

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2009 FEB 12 PM 2:47
REGIONAL HEARING
CLERK

IN THE MATTER OF:

**Félix Ayala and Silvette Ayala
d/b/a Cantera El Roble**

**State Road 827, Km 2.0
Piñas Ward
Toa Alta, PR 00953**

Proceeding to Assess Class II Civil
Penalty Under Section 309(g)(2)(B)

**DOCKET NUMBER
CWA-02-2009-3451**

RESPONDENTS

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

I. Statutory Authority

1. This Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act ("Act"), 33 U.S.C. § 1319(g)(2)(B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Caribbean Environmental Protection Division ("CEPD") of EPA, Region 2 ("Complainant").
2. Pursuant to Section 309(g)(2)(B) of the Act, and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("CROP"), 40 C.F.R. Part 22 (2005), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Félix Ayala and Silvette Ayala d/b/a Cantera El Roble ("Respondents") for the unlawful discharge of stormwater, in violation of Section 301(a) and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

II. Statutory and Regulatory Background

1. 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.
2. Section 502 of the Act, 33 U.S.C. § 1362, and its implementing regulations, contain the following definitions:
 - a. Section 502(5) defines "person" as an individual, corporation, partnership or association;
 - b. Section 502(6) defines "pollutant" as including, among others, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge and industrial, municipal and agricultural waste discharged into water;
 - c. Section 502(7) defines "navigable waters" as the waters of the United States, including the territorial seas;
 - d. Section 502(12) defines in part "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source;
 - e. Section 502(14) defines "point source" as 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.
3. Section 402 of the Act, 33 U.S.C. § 1342, defines the National Pollutant Discharge Elimination System ("NPDES") as the national program for, among other things, issuing and enforcing permits.
4. Section 402 of the Act authorizes the Administrator to promulgate regulations for the implementation of the NPDES requirements.
5. Pursuant to the Act, on April 1, 1983, EPA promulgated regulations to implement the NPDES program, under the EPA Administered Permit Programs: the NPDES, at 40 C.F.R. Part 122, as amended.
6. Pursuant to the NPDES regulations at 40 C.F.R. § 122.5(b), the NPDES program requires permits for the discharge of any pollutant from any point source into waters of the United States.

7. The NPDES regulations under 40 C.F.R. § 122.2 define such terms:
 - a. "Pollutant," in part, as dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, chemical wastes, rock, sand and others.
 - b. "Facility," as 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.
 - c. "Owner" or "operator," as the owner or operator of any facility or activity subject to regulation under the NPDES program.
 - d. "Point Source," as any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, from which pollutants are or may be discharged.
 - e. "Discharge," as the addition of a pollutant or combination of pollutants into waters of the United States from any point source.
8. The term "overburden" means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations, 40 C.F.R. 122.26(10).
9. The NPDES regulations under 40 C.F.R. § 122.41(m)(a) require a permittee to comply with all conditions of its NPDES permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is ground for: enforcement action, permit termination, revocation and reissuance, modification or denial of a permit renewal application.
10. The EPA Administrator promulgated regulations which require operators of mining sites to apply for and obtain NPDES permit coverage for the discharges of storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations. These regulations are codified in 40 C.F.R. § 122.26(b)(14)(iii).
11. The EPA regulations at 40 C.F.R. § 122.21(c)(1) and 40 C.F.R. § 122.26(b)(14)(iii), require operators of mining sites to file an NPDES permit application no later than one hundred and eighty (180) days before the facility commences industrial activity which may result in a discharge of storm water associated with industrial activity, unless authorized by an NPDES storm water general permit for industrial activities.

12. On October 30, 2000, EPA reissued the NPDES Storm Water Multi-Sector General Permit ("MSGP-2000") pursuant to Section 402 of the Act, 33 U.S.C. § 1342. The MSGP-2000 expired on October 30, 2005. Facilities that did not obtain coverage under the MSGP-2000 did not have general permit coverage available until a new permit is issued. Hence, operators of these facilities were expected to develop and implement Storm Water Pollution Prevention Plans ("SWPPP") as described in the MSGP-2000.
13. The MSGP-2000 established, among others, Notice of Intent ("NOI") requirements, SWPPP, monitoring, reporting and other conditions. Part 6.J of the MSGP-2000 included special conditions and requirements applicable to mining sites.
14. A new MSGP was issued on September 29, 2008 ("MSGP-2008"). All facilities must submit a new NOI in order to obtain coverage under the MSGP-2008. Operators of these facilities should develop and implement SWPPPs as described in the MSGP-2008.

