

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

IN THE MATTER OF:

**CONSTRUCTORA DEL VIVÍ, INC.**  
P. O. Box 472  
Utuaado, Puerto Rico 00641

**Sand and Gravel Mining Site**  
Road PR-123, Km. 6.4, Río Abajo Ward  
Utuaado, Puerto Rico

NPDES ID: PRU405194

**RESPONDENT**

**DOCKET NUMBER**  
**CWA-02-2019-3351**

Proceeding pursuant to  
Section 309(g)(2)(A) of the  
Clean Water Act,  
33 U.S.C. § 1319(g)(2)(A),  
to Assess Class I Civil Penalty

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

**I. Statutory and Regulatory Authorities**

1. This Administrative 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 U.S. Environmental Protection Agency ("EPA") by Section 309(g)(2)(A) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1319(g)(2)(A). 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)(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 Code of Federal Regulations ("C.F.R.") Part 22, a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against **Constructora del Vivi, Inc.** ("Respondent" or ("CDVI")), as a result of Complainant's determination that the Respondent violated Sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), for its failure to apply for and obtain National Pollutant Discharge Elimination System permit coverage for its



storm water discharges associated with industrial activity from its sand and gravel mining site located in Utuado, Puerto Rico, and for its discharges of pollutants (storm water runoff associated with industrial activities) from this mining site into waters of the United States without NPDES permit coverage.

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), provides in part that “[e]xcept as in compliance with [CWA Section 402], the discharge of any pollutant by any person shall be unlawful.”
4. Section 402 of the CWA, 33 U.S.C. § 1342, defines the National Pollutant Discharge Elimination System, as the national program for, among other things, issuing and enforcing discharge permits.
5. Section 402 of the CWA authorizes the Administrator to promulgate regulations for the implementation of the NPDES requirements.
6. Section 402(p)(2)(B) of the CWA authorizes the Administrator of EPA to issue NPDES permits to stormwater discharges associated with industrial activity.
7. Pursuant to the CWA, EPA promulgated regulations known as “EPA Administered Permit Programs: the National Pollutant Discharge Elimination System” (“NPDES”), which was codified at 40 C.F.R. Part 122, as amended.
8. Pursuant to 40 C.F.R. § 122.1(b)(1), the NPDES Program requires permits for the discharge of any pollutant from any point source into waters of the United States.
9. Pursuant to 40 C.F.R. § 122.21(a)(1), any person who discharges or proposes to discharge pollutants, and who does not have an effective permit, must submit a complete NPDES permit application to EPA.
10. Pursuant to 40 C.F.R. § 122.26(b)(14), certain categories of facilities are considered to be engaging in industrial activity, and their operators are required to obtain an NPDES permit for stormwater discharges associated with industrial activity.
11. Pursuant to 40 C.F.R. § 122.26(b)(14)(iii), certain facilities engaged in mining operations were included in the definition of stormwater associated with industrial activity.
12. The CWA and its implementing NPDES regulations contain the following definitions:
  - a. “Administrator” means the Administrator of EPA, or an authorized representative. 40 C.F.R. § 122.2;
  - b. “Best Management Practices” or “BMPs” mean schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States.



BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. 40 C.F.R. § 122.2;

- c. "discharge of a pollutant" means any addition of any pollutant to navigable waters and/or waters of the United States from any point source. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2;
- d. "facility" means any NPDES point source or any other facility or activity (including land or appurtenances thereto) that is subject to the regulations of the NPDES program. 40 C.F.R. § 122.2;
- e. "industrial activity" means the eleven categories of industrial activities included in the definition of stormwater discharges associated with industrial activity, as defined in 40 C.F.R. §§ 122.26(b)(14)(i)-(xi);
- f. "navigable waters" means the waters of the United States, including the territorial seas. Section 502(7) of the CWA, 33 U.S.C. § 1362(7);
- g. "owner" or "operator" means the owner or operator of any facility or activity subject to regulation under the NPDES program. 40 C.F.R. § 122.2;
- h. "permit" means an authorization, license, or equivalent control document issued by EPA or an approved State to implement the requirements of 40 C.F.R. Parts 122, 123 and 124. The term "permit" does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit." 40 C.F.R. § 122.2;
- i. "person" means an individual, corporation, partnership or association. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2;
- j. "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. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2;
- k. "pollutant" includes solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge and industrial, municipal and agricultural waste discharged into water. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2;
- l. "site" means the land or water area where any "facility" or "activity" is physically located or conducted, including adjacent land used in connection with the "facility" or "activity". 40 C.F.R. § 122.2;



