UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

In the Matter of

A.B.E.F. Development Corp. and
Herminio Cotto Construction, Inc.

Respondents

Docket No. CWA-02-2010-3465

ORDER ON DEFAULT AS TO LIABILITY

This is a proceeding under Section 309(g)(2)(B) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g)(2)(B), and the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment and Revocation or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22. This proceeding was initiated by a Complaint filed by the Director, Caribbean Environmental Protection Division ("Complainant") against A.B.E.F. Development Corp. and Herminio Cotto Construction, Inc. ("Respondents") for violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

On April 18, 2010, Complainant filed a Motion for Entry of Default Against Respondent Herminio Cotto Construction, Corp. ("Motion" or "motion for default order on liability") finding Respondent Herminio Cotto Construction, Inc. ("Cotto Construction" or "Respondent") liable for the violations alleged in the Complaint. To date, Cotto Construction has not replied to this Motion. A party may be found to be in default, after motion, upon failure to file a timely answer to a complaint. Default by Respondent constitutes 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). Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, the record in this matter and the following Findings of Fact and Conclusions of Law, Complainant's motion for default order on liability is hereby granted.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, the undersigned, as Presiding Officer in this matter, makes the following findings of fact:

1. A.B.E.F. Development Corp. ("ABEF") is a for profit corporation organized under the laws of Puerto Rico.

2. ABEF is a person within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

3. ABEF is the owner and operator of "Extensión Praderas de Ceiba Norte" (the Project), as defined in 40 C.F.R. § 122.2.

4. Cotto Construction is a for profit corporation organized under the laws of Puerto Rico.

5. Cotto Construction is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

6. Cotto Construction is the operator of the Project, as defined in 40 C.F.R. § 122.2.

7. The Project is located at State Road PR-935, Km. 3.1, in Juncos, Puerto Rico.

8. On or about October 16, 2008, ABEF hired Cotto Construction, a construction company, to conduct clearing, grading and excavating activities.

9. The construction activities associated with the Project consist of clearing, grading and the construction of 224 residential units.

10. Cotto Construction submitted an incomplete Notice of Intent ("NOI") to EPA on September 2, 2008, seeking coverage under the Construction General Permit ("CGP").

11. According to the NOI submitted by Cotto Construction on May 11, 2009, the Project impacted a total area of 26.50 acres.

12. According to the NOI submitted by Cotto Construction on May 11, 2009, the Project start date was February 2, 2009.

13. Quebrada Ceiba is a tributary of the Río Gurabo, which, in turn, is a tributary of the Río Grande de Loíza.

14. According to blueprints developed for the Project in December 2007, the Project discharges at "Quebrada Ceiba" in 5 distinct points.

15. The Project discharges pollutants into "Quebrada Ceiba."

16. The Quebrada Ceiba, the Rio Gurabo, and the Rio Grande de Loiza, are waters of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7).

17. The Project is a "point source" pursuant to Section 502(14) of the Act, 33 U.S.C. § 1362(14).

18. The Administrator of EPA promulgated regulations, which require operators of construction activities to apply for and obtain National Pollutant Discharge Elimination System ("NPDES") permit coverage for storm water discharges, pursuant to 40 C.F.R. §§ 122.21, 122.26(b) and 122.26(e).

19. The NPDES storm water permit application regulations require operators of construction sites to submit an individual permit application no later than ninety (90) days before the date on which construction is to commence, unless the operators obtain authorization under an NPDES storm water general permit for construction activities, pursuant to 40 C.F.R. § 122.21.

20. According to the 2008 CGP, prior to commencement of construction activities of a new project, the permittee must submit a complete and accurate NOI and wait for EPA to authorize the discharge.

21. The earth movement activities at the Project are covered by the NPDES storm water regulations for construction activities, pursuant to 40 C.F.R. § 22.26(b)(14)(x).

22. Respondents were required to apply for and obtain an NPDES permit for all the discharges associated with industrial activity from their construction activities at the Project into waters of the United States, pursuant to Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and 40 C.F.R. §§ 122.21 and 122.26.

23. Based on the paragraphs above, Respondents are subject to the Provisions of the Act.

24. On April 8, 2009, EPA enforcement officers, upon presentation of credentials to ABEF's representatives, performed a Compliance Evaluation Inspection ("CEI") of the Project.

25. The findings of the CEI were included in the Inspection Report dated June 24, 2009, and included as Attachment 1 to the Complaint.

