

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. 2
2008 NOV -6 AM 11:39
REGIONAL HEARING
CLERK

IN THE MATTER OF:

Culebra Resort Associates
P.O. Box 192336
San Juan, Puerto Rico 00917-2336

Villa Mi Terruño Development
NPDES Permit Number PRU202016

Respondent

Proceeding pursuant to Section 309(g)
of the Clean Water Act 33 U.S.C. §1319(g)

Docket No. CWA-02-2008-3356
Proceeding to Assess a Class I
Civil Penalty

ANSWER TO COMPLAINT AND REQUEST FOR HEARING

TO: Regional Hearing Clerk
U.S. EPA Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866

COMES NOW Respondent Culebra Resort Associates II S. en C. por A., S. E. (hereinafter CRA) through its undersigned representative and respectfully alleges, states and requests as follows:

1. On October 9, 2008, CRA received by mail an Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing (hereinafter Complaint), that had an attached certificate to the effect that it was served by mail on October 6, 2008.
2. Within 30 days after receipt of the Complaint, and pursuant to 40 C.F.R. §22.15, CRA hereby files an Answer to the Complaint contesting the jurisdictional findings and the material facts upon which it is based, and contending that the proposed penalty is not applicable.
3. Respondent, CRA, without submitting to the jurisdictional authority regarding subject matter of the Regional Administrator of Region 2, EPA and/or the Director of the

1. CRA admits paragraph number 11 of section II of the Complaint and clarifies that it is a limited partnership organized under the Code of Commerce of Puerto Rico and a Special Partnership under the Income Tax Act of Puerto Rico organized under the name of Culebra Resort Associates II S. en C. por A., S. E. ("CRA").

2. CRA denies, as drafted, paragraph number 12 of section II of the Complaint. CRA avers and clarifies that in 2002 and 2003 it purchased two parcels of rural agricultural grazing land approximately 57 and 36 "cuerdas" (1 acre = 1.029 cuerdas and 1 cuerda = .9718 acre), respectively. No construction plans or specifications exist or have been contracted for, and no project is under development or construction for which a SWPPP would be required.

3. CRA denies paragraph number 13 of section II of the Complaint and clarifies that the "Project" does not exist nor has any been approved on the subject rural agricultural grazing land.

4. CRA denies paragraph number 14 of section II of the Complaint, and clarifies that no construction activities are being carried out nor has any request for lotification been made or approved nor exists other than the prevailing R025-C zoning district, and smaller R01-C district.

5. CRA denies paragraph number 15 of section II of the Complaint, and clarifies that no construction activity or Project exists and that the agricultural grazing land fronts to the north on state road # 253.

6. CRA denies paragraph number 16 of section II of the Complaint and clarifies that no construction activity is underway as defined in 40 CFR §122.26(b)(15) and avers that this definition does not apply to stabilization and maintenance activities or to rural agricultural grazing lands.

7. CRA denies paragraph number 17 of section II of the Complaint and clarifies that the term "point source" does not include "agricultural stormwater discharges" or natural nonpoint stormwater runoff.

8. CRA denies paragraph number 18 of section II of the Complaint and clarifies that no construction activities as defined under 40 CFR §122.26(b)(15) were underway during the alleged violation period from April 1, 2007 to April 1, 2008, and re-alleges the clarifications made in paragraphs 2-7.

9. Paragraphs number 19 and 20 of section II of the Complaint are statements of law for which no answer is necessary, but to the extent an answer is required, CRA denies the aforementioned paragraphs.

10. CRA denies paragraph number 21 of the section II of the Complaint and restates that no construction activities or project existed on its agricultural grazing lands during the

20. Respondent CRA has complied with all applicable laws and regulations.

21. EPA has received, accepted and processed all information CRA submitted in compliance with applicable requirements, notwithstanding their applicability.

22. This administrative action is time-barred and/or the delay in the preparation of the Complaint by Complainant from the time of the off-site inspection to the time of the service of the Complaint, i.e. approximately 4 months afterward, has caused the Respondent, CRA, to be in an unjust position, where