- m. "stormwater associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. 40 C.F.R. §§ 122.2 and 122.26(b)(14); and
  - n. "waters of the United States" means all waters such as lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, among others, and their tributaries. 40 C.F.R. § 122.2.
13. On September 29, 2008, EPA re-issued the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (the "2008 MSGP"), as authorized under Section 402(p) of the CWA, 33 U.S.C. § 1342(p). The 2008 MSGP became effective on September 29, 2008 and had an expiration date of September 29, 2013. However, the 2008 MSGP was administratively continued in accordance with 40 C.F.R. § 122.6 and remained in force until June 3, 2015.
  14. On June 4, 2015, EPA re-issued the NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (the "2015 MSGP"), as authorized under Section 402(p) of the CWA, 33 U.S.C. § 1342(p). The 2015 MSGP became effective on June 4, 2015 and will expire on June 4, 2020.
  15. The 2015 MSGP establishes permit coverage filing requirements, development and implementation of a Storm Water Pollution Prevention Plan ("SWPPP"), inspections, monitoring, reporting, recordkeeping, and other special and general conditions.
  16. Part 1.2 of the 2015 MSGP establishes Notice of Intent ("NOI") filing requirements for operators of industrial activities to obtain coverage under the 2015 MSGP. Specifically, operators of industrial activities that commenced discharging prior to September 2, 2015, but not covered under the 2008 MSGP or another NPDES permit were required to file for coverage immediately after the 2015 MSGP became effective, to minimize the time discharges from the facility will continue to be unauthorized.
  17. Upon the electronic NOI submittal, the discharge authorization under the 2015 MSGP becomes effective thirty (30) days after EPA notifies the applicant that it has received a complete electronic NOI, unless EPA notifies the applicant that the authorization to discharge has been denied or delayed.
  18. Part 8.J.3 and Appendix A of the 2015 MSGP contain the following definitions:
    - a. "active mining activities" means activities related to the extraction, removal or recovery, and beneficiation of non-metallic minerals from the earth; removal of overburden and waste rock to expose mineable minerals; and site reclamation and closure activities. All such activities occur within the "active mining area." Reclamation involves activities undertaken, in



compliance with applicable mined land reclamation requirements, to return the land to an appropriate post-mining contour and land use in order to meet applicable federal and state reclamation requirements. In addition, once earth-disturbing activities conducted prior to active mining activities have ceased and all related requirements in Part 8.J.4 of the 2015 MSGP have been met, and a well-delineated "active mining area" has been established, all activities (including any clearing, grading, and excavation) that occur within the active mining area are "active mining activities";

- b. "active mining area" means a place where work or other activity related to the extraction, removal or recovery of non-metallic minerals is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun. Note: Earth-disturbing activities described in the definition in Part 8.J.3.2 of the 2015 MSGP that occur on areas outside the active mining area (e.g., for expansion of the mine into undeveloped territory) are considered "earth-disturbing conducted prior to active mining activities" and must comply with the requirements in Part 8.J.4 of the 2015 MSGP;
- c. "earth-disturbing activities conducted prior to active mining activities" consists of two classes of earth-disturbing (i.e., clearing, grading and excavation) activities, as defined below:
  - 1) activities performed for purposes of mine site preparation, including: cutting new rights of way (except when related to access road construction); providing access to a Multi-Sector General Permit (MSGP) mine site for vehicles and equipment (except when related to access road construction); other earth disturbances associated with site preparation activities on any areas where active mining activities have not yet commenced (e.g., for heap leach pads, waste rock facilities, tailings impoundments, wastewater treatment plants); and
  - 2) construction of staging areas to prepare for erecting structures such as to house project personnel and equipment, mill buildings, etc., and construction of access roads. Earth-disturbing activities associated with the construction of staging areas and the construction of access roads conducted prior to active mining are considered to be "construction" and have additional effluent limits in Part 8.J.4.2 of the 2015 MSGP.
- d. "measurable storm event" means a precipitation event that results in a measurable amount of precipitation (i.e., a storm event that results in an actual discharge) and that follows the preceding storm event by at least 72 hours (3-days). The 72-hour storm interval does not apply if you document that less than a 72-hour interval is representative for local storm events;



non-stormwater discharges” means discharges that do not originate from storm events. They can include, but are not limited to, discharges of process water, air conditioner condensate, non-contact cooling water, pavement wash water, external building wash-down, irrigation water, or uncontaminated ground water or spring water;