26. The findings of the CEI revealed the following:

    a. Respondents operated the Project without applying for an NPDES storm water permit.

    b. The Storm Water Pollution Prevention Plan ("SWPPP") developed for the Project, dated August 18, 2008, was incomplete and did not comply with the minimum requirements of the 2008 CGP.

    c. The Project lacked implementation and maintenance of erosion and sediment controls.

    d. The Project was discharging pollutants into waters of the United States.

27. Based on the findings of the CEI, EPA found that Respondents were in violation of the CWA and the 2008 CGP, and issued an Administrative Compliance Order ("ACO"), Docket Number CWA-02-2009-3132, against Respondents on June 26, 2009.

28. The ACO incorporated findings of violation of the CEI, and ordered Respondents to:

    a. cease and desist from discharging storm water runoff from the project into Quebrada Ceiba;

    b. immediately cease and desist all clearing, grading and excavation activities at the Project;

    c. provide temporary stabilization to areas where clearing, grading and excavation activities had temporarily ceased;

    d. provide final stabilization to areas where clearing, grading and excavation activities will no longer be performed;

e. construct and install Best Management Practices ("BMPs");

f. provide maintenance for the existing and future BMPs;

g. install and maintain sediment and erosion controls required by EQB, provided that a written notification is submitted no later than 5 calendar days before the commencement of such activity. Such notification shall include a description and itinerary of implementation of the activities to be undertaken;

h. amend the SWPPP to comply with the terms and requirements of the Permit and address the findings documented in the Inspection Report, and submit the amended SWPPP to EPA for review by June 24, 2009; and

i. submit a Compliance Plan to comply with the requirements of the Permit and the Act.

29. On May 11, 2009, Cotto Construction submitted a NOI to seek coverage under the 2008 CGP.

30. By letter dated May 11, 2009, EPA acknowledged receipt of Cotto Construction's NOI and informed that its coverage under the 2008 CGP would begin at the conclusion of the seven-day waiting period, on May 18, 2009.

31. Cotto Construction's 2008 CGP Tracking Number is PRR10BN72.

32. On July 14, 2009, ABEF submitted a NOI to seek coverage under the 2008 CGP.

33. By letter dated July 14, 2009, EPA acknowledged receipt of ABEF's NOI and informed Respondent that its coverage under the 2008 CGP would begin at the conclusion of the seven-day waiting period, on July 21, 2009.

34. ABEF's 2008 Permit Tracking Number is PRR10BO92.

35. By July 2009, both Respondents had coverage under the 2008 CGP.

36. On September 18, 2009, the amended SWPPP was submitted to EPA offices.

37. By letter dated October 26, 2009, ABEF's representative Guillermo Burgos-Amaral informed EPA that on August 24, 2009, Respondents had ceased and desisted from discharging storm water runoff from the Project into waters of the United States.

38. On November 24, 2009, EPA Enforcement Officers conducted a Follow up Inspection, in order to ascertain compliance with the ACO.

39. During the Follow up Inspection, EPA observed that construction activities continued to be performed and that most of the houses had been constructed. It was, therefore, evident that Respondents failed to comply with the requirements of the ACO.

40. During the Follow up Inspection, Mr. Burgos (Mr. Guillermo Burgos-Amaral's father) stated that the Project had been detained approximately 2 months, around the month of August, because of financing problems.

41. During the Follow up Inspection, EPA Enforcement Officers inspected the BMPs implemented by Respondents.

42. The findings of the Follow up Inspection revealed that:

    a. construction activity was being performed and that the houses were already built, evidencing noncompliance with the provisions of the ACO;

    b. the concrete washout was not properly constructed; and

    c. the inlet protections showed lack of maintenance.

43. On December 2, 2009, Respondents sent Complainant an Inspection Report prepared by Inspector Guillermo Burgos-Amaral, in which Respondents addressed the observations made during the Follow up Inspection and brought evidence of the measures taken to cure said deficiencies.

44. On December 8, 2009, Complainant issued a letter notifying Respondents that the ACO was being closed, based on Respondents' compliance with the Ordered Provisions of the ACO.

45. Respondents failed to submit a NPDES permit application to discharge storm water associated with industrial activities from construction activities at the Project into Quebrada Ceiba, in violation of Sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p).

46. Respondents discharged pollutants from the Project into waters of the United States without NPDES permit coverage, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

47. Respondents did not post a sign or other notice at the Project concerning the NOI and did not maintain a SWPPP available at the site for EPA review and copying at the time of the CEI as required by Section 5.11 of the 2008 CGP.

48. Respondents did not prepare a complete SWPPP, in order to provide storm water pollution prevention for the Project, as required under Part 5 of the 2008 CGP. The SWPPP remained incomplete until September 18, 2009, on which date the Respondents submitted a complete SWPPP.

