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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	
Corporación para el Desarrollo Económico y Futuro de la Isla Nena, et al.,	Docket No. CWA-II-97-61
Respondents	

ORDER ASSESSING DEFAULT PENALTY AGAINST RESPONDENT INPC

Introduction

On June 12, 1998, Complainant filed a Motion to Assess Penalty on Defaulting Respondent Isla Nena Paving Corporation, requesting that a penalty of $35,000 be imposed. For the reasons discussed below, Complainant's Motion will be **granted** in part and **modified** in part.

Background

On March 31, 1997, the Director of the Enforcement and Compliance Assistance Division of the EPA for Region II commenced this proceeding by filing and serving an Administrative Complaint against the three Respondents - Corporación para el Desarrollo Económico y Futuro de la Isla Nena (CODEFIN"), the Puerto Rico Land Administration ("PRLA"), and Isla Nena Paving Corporation ("INPC").(1) The Complaint alleges that Respondents violated Sections 301 and 308(a) of the Clean Water Act by failing to follow storm water discharge permit requirements promulgated at 40 C.F.R. §§ 122.21 and 122.26 with respect to a housing development known as "Quintas A de Santa Elena" in Vieques, Puerto Rico.(2) The Complaint proposes a penalty of $75,000 for the violations.

Two of the Respondents, CODEFIN and PRLA, actively responded to and defended the case. However, Respondent INPC never formally responded to the Complaint or any other pleading or Order issued in this case.

By Motion dated December 4, 1997, Complainant moved for a default order against Respondent INPC, asserting that, beyond a single, unfiled letter, dated May 5, 1997, sent directly to the Complainant denying liability, INPC had not responded in any manner to the Complaint. By Order dated February 3, 1998, the undersigned granted Complainant's Motion for a Default Order against Respondent INPC, staying the imposition of a penalty until the issue of liability as to Respondent CODEFIN was resolved.[(3)]

On May 11, 1998, the Regional Administrator for Region II approved and executed a Consent Agreement and Order Assessing Administrative Penalties wherein CODEFIN agreed to pay, in installments, a penalty in the principal amount of $40,000 in settlement of this action.

On June 12, 1998, Complainant filed a Motion to Assess Penalty on Defaulting Respondent INPC. As such, the sole remaining issue in this proceeding is the imposition of an appropriate default penalty against Respondent INPC, to which we now turn.

In its Motion, Complainant requests that a $35,000 default penalty be assessed against INPC in this proceeding. Complainant reaches that result by subtracting the amount of the settlement penalty agreed to with CODEFIN ($40,000) from the original proposed penalty ($75,000). Such an approach ostensibly allows Complainant to impose the whole of its initial proposed penalty on the two respondents, INPC and CODEFIN. However, because Complainant has yet to receive the full amount of its $40,000 settlement with CODEFIN, and because CODEFIN could fail to meet its monetary obligations under the settlement, I am modifying the default penalty imposed on INPC, as discussed below.

The first order of business is to determine the authority of an Administrative Law Judge to review and adjust a complainant's proposed penalty in the instance of default. The Consolidated Rules of Practice (40 C.F.R. §22.01 et seq.) are equivocal concerning the extent to which such review is appropriate. Section 22.17 of the Rules of Practice, provides that when a respondent is found to be in default, "the penalty proposed in the complaint shall become due and payable by respondent *without further proceedings* sixty (60) days after a final order issued on default." 40 C.F.R. § 22.17(a). This would seem to preclude any exercise of judicial discretion to review or modify a proposed penalty upon default. On the other hand, under Section 22.27 of the Rules of Practice, provides that an Administrative Law Judge may not "raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted." 40 C.F.R. § 22.27(b). This implies that judicial review and modification of a proposed penalty in the case of a default order would be appropriate, so long as the final penalty is not greater than the total proposed penalty.