- e. “mining operations” means mining operations which are grouped into two distinct categories, with distinct effluent limits and requirements applicable to each: a) earth-disturbing activities conducted prior to active mining activities); and b) active mining activities, which includes reclamation. “Mining operations” can occur at both inactive mining facilities and temporarily inactive mining facilities;
  - f. “operator” means any entity with a stormwater discharge associated with industrial activity that meets either of the following two (2) criteria:
    - (1) the entity has operational control over industrial activities, including the ability to modify those activities; or
    - (2) the entity has day-to-day operational control of activities at a facility necessary to ensure compliance with the permit (e.g., the entity is authorized to direct workers at a facility to carry out activities required by the permit).
  - g. “qualified personnel” means those individuals who are knowledgeable in the principles and practices of industrial stormwater controls and pollution prevention, and who possess the education and ability to assess conditions at the industrial facility that could impact stormwater quality, and the education and ability to assess the effectiveness of stormwater controls selected and installed to meet the requirements of the permit; and
  - h. “storm event” means a precipitation event that results in a measurable amount of precipitation.
19. Section 308(a)(A) of the CWA provides that “[w]henever required to carry out the objective of . . . [CWA Section 402], the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as [the Administrator] may reasonably require.”
20. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), provides that “[w]henever on the basis of any information available . . . the Administrator finds that any person is in violation of [CWA Sections 301 and 308], or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under



[Section 402 of the Act, the Administrator] shall issue an Order requiring such person to comply with such section....”

21. Section 309(a)(5)(A) of the CWA, 33 U.S.C. § 1319(a)(5)(A), provides that “[a]ny Order issued under [CWA Section 309] shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance . . . taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.”
22. EPA is the agency within the Commonwealth of Puerto Rico with authority to administer the federal NPDES program. EPA maintains enforcement authority for violations of the CWA and its implementing regulations.

## II. Jurisdictional Statements

23. Respondent is a for-profit corporation organized and authorized to do business under the laws of the Commonwealth of Puerto Rico since 2005.
24. Respondent is a “person” pursuant to Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
25. Respondent is the owner and/or operator of a sand and gravel mining operation site (“Mining Site”).
26. The Mining Site is located at Road PR-123, Km. 6.4, Río Abajo Ward, Utuado, Puerto Rico.
27. Respondent’s main industrial activity at the Mining Site involves the operation of sand and gravel pits and dredges, and the preparation of sand and gravel of different sizes for construction uses.
28. Respondent’s industrial activities at the Mining Site are best described by the Standard Industrial Classification Code 1442 (construction sand and gravel).
29. The Mining Site is a “facility”, as defined in 40 C.F.R. § 122.2.
30. At all relevant times alleged in this Complaint, Respondent has been the “owner and/or operator” of the Mining Site, as defined in 40 C.F.R. § 122.2.
31. The Mining Site is a “point source” pursuant to Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
32. Respondent discharged stormwater runoff containing “pollutants” associated with industrial activity from the Mining Site into a ditch located on the nearby Road PR-123, which in turn the drainage ditch conveys the stormwater runoff into Río Grande de Arecibo.

33. Río Grande de Arecibo is a “water of the United States” pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.
34. Río Grande de Arecibo discharges into the Atlantic Ocean, a “navigable water of the United States” pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
35. Respondent is subject to the provisions of the CWA, 33 U.S.C. § 1251, *et seq.*, and the applicable NPDES permit application regulations found at 40 C.F.R. § 122.
36. Respondent is required to apply for and obtain NPDES permit coverage for the Mining Site’s discharges of pollutants into a water of the United States pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

### III. Findings of Violations

37. Complainant re-alleges Paragraphs 1 – 36, above.
38. On March 6, 2019, and July 30, 2019, an EPA official reviewed EPA’s Storm Water Notice of Intent database and EPA’s files located at the Caribbean Environmental Protection Division (the “Review”) in order to determine if Respondent had obtained NPDES coverage for the Mining Site. The Review revealed that:
  - a. CDVI did not file a NOI seeking coverage under the 2008 neither 2015 MSGP, for its discharges of pollutants from the Mining Site into waters of the United States; and
  - b. CDVI did not file an individual NPDES permit application for its discharges of pollutants from the Mining Site into waters of the United States.
39. On March 6, 2019, an EPA official conducted an NPDES Stormwater Inspection (“Inspection”) of the Mining Site. The purpose of the Inspection was to evaluate Respondent’s compliance with the 2015 MSGP, as it relates to the operations of the Mining Site.
40. The findings of the Inspection were summarized in an Inspection Report (“Inspection Report”), dated May 15, 2019.
41. During the Inspection, the EPA official performed a walkthrough of the Mining Site, which revealed, among other things, the following:
  - a. lack of stormwater erosion and sediment controls at the mining operations;
  - b. lack of stormwater runoff management measures at the mining operations;
  - c. lack of BMPs implementation at sand and gravel material staging, storage, loading and unloading facility, and access roads entrance/exit points where track-out of sediments occurs;