49. Respondents did not adequately implement the SWPPP at the Project, as required under Part 5 of the 2008 CGP, until September 18, 2009.

50. On September 29, 2010, and pursuant to 40 C.F.R. §22.5(b)(1), Complainant mailed to Respondent, by certified mail, return receipt requested, a true and correct copy of the Administrative Complaint ("the Complaint").

51. 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, proposed to assess a penalty of **$58,765.00** for unlawful discharge of pollutants into navigable waters without authorization by a NPDES permit in violation of Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

52. The Complaint explicitly stated that if Respondents wished to avoid being found in default, Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk no later than thirty (30) days from the date of receipt of this Complaint. EPA, Region 2 may make a motion pursuant to § 22.17 of the Proposed Consolidated Rules of Practice seeking a default order thirty (30) days after Respondents' receipt of the Complaint unless Respondents file an Answer within that time. Default by the Respondents constitutes admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations. If a default order is entered, the proposed penalty may be assessed and the proposed compliance measures may be required, without further proceedings.

53. A Domestic Return Receipt, signed by "Eng. Burgos", indicated that the Complaint was received by Respondent Cotto Construction on October 8, 2010.

54. To date, the Respondent Cotto Construction has not provided EPA with an Answer to the Complaint in this matter or submitted payment of the civil penalty proposed in the Complaint.

55. According to the Motion filed by Complainant, Mr. Burgos, who signed the Domestic Return Receipt, participated in a January 20, 2011 meeting of representatives of Respondent ABEF and Complainant to address matters raised in the Complaint.

56. At that meeting, Complainant states that it provided Mr. Burgos with a detailed explanation of Respondent Cotto Construction's duty to answer the Complaint, and EPA's willingness to meet with Cotto Construction's representatives in a timely manner.

57. In addition, Mr. Burgos, as well as ABEF's representatives at that meeting, Louis Rosado and Jorge Figueroa, stated that they would communicate Complainant's message directly to representatives of Respondent Cotto Construction.

58. On April 18, 2011, and pursuant to 40 C.F.R. § 22.5(b)(1), Respondent was served, by certified mail, return receipt requested, with a Motion for default order on liability.

59. To date, the Respondent has not filed a response to the Motion.

DISCUSSION

Before proceeding to the findings of a violation and appropriate penalty, 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 Respondent Cotto Construction 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 consider the following facts: 1) Mr. Burgos, rather than Herminio Cotto, signed for Cotto Construction; and 2) Mr. Burgos did not include the date when signing the return receipt.

Rule 4(d) of the Federal Rules of Civil Procedure ("FRCP") appears to require personal delivery of a Complaint, but the FRCP are not binding on administrative agencies. *See Hess & Clark, Division of Rhodia, Inc. v. FDA*, 495 F.2d 975, 984 (D.C.Cir. 1974). Administrative 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. United States Environmental Protection Agency*, 839

F.2d 1396, 1399 (10th Cir. 1988).[1] 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,* 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, 40 CFR Part 22, provide that:

> Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. 40 CFR § 22.5(b)(1).

In the instant case, Respondent is a corporation organized under the laws of Puerto Rico. As to corporations, the Consolidated Rules provide:

> Where respondent is a domestic or foreign corporation...complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or state law to receive service of process. 40 C.F.R. § 22.5(b)(1)(ii)(A).

The term "representative" as used in section 22.5(b)(1) of the Consolidated Rules, as cited above, is to be construed broadly and with flexibility, and is not limited to an officer, partner, agent or comparable relationship when serving a corporation. *See Katzson Bros., Inc. v. United States. Environmental Protection Agency*, 839 F.2d 1396, 1399 (10th Cir.1988). As stated by the 10th Circuit,

> We believe the relevant sections of EPA's Consolidated Rules do not require direct personal service. It is undisputed that EPA served the complaint by certified mail, return receipt requested, and addressed to Seymour Katzson. Service to a representative encompasses a personal secretary, such as Ms. Rudisell,

[1] Although *Katzson Brothers* analyzed the former version of the Consolidated Rules, the minor differences between the applicable sections of the Consolidated Rules and the former version is insignificant for purposes of the current analysis.

> who regularly receives and signs for certified mail. If "representative" was intended to be read narrowly, to include only officers, partners and agents, it would have been further qualified to indicate the specific classes of persons mentioned in the second section. *Katzson Bros., Inc.,* 839 F.2d at 1399.