In light of the inconsistent language of the Consolidated Rules of Practice, we turn to the Environmental Appeals Board ("EAB") for guidance concerning the propriety of an Administrative Law Judge's review of a proposed penalty for a defaulting respondent. Although it has not spoken directly on the subject, the EAB has suggested in a number of opinions that such review and modification is appropriate, and indeed necessary, in certain situations. In *P.L.C. Corporation*, the EAB not only upheld the Administrative Law Judge's review and modification of the EPA's proposed default penalty, but also invoked Section 22.17(a) of the Rules of Practice as support for the proposition that the Judge may modify a proposed default penalty, so long as the penalty levied does not exceed the penalty in the complaint. *See P.L.C. Corporation*, FIFRA Appeal No. 95-1, 1995 EPA App. LEXIS 21 (EAB, July 12, 1995). Moreover, in *Rybond, Inc.*, the EAB asserted its own authority to increase or decrease a default penalty on appeal, implying that Section 22.17(a) should not be read to limit the EAB's review of proposed default penalties. *See Rybond, Inc.*, RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614, 638-41 (EAB, November 8, 1996). As such, EAB precedent clearly contemplates the review and modification of a proposed default penalty as appropriate under the Consolidated Rules of Practice, and I conclude that the exercise of such review is fitting in this case.[(4)]

As stated earlier, Complainant requests that a $35,000 penalty be levied on INPC,

the defaulting Respondent, equal to the difference between the initial proposed penalty and the amount to which Complainant and CODEFIN agreed in settlement. On initial glance, Complainant's request appears fair and reasonable to both sides. A defaulting party may be liable for up to the full proposed penalty amount and Complainant's calculus will allow it to allocate the full proposed penalty between the two Respondents, giving INPC, the defaulting party, the full benefit of the settlement reached between Complainant and CODEFIN. However, upon closer scrutiny, this allocation method has some drawbacks. Specifically, since Respondent CODEFIN has yet to pay its settlement penalty in full, Complainant has no assurance that a $35,000 default penalty against Respondent INPC will, in fact, cover the entire initial proposed penalty. For example, should CODEFIN fall into insolvency prior to full payment of the settlement amount, Complainant will be unable to recover the full proposed penalty of $75,000. In such a situation, the logical party from whom to seek the remaining penalty, the defaulting respondent, would be insulated from paying more than the $35,000 default penalty.

In order to avoid such a scenario, I hereby impose a default penalty upon INPC in the full amount of $75,000. To the extent that CODEFIN pays the $40,000 penalty agreed to in settlement, such amount shall be considered as contribution to the $75,000 penalty imposed on INPC. Thus, if CODEFIN completely fulfills its obligations under the May 11, 1998 Consent Agreement and Consent Order, INPC's total actual liability will not exceed, in principal, $35,000. Should CODEFIN fail to pay its full penalty, however, INPC will be liable for up to the full $75,000 penalty. Of course, CODEFIN may not simply thrust its responsibilities upon INPC--should CODEFIN renege on its Consent Agreement, Complainant may still pursue CODEFIN for the outstanding penalty. Nevertheless, Complainant will also have the opportunity to turn to INPC for any uncollected portion of CODEFIN's penalty.

Such an imposition falls squarely within the policy goals surrounding the allocation of penalties in multi-party cases, particularly for Clean Water Act violations such as this in which the harm from the violating parties is indivisible. Under the penalty scenario that I have developed, Complainant may choose the best method by which to collect the full penalty initially proposed in the Complaint. On the other hand, it will not be able to extract more than the original $75,000 from the two liable parties. Moreover, requiring INPC to cover CODEFIN deficiencies, should CODEFIN fail to pay its penalty and should Complainant choose to turn to INPC rather than to pursue CODEFIN, recognizes the superseding liability of a defaulting party over those that properly participated in a proceeding.

FINAL DEFAULT ORDER[(5)]

In accordance with 40 C.F.R. § 22.17, and based on the record in this matter, I hereby find defaulting Respondent Isla Nena Paving Corporation liable for a penalty in the amount of $75,000.