- d. lack of stormwater runoff management measures from the aggregates' storage areas of the Mining Site;
  - e. ongoing sand and gravel mining operations;
  - f. track-out of sediments onto Road PR-143; and
  - g. lack of a wheel washing station to minimize sediment track-out outside the Mining Site.
42. Pursuant to Section 309(a)(3) of the Act, 33 U.S.C. § 1319(a)(3), and based on the Inspection's observations and further investigations, EPA issued an Administrative Compliance Order ("ACO"), Docket No. CWA-02-2019-3112, dated August 6, 2019, against Respondent.
43. The ACO incorporated the findings of violations described in paragraphs 38 and 41, above, and required Respondent to, among other things:
- a. not to discharge stormwater runoff associated with industrial activity from the Mining Site into the Río Grande de Arecibo, except with authorization under a NPDES permit issued pursuant to the provisions of Section 402 of the CWA, 33 U.S.C. § 1342;
  - b. install and maintain stormwater erosion and sediment controls; provide stormwater runoff management measures; install and maintain BMPs at the sand and gravel material staging, storage, loading and unloading facility; and install BMPs at the access roads entrance/exit points, while Respondent obtain coverage for the Mining Site under an NPDES permit;
  - c. prepare and submit to EPA a Mining Site-Specific SWPPP in accordance with the requirements of the 2015 MSGP;
  - d. prepare and submit to EPA a Work Plan to bring the Respondent into compliance with the CWA and the 2015 MSGP; and
  - e. submit to EPA an NOI seeking coverage under the 2015 MSGP for its discharges of pollutants (stormwater discharges associated with industrial activity) from the Mining Site into waters of the United States in accordance with Part 1.2 of the 2015 MSGP.
44. Based on the findings on paragraphs 37 to 43 above, Respondent is liable for the violations of Sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), as specified below:
- a. **Claim 1 - Failure to apply for and obtain NPDES permit coverage:**  
Respondent did not submit an individual NPDES permit application, as



required by 40 C.F.R. § 122.21, nor did it file a NOI seeking coverage under the 2015 MSGP from September 2, 2015 (the deadline for Respondent to file a NOI form seeking coverage under the 2015 MSGP) to August 6, 2019 (the date of the issuance of the ACO). Therefore, the number of days that Respondent operated the Mining Site without the required NPDES permit coverage was **1,435 days**.

- b. **Claim 2 - Illegal discharges of pollutants (stormwater associated with its industrial activity) into waters of the United States without NPDES permit coverage.** Measurable storm events occurred on at least 151 instances during the period of September 2, 2015 to May 31, 2019 (last day when precipitation data was available for the area). Therefore, the number of days on which Respondent discharged pollutants from the Mining Site into a water of the United States without a NPDES permit coverage was **151 days**.

45. The EPA will notify 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.

#### **IV. Notice of Proposed Order Assessing a Civil Penalty**

Based on the foregoing Findings of Violations, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a penalty of **\$32,141.00**. The proposed penalty has been determined in accordance with the applicable factors under Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). EPA is required to take in consideration 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. EPA has also taken in consideration the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through 2019, which prescribes a formula for adjusting statutory civil penalties to reflect inflation, maintain the deterrent effect of statutory civil penalties, and promote compliance with the law.

Based on the Findings set forth above, Respondent has been found to have violated the NPDES regulations and the Act. Respondent failed to apply for NPDES permit coverage immediately after starting to operate the Mining Site, as required by Part 1.2.1 the 2015 MSGP. Respondent is culpable for the violations alleged in this Complaint. EPA took into account Respondent's knowledge of the NPDES regulations, the 2015 MSGP, and the risks to human health and the environment posed by the uncontrolled discharges of stormwater runoff from the Mining Site into the Río Grande de Arecibo, a water of the United States.