As stated by the 10th Circuit in *Katzson Bros., Inc. v. U.S. EPA*, 839 F.2d 1396 (10th Cir. 1988), the Consolidated Rules do not require direct, personal service of the named Respondent or, in the case of a corporation, an officer, partner, agent, etc.; the letter needs only to be addressed to an officer, partner, agent, etc.

A "representative" may be someone who routinely receives and/or signs for mail, such as a personal secretary or a person who signs a certified mail receipt card and picks up mail at respondent's post office box. *In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 EPA RJO Lexis 211, 2000 WL 1660913 (April 4, 2000).

Where the Consolidated Rules do seek to require actual delivery to a specific person, they clearly set forth this requirement. *See Katzson Bros., Inc.*, 839 F.2d 1396 (10th Cir. 1988). By providing that the complaint be addressed to the Respondent (or, in the case of a corporation, an officer, agent, etc.) the Consolidated Rules ensure that the representative who actually receives the mail will know to whom it should be delivered.

The 10th Circuit, in addressing the adequacy of service upon a corporation under the previous version of 40 CFR § 22.5(b)(1)(ii), contrasted regulatory provisions mandating actual delivery to a specific person as follows:

> Furthermore, where the Consolidated Rules seek to require actual delivery, they quite clearly use the appropriate language See, e.g., 40 CFR 22.5(b)(1)(iv)(A) (service upon a state or a local government shall be accomplished "by delivering a copy of the complaint to the chief executive officer therefore"). The plain language of the second section, on the other hand, indicates that when service is made by certified mail, the letter need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual. This provision ensures that the representative who actually receives the mail will know to whom it should be delivered. Any other interpretation would severely hinder service of process on corporations by certified mail, since

> the postal service employee would have to wait on the corporation's premises until the officer, partner or agent could sign the return receipt. *Katzson Bros., Inc.,* 839 F.2d 1at 1399.

Although, as stated above, the court in *Katzson Bros., Inc.* was discussing service of process on a corporation under the earlier version of Part 22, the reasoning therein could be applied to the current version of Part 22 which similarly uses the word "serve" rather than "deliver" when addressing service upon an a corporation,

The Respondent has not challenged the service of the Complaint as inadequate, nor has the Respondent denied that it actually received the documents served. In any case, due process does not require actual notice; due process requirements are satisfied if the agency employs a procedure reasonably calculated to achieve notice. *Katzson Bros., Inc., 839* F.2d at 1400; *In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 WL 1660913 (EPA Region VI 2000). Under this standard, the proper inquiry is whether the Complaint was sufficiently directed at the respondent (or in the cases of a corporation, an officer, agent, etc.) in order that the representative who actually receives the mail will know to whom it should be delivered. *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 (February 6, 2002); *In the Matter of Medzam, Ltd.*, Docket No. IF&R II-470-C, 1992 EPA App. Lexis 1 (July 20, 1992).

The first issue as to the adequacy of service in this case arises because the person signing the return receipt, Mr. Burgos, was not the individual whose name appeared on the address above the name and address of the Respondent Cotto Construction, and he not indicate his relationship either to the designated representative, Herminio Cotto, or Cotto Construction when signing the return receipt. Based on the discussion herein, I believe that it is only necessary for me to determine whether the individual who accepted delivery, Mr. Burgos, is "authorized to receive service on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i).

Complainant's Motion states the following: the Complaint was sent by certified mail, return receipt requested, and directed to Mr. Cotto at Cotto Construction's post office box; EPA did receive the return receipt back at their offices by October 8, 2010; and the Respondent never replied either to the Complaint or the Motion for Entry of Default. In addition, based on information contained in Complainant's Motion, Mr. Burgos is obviously involved with the project that is the subject of this enforcement action, and was present at a meeting to discuss the complaint brought against Respondents Cotto Construction and ABEF. Moreover, at that meeting, the Complainant's representatives gave a detailed explanation of Cotto Construction's obligation to answer the Complaint, and expressed interest in meeting with Cotto

Construction's representatives as soon as possible. Mr. Burgos, as well as representatives of ABEF that were present at the meeting, represented that they would communicate the Complainant's message to representatives of Cotto Construction

Although Herminio Cotto did not sign for the Complaint, the Complaint was properly addressed to him as the named representative of the Respondent Cotto Construction. Similar service has been upheld in earlier decisions.

For example, in *In the Matter of C.W. Smith, Grady Smith, & Smith's Lake Corporation*, Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7 (February 6, 2002), although the Administrative Law Judge noted that the fact that there was actual service obviates any failure of Complainant to strictly comply with the service of process procedures of the Consolidated Rules, service of process on an unrelated third party of the respondent at the address which respondent provided was deemed sufficient as long as the Complaint was properly addressed to the respondent's attention at the correct address. Similarly, where a complaint was addressed to respondent's post office box address and a person other than the respondent signed for and received the Complaint, service was held to be proper since that person had the apparent authority to collect the mail. *In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 WL 1660913 (EPA Region VI 2000).

