

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

<p>IN THE MATTER OF: Bend Mald Corp. d/b/a Cinderella Poultry Farm NPDES Number PRU020712</p>	<p>DOCKET NO. CWA 02-2011-3357 Proceeding pursuant section 309 (g) of the CWA 33 U.S.C. § 1319(g) to Assess Class I Civil Penalty</p>
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Answer to Complaint and Request to Dismiss of Complaint.

Comes now before this Honorable Court Ben Mald Corporation through its legal counsel and very respectfully inform and prays as follow:

1. The respondent was served with a complaint as the result of EPA determination that respondent's facility discharged pollutants (chicken manure) into waters of the United States without a NPDES permit in violation of Section 301 (a) of the Clean Water Act, 33 U.S.C § 1311. Complaint seeks a penalty of \$11, 525.00 against the Respondent for the violation.

2. The Complaint indicates that the purposes of the NPDES program it is to regulate the discharge of pollutants from point sources to waters of the United States. The NPDES program establish among other things that a Concentrated Animal Feeding Operation (CAFOs) is a point source, as defined by the CWA [Section 502(14)], and to be considered as a CAFO, a facility must first be defined as an Animal Feeding Operation (AFO).

3. As by definition an Animal Feeding Operation (AFO) is an agricultural operation where animals are kept and raised in confined situations. To be considered as a AFO, the facility must have two conditions: 1) Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and 2) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

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4. Once a facility comply with both requirements is defined as an AFO. A AFOs that meet the regulatory definition of a CAFO may be regulated under the NPDES permitting program.
5. The definitions provided in 40 CFR 122.23(b) of the 2003 and 2008 CAFO rule remain in effect and are unchanged. First, an operation must be defined as an animal feeding operation (AFO) before it can be defined as a concentrated animal feeding operation (CAFO), according to 40 CFR 122.23.
6. Whether an AFO is a CAFO depends primarily on the number of animals confined, which is also unchanged as per 2003 and 2008 CAFO rule. Large CAFOs are AFOs that confine more than the threshold number of animals detailed in 40 CFR 122.23(b)(4).
7. Bend- Mäld, Corp. is an agricultural farm doing business as Cinderella Poultry. Information on the complaint regarding physical address and identification of its resident agent is correct. The respondent denies to be an AFO facility as defined by 40 C.F.R. § 122.23 (b)(1) .
8. As part of its regular business operation The Respondent stabled layer hens for a period longer than 45 days. In doing so paragraph (i) of the 40 C.F.R. § 122.23 (b) (1) apply to the respondent operation. To be considered as an AFO the operation must met all the criteria established by the law.
9. The second criteria to be present in other to be consider as an AFO according with the law definition is that: crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility. This criteria is not meet in our case.

The respondent facilities sustain forage growth in the normal growing season all year long in the immediate premises of the hen house as and all over its facility. *Exhibit A is color pictures of the respondent hen house. Exhibit B is an aerial color image of the respondent facility.* Because all criteria are not met in this case, the , the respondent's facility, by definition cannot be consider as an AFO neither as CAFO. The following table represents the requirements to be consider as CAFO:

Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs

A **Large CAFO** confines at least the number of animals described in the table below.

A **Medium CAFO** falls within the size range in the table below and either:

- has a manmade ditch or pipe that carries manure or wastewater to surface water; or
- the animals come into contact with surface water that passes through the area where they're confined.

If an operation is found to be a significant contributor of pollutants, the permitting authority may designate a medium-sized facility as a CAFO.

A **Small CAFO** confines fewer than the number of animals listed in the table **and** has been designated as a CAFO by the permitting authority as a significant contributor of pollutants.

Animal Sector	Size Thresholds (number of animals)		
	Large CAFOs	Medium CAFOs ¹	Small CAFOs ²
cattle or cow-calf pairs	1,000 or more	300 - 999	less than 300
mature dairy cattle	700 or more	200 - 699	less than 200
veal calves	1,000 or more	300 - 999	less than 300
swine (weighing over 55 pounds)	2,500 or more	750 - 2,499	less than 750
swine (weighing less than 55 pounds)	10,000 or more	3,000 - 9,999	less than 3,000
horses	500 or more	150 - 499	less than 150
sheep or lambs	10,000 or more	3,000 - 9,999	less than 3,000
turkeys	55,000 or more	16,500 - 54,999	less than 16,500
laying hens or broilers (liquid manure handling systems)	30,000 or more	9,000 - 29,999	less than 9,000
chickens other than laying hens (other than a liquid manure handling systems)	125,000 or more	37,500 - 124,999	less than 37,500
laying hens (other than a liquid manure handling systems)	82,000 or more	25,000 - 81,999	less than 25,000
ducks (other than a liquid manure handling systems)	30,000 or more	10,000 - 29,999	less than 10,000
ducks (liquid manure handling systems)	5,000 or more	1,500 - 4,999	less than 1,500

¹ Must also meet one of two "method of discharge" criteria to be defined as a CAFO or may be designated.

² Never a CAFO by regulatory definition, but may be designated as a CAFO on a case-by-case basis.

11. Even in the event that the respondent's facility could have comply with the AFO law requirements, it cannot be consider as a CAFO by law definition.

According to paragraph 23 of the complaint the facility was confining approximately 23,000 laying hens. This classified the respondent's facility as Small. Once considered as Small CAFO, by regulatory definitions the Small CAFO facility is never a CAFO, but may be designated as a CAFO on case by case basis.

12 In the present case and or prior to the present proceeding, the respondent's facility is not or has not been designated as a Small CAFO or any other type of CAFO according to the law, by EPA or any other administrative agency. The respondent facility is excluded to have an NPDES permit in the absence of any EPA prior designation as a CAFO.

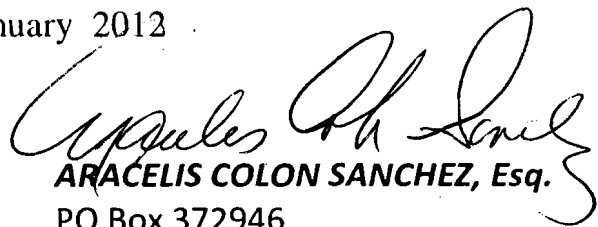
13. None of the law requirements to be found in violation of not having an NPDES permit are met in the present case. The Complaint is in violation of due process. The EPA lacks of jurisdiction to seek findings of violations and assessment of civil penalty against the respondent. Without law binding the complaint is illegal and contrary to the law and has to be dismissed.

WHEREFORE, respondent respectfully request this court grant his motion and dismiss the present complaint.

CERTIFICATE OF SERVICE.

Copy of this document has been caused to Attorney Lourdes del Carmen Rodríguez, Assistant Regional counsel at U.S. Environmental Protection Agency, Region 2 1492 Ponce de León Avenue, Suite 417, Centro Europa Building, San Juan Puerto Rico 00907-4127.

At Cayey, Puerto Rico this 3 of January 2012


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