The violations discussed in this Complaint are serious since Respondent's failure to develop and implement a Mining Site-specific SWPPP, and its stormwater discharges



associated with industrial activity into waters of the United States caused a potential amount of pollutants to reach surface water that could cause direct and indirect negative effects on human health and the environment. Respondent knew of its obligations under the NPDES regulations, 2015 MSGP, and the Act. Respondent does not have a prior history of violations under the NPDES program. EPA may issue a 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 Litigation**

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, which have been codified at 40 C.F.R. Part 22. A copy of these rules accompanies this Complaint.

### **A. Answering the Complaint**

Where Respondent intend 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 C.F.R. § 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, 16<sup>th</sup> 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 C.F.R. § 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 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 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 dispute (and thus intends to place at issue in the proceeding), (3) the basis for opposing the proposed relief, and (4) whether Respondent requests a hearing. 40 C.F.R. § 22.15(c).

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

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 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 C.F.R. 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, 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 the Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). 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 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 a 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.

## **VI. 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 C.F.R. § 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 it believes 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 C.F.R. § 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 VIII, Paragraph 2, below.

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing do not prevent him 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 22.18(b)(2). In accepting the Consent Agreement, Respondent waives his right to contest the allegations in the Complaint and waives any right to appeal the Final Order that is to accompany the Consent Agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's 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 terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's 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.



**VII. 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, **\$32,141.00**, within thirty (30) days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address noted in Part V.A, above), a copy of the check or other instrument of payment. 40 C.F.R. § 22.18(a).

A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified on Section VIII, 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:

**United States Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P. O. Box 979077  
St. Louis, MO 63197-9000  
Docket No. CWA-02-2019-33351**

Pursuant to 40 C.F.R. § 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 C.F.R. § 22.18(a)(3). In accordance with 40 C.F.R. § 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. 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 C.F.R. § 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.

**VIII. Filing of Documents**

1. The original and one copy of 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 - 16<sup>th</sup> Floor  
New York, New York 10007-1866**



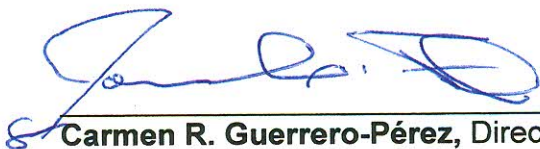
2. A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

**Evelyn Rivera-Ocasio, Esq.**  
**Office of Regional Counsel**  
**U.S. Environmental Protection Agency, Region 2**  
**City View Plaza II, Suite 7000**  
**Guaynabo, Puerto Rico 00968**  
**Telephone: (787) 977-5859**

**IX. 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 19<sup>th</sup> DAY OF September, 2019.



**Carmen R. Guerrero-Pérez, Director**  
Caribbean Environmental Protection Division  
United States Environmental Protection Agency - Region 2

cc: **Ángel Meléndez, Director**  
Water Quality Area  
Department of Natural and Environmental Resources  
P. O. Box 11488  
San Juan, PR 00910



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

IN THE MATTER OF:

**CONSTRUCTORA DEL VIVÍ, INC.**  
P. O. Box 472  
Utuaado, Puerto Rico 00641

**Sand and Gravel Mining Site**  
Road PR-123, Km. 6.4, Río Abajo Ward  
Utuaado, Puerto Rico

NPDES ID: PRU405194

**RESPONDENT**

**DOCKET NUMBER**  
**CWA-02-2019-3351**

Proceeding pursuant to  
Section 309(g)(2)(A) of the  
Clean Water Act,  
33 U.S.C. § 1319(g)(2)(A),  
to Assess Class I 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 and the Revocation/Termination or Suspension of Permits", 40 C.F.R. Part 22, to the following persons at the addressed listed below:

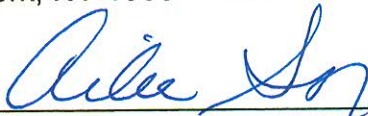
**Mr. Jesus Arce Rosado**  
President  
Constructora del Vivi, Inc.  
P. O. Box 472  
Utuaado, Puerto Rico 00641

Also, I sent the original and a copy of the foregoing ADMINISTRATIVE 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:

September 23, 2019

  
\_\_\_\_\_  
Aileen Sánchez

Administrative Assistance  
Multimedia Permits and Compliance Branch  
Caribbean Environmental Protection Division  
U.S. Environmental Protection Agency, Region 2