c)(3), no Final Order shall issue until at least ten (10) days after the close of the comment period on this Complaint.
76. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint (note that a new enforcement action may be initiated based on continued non-compliance).
77. 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.

78. 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.

**VIII. FILING OF DOCUMENTS**

79. 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 10007-1866

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


Silvia Carreño, Esq.  
Team Leader  
Caribbean Team  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
1492 Ponce de Leon Avenue, Suite 417  
San Juan, PR 00907  
Telephone (787) 977-5818  
Fax: (787) 729-7748

**IX. GENERAL PROVISIONS**

81. Respondent has a right to be represented by an attorney at any stage of these proceedings.
82. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated thereunder, or any applicable permit.

83. 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 30<sup>th</sup> DAY OF March, 2009.

  
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Carl-Axel P. Soderberg  
Director, Caribbean Environmental Protection Division  
U. S. Environmental Protection Agency - Region 2  
Centro Europa Building, Suite 417  
1492 Ponce de León Avenue  
San Juan, Puerto Rico 00907

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2**

<b>In the Matter of</b>  <b>MUNICIPALITY OF LOIZA</b> P.O. Box 508 Loiza, Puerto Rico 00772-0508  <b>Respondent</b>	<b>Docket No. CWA-02-2009-3457</b> Proceeding to Assess Class II Civil Penalty under Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)
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**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 and the Revocation/Termination or Suspension of Permits", 40 C.F.R. Part 22 , to the following person at the address listed below:

**Honorable Eddie M. Manzo Fuentes**  
**Mayor**  
**Municipality of Loíza**  
**P.O. Box 508**  
**Loíza, Puerto Rico 00772-0508**

I sent the original and a copy of the foregoing Complaint for filing, to:

**Karen Maples**  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, R 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866.

Date: 3/31/09  
San Juan, Puerto Rico

Aileen Sanchez  
Aileen Sanchez