III. Findings of Violation

A. Findings of Fact

15. Félix Ayala and Silvette Ayala own and operate a mining site known as "Cantera El Roble" ("the facility").
16. Respondents are "person[s]" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
17. The facility is located at State Road PR-827, Km. 2.0, Piñas Ward, Toa Baja, Puerto Rico.
18. Operation at the facility started on or about January 2003.
19. The facility is a "point source" as defined in 40 C.F.R. § 122.2.
20. Respondents "discharge pollutants" from their facility into La Plata River.
21. La Plata River is a water of the United States, pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7).

22. On December 13, 2005, an EPA enforcement officer, upon showing of credentials, inspected the facility. The findings of this Inspection are included in the NPDES Water Compliance Inspection Report dated January 18, 2006.
23. The Inspection Report dated January 18, 2006, states, among other findings, that:
 - a. Review of the records at the mining site revealed that Respondents failed to file a NOI form or an individual permit application for the site.
 - b. Respondents do not have NPDES permit coverage to discharge storm water associated with industrial activity from the mining site into waters of the United States.
 - c. The site involves clearing, grading, excavation and mining activities on approximately fifty (50) acres of land. Clearing and grubbing activities at the site began on or about January 2003.
 - d. A Storm Water Pollution Prevention Plan had not been developed for the site.
 - e. Erosion and sediment controls were not observed at the site.
24. On December 30, 2005, EPA's personnel reviewed the EPA Storm Water NOI Processing Center database and EPA's files and found that Respondents had not filed a NOI form or individual permit application for the facility.
25. On January 19, 2006, an Administrative Compliance Order was issued (CWA-02-2006-3033). The same ordered Respondents, among others, to:
 - a. Cease and desist earth movement and mining activities at the facility.
 - b. Submit a certification stating that earth movement and mining activities ceased at the facility.
 - c. Submit a Compliance Plan to bring the facility into compliance with the NPDES permit application and the Act.
26. On February 3, 2006, Respondents sent a letter acknowledging receipt of the Administrative Compliance Order and informing the following:
 - a. that they ceased activities at the facility;
 - b. that they would conduct erosion and sediment control;
 - c. that they had commenced the process of development of a SWPPP; and
 - d. that they would periodically submit progress and performance reports.
27. On February 28, 2006, a revised SWPPP was submitted by Respondents.
28. On May 30, 2006, EPA personnel inspected the facility.

29. At the May 30 2006 Inspection, EPA found the project in compliance with the regulations of the MSGP. Actions taken to bring the project into compliance included the preparation of a mitigation plan to control erosion and sedimentation at the south and south east parts of the site, conducting and documenting quarterly visual examinations of the storm water discharges associated with industrial activity at each outfall, keeping inspection records as required by the SWPPP in Part 5.1.1.3, and the implementation of all the requirements of the expired MSGP.
30. EPA sent Respondents a letter dated June 30, 2006, in which it notified the closing of the Order CWA-02-2006-3033.
31. On October 16, 2007, an EPA enforcement officer, upon showing of credentials, inspected the facility. A summary of the findings is included below:
 - a. Respondents did not have NPDES permit coverage to discharge storm water associated with industrial activity from the mining site into waters of the United States.
 - b. The site involves clearing, grading, excavation and mining activities on approximately 50 acres of land. Clearing and grubbing activities at the site began on or about January 2003.
 - c. The site was active during the October 16, 2007 Inspection. Several heavy machines and trucks were working at the site.
 - d. Mr. Félix Ayala admitted that he had moved the berms from the north side border of the site. The rocks and sediments were falling down the steep slope reaching the unnamed creek tributary of the La Plata River.
 - e. Sediments were observed reaching the La Plata River.
 - f. Erosion and sediment controls were not appropriately maintained at the site.
32. An Administrative Compliance Order, CWA-02-2008-3103, was issued on June 23, 2008, based on the findings of the October 16, 2007 Inspection.
33. As set forth above, Respondents violated Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, for their failure to comply with certain requirements of the NPDES 2000 MSGP for their discharges of storm water from the mining site into waters of the United States.

B. Conclusions of Law

34. As set forth above, Respondents are liable for the violations of Sections 301(a) of the Act, 33 U.S.C. § 1311(a), as specified below:
- a. **Claim 1 – Failure to implement SWPPP**
Respondents did not implement the SWPPP at the facility, as required by the Administrative Compliance Order, Docket Number CWA-2008-3103. The period of violations is from October 16, 2007 (date of the last RI) until June 23, 2008 (date when EPA issued the Compliance Order). The number of days that Respondents failed to implement the SWPPP are 250.
35. 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 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 Respondents, assessing a penalty of fifty thousand and twenty dollars (\$50,020.00).

EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). EPA has taken account of the nature, circumstances, extent and gravity of the violations, Respondents' prior history of noncompliance, degree of culpability, economic benefit or savings accruing to Respondents by virtue of the violations, and Respondents' ability to pay the proposed penalty. The existing conditions of the facility and the risks and possible effects to human health and the environment posed by the discharges into La Plata River were also considered.

Respondents have been found to have violated the Act by failing to implement the SWPPP. Respondents do not have a prior history of violations in the NPDES program. Respondents obtained an economic benefit for the unlawful discharge of pollutants into La Plata River. No ability to pay argument is anticipated.

EPA may issue a final Order Assessing Administrative Penalties thirty (30) days after Respondents' receipt of this Notice, unless Respondents, within that time, file an answer to the Complaint and request 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, 40 C.F.R. Part 22. A copy of these rules accompanies this Complaint.

A. Answering the Complaint

Where Respondents intend to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondents are entitled to judgment as a matter of law, Respondents 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, 16th floor
New York, New York 10007-1866**

Respondents shall also 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).

Respondents' 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 Respondents has any knowledge, 40 C.F.R. § 22.15(b). Where Respondents lack knowledge of a particular factual allegation and so state in their 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 their defense; (2) the facts that Respondents dispute (and thus intend to place at issue in the proceeding); (3) the basis for opposing the proposed relief; and (4) whether Respondents request a hearing, 40 C.F.R. § 22.15(b).

Respondents' failure to raise in their Answer facts that constitute or that might constitute the grounds of their defense may preclude Respondents, 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 Respondents in their Answer, a hearing upon the issues raised by the Complaint and Answer may be held, 40 C.F.R. § 22.15(c). If, however, Respondents do 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. §§ 551-559, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

Should Respondents request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309 (g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondents not request a hearing, EPA will issue a Final Order, and only members of the public who submit timely comments 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 Respondents fail to admit, deny, or explain in their Answer any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation, 40 C.F.R. § 22.15(d). If Respondents fail 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, Respondents may be found in default upon motion, 40 C.F.R. § 22.17(a). Default by Respondents constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations, 40 C.F.R. § 22.17(a). Following a default by Respondents 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 Respondents without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 C.F.R. § 22.27(c) and 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default against Respondents, and to collect the assessed penalty amount in federal court.

VI. Informal Settlement Conference

Whether or not Respondents request 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, Respondents may comment on the charges made in this complaint, and Respondents may also provide whatever additional information that they believe is relevant to the disposition of this matter, including: (1) actions Respondents have 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 Respondents' ability to continue in business; and/or (4) any other special facts or circumstances Respondents wish to raise.

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

Any request for an informal conference or any questions that Respondents 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 Respondents have requested a hearing, 40 C.F.R. § 22.18(b)(1). Respondents' request of a formal hearing does not prevent them 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 Respondents' 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, Respondents waive their right to contest the allegations in the Complaint and waive 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).

Respondents' entering into a settlement through the signing of such Consent Agreement and their compliance 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. Respondents' entering into a settlement does not extinguish, waive, satisfy or otherwise affect their 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, Respondents may choose to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, provided that Respondents file with the Regional Hearing Clerk, Region 2 (at the address noted in Section V, 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 in Section VIII, paragraph 2. 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 address:

**US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000**

Pursuant to 40 C.F.R. § 22.18(a)(3), if Respondents elect 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 be issued until at least ten (10) days after the close of the comment period on this Complaint. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondents shall constitute a waiver of Respondents' 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 Respondents' 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 shall be sent to:

**Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 16th 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:

**Carolina Jordán-García, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
1492 Ponce de León Ave., Suite 417
San Juan, Puerto Rico 00907-4127
Telephone: (787) 977-5834
Fax: (787) 729-7748**

IX. General Provisions

1. Respondents have 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 there under, or any applicable permit.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondents'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 17th DAY OF FEBRUARY, 2009



CARL AXEL P. SODERBERG

Director, Caribbean Environmental Protection Division
United States Environmental Protection Agency - Region 2
1492 Ponce de León Ave., Suite 417
San Juan, Puerto Rico 00907-4127

To: Félix Ayala and Silvette Ayala
d/b/a Cantera El Roble
State Road PR-827, Km 2.0
Piñas Ward
Toa Alta, Puerto Rico 00953

Enclosures