In this case, Mr. Burgos had access to Cotto Construction's post office box, and it is reasonable to assume that Mr. Burgos was authorized to receive documents on Cotto Corporation's behalf. Service in this instance, accepted by Mr. Burgos at the post off box address supplied by Herminio Cotto, appears sufficient in light of the standards established by due process and the Consolidated Rules, discussed herein.

By addressing the Complaint to the named representative of Cotto Construction and delivering it by certified mail, return receipt requested, to the address of Cotto Construction, the Complainant properly directed the Complaint to Cotto Construction. I find that the Complainant did utilize a procedure calculated to achieve notice to the Respondent and that the Complainant was reasonable in assuming that the person signing for Cotto Construction's agent would know to whom to direct the Complaint.

The second issue impacting the service of the Complaint in this matter is presented by the fact that the copy of the return receipt included as Exhibit A to the Motion indicates that Mr. Burgos signed the receipt, but did not indicate the date of signature. However, the record does indicate that the receipt was returned to the post office on October 8, 2010, and the Complainant is correct in concluding that the receipt was signed by Mr. Burgos prior to that date.

The Consolidated Rules provide that the "[s]ervice of the complaint is complete

when the return receipt is signed." 40 CFR §22.7(c). Nothing in the Rules specifies that, for service to be effective, the return receipt must be dated. 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.

In this case, the Complainant has not indicated the date upon which the Complaint was served. However, Aileen Sanchez of EPA did sign a Certificate of Service indicating that she mailed the Complaint to both Respondents on September 29, 2010 by certified mail, return receipt requested. It may be assumed that the Complaint was served within a reasonable time of the date of upon which Ms. Sanchez mailed it, and certainly before the return receipt was returned to the post office on October 8, 2010. 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 six months 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.

Based on these facts, I conclude that service of the Complaint is in compliance with the Consolidated Rules and satisfies due process concerns.

CONCLUSIONS OF LAW

This determination of violation is based upon the following:

1. Jurisdiction is conferred by Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

2. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B) as amended by the Debt Collection Act of 1996, implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, any person who violates 301(a) and 402 of the CWA, 33 U.S.C.§§ 1311 and 1342, shall be liable to the United States for a civil penalty of up to $16,000 for each day of violation for any past or current violation, up to a maximum penalty of $137,500. The Complaint proposed a penalty of $58,765.00.

3. Respondent failed to comply with Sections 301(a) and 402 of the CWA, as set forth in the Findings of Fact above.

4. The Complaint in this action was served upon Cotto Construction in accordance with 40 C.F.R. § 22.5(b)(1).

5. Respondent Cotto Construction's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Cotto Construction pursuant to 40 C.F.R. § 22.17(a).

6. Respondent Cotto Construction's default constitutes an admission of the allegations as they apply to Cotto Construction and a waiver of Cotto Construction's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

7. Respondent's failure to file a timely Answer to the Complaint is grounds for the entry of a Default Order against the Respondent. 40 C.F.R. § 22.17. However, it must be noted that this Order does not constitute an Initial Decision in accordance with 40 C.F.R. § 22.17(c). As stated on page 4 of Complainant's Motion, "since this case involves other respondent [sic], and the matter of an appropriate penalty has not yet been resolved, EPA requests that the default order does not constitute an Initial Decision under 40 C.F.R. § 22.17. The issue of an appropriate penalty shall be subject to subsequent actions."

8. A Default Order that does not determine remedy along with liability is not an initial decision, unless it resolves "all issues and claims in the proceeding." Based upon a reading of the regulation along with pertinent portions of the preamble, there is an expectation that a motion for default order on liability and Order granting same contemplates a second Motion for Penalty, to be filed by Complainant with the Administrative Law Judge assigned to this matter when this matter is forwarded to the Office of Administrative Law Judges in accordance with EPA regulations and practice.

ORDER

Based on the above Findings of Fact and Conclusions of Law, Complainant's **Motion for default order on liability is GRANTED as against Respondent Cotto Construction.** Respondent Cotto Construction is hereby found liable for violating Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342 as set forth above, and may become subject to the assessment of a civil penalty pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. §§ 1319(g)(2)(B).

Date: February 15, 2012

Helen Ferrara

Helen Ferrara
Presiding Officer