IT IS THEREFORE, ORDERED that Isla Nena Paving Corporation shall, within sixty (60) days from the date of this Order, submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of SEVENTY-FIVE THOUSAND DOLLARS ($75,000). Such payment shall be sent to:

U.S. Environmental Protection Agency
Region II Hearing Clerk
P.O. Box 3601 88 M
Pittsburgh, PA 15251-6863

A transmittal letter, containing Respondent's name, complete address, and this case number, shall accompany such payment, A copy of the check and transmittal letter shall be delivered or mailed to the following addresses:

U.S. Environmental Protection Agency
Region II Hearing Clerk
290 Broadway - 17th Floor
New York, N.Y. 10007-1866

Office of Regional Counsel
Caribbean Environmental Protection Division
U.S. EPA, Region II1
Centro Europa Building Suite 207
1492 Ponce de Leon Avenue
Santurce, P/R. 00907
ATTN: Lourdes del Carmen Rodriguez, Esq.

TO THE EXTENT THAT RESPONDENT CORPORACION PARA EL DESARROLLO ECONOMICO Y FUTURE DE LA ISLA NENA PAYS THE $40,000 PENALTY IN ACCORDANCE WITH THE CONSENT AGREEMENT AND ORDER ASSESSING ADMINISTRATIVE PENALTIES WHICH IT EXECUTED ON APRIL 22, 1998 IN CONNECTION WITH THE SETTLEMENT OF THIS PROCEEDING AGAINST IT, SUCH AMOUNT SHALL BE CONSIDERED TO BE AS CONTRIBUTION TO THE $75,000 PENALTY IMPOSED ON RESPONDENT ISLA NENA PAVING CORPORATION HERE.[(6)]

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Susan L. Biro
Chief Administrative Law Judge

Dated: _____

1. The authority to institute this action was delegated by the Administrator of the EPA to the Regional Administrator for Region II, who further delegated such authority to the Director of the Enforcement and Compliance Assistance Division for Region II.

2. Pursuant to 33 U.S.C. § 1319 (g)(4)(a), prior to the imposition of any penalty, the EPA was required to publish public notice of the enforcement action and provide for a public hearing should any comments to such notice be given. The EPA met its public notice requirements by publication of notice in the San Juan Star on May 14, 1997. It contends that no comments were tendered and, thus, no public hearing was required.

3. That Order also granted Complainant's Motion for Voluntary Dismissal of Puerto Rico Land Administration without prejudice, thus leaving CODEFIN and INPC as the only remaining Respondents in the case.

4. In situations, such as this, in which two respondents are involved and one settles, careful scrutiny of the default penalty may often be necessary to avoid injustice. Consider, for example, a situation in which two respondents are involved, one with immense assets who eventually settles, one with a marginal operating budget who defaults. Because the EPA proposes only one penalty, the combined assets of the two respondents would be considered for the proposed penalty. If the wealthy respondent were to settle with the Agency for a small fraction of the penalty, the defaulting party may be left with an unfairly high penalty. In such a situation, it is imperative that the Presiding Officer carefully review the allocation of the penalty for some approximation of fairness.

5. [5] Pursuant to 40 C.F.R. § 22.17(d), Respondent INPC may move to set aside the default order for good cause and such a motion may be filed with the undersigned in a timely manner. Furthermore, the Respondents are hereby advised that a default order constitutes an initial decision. An appeal of an initial decision must be filed with the Environmental Appeals Board (EAB) within **twenty** (**20**) **days** of service

of the initial decision, as provided in 40 C.F.R. § 22.30. An initial decision becomes the final order of the EAB forty-five (45) days after service of the initial decision unless it is appealed to or reviewed *sua sponte* by the EAB. 40 C.F.R. §§ 22.17(b) and 22.27.

6. The Agreement between CODEFIN and EPA provides for payment of the $40,000 penalty, plus interest, in installments over the course of a year. Respondent INPC may wish to contact Complainant to arrange for a similar payment plan as to its penalty so that the payments made by CODEFIN can be fully credited towards its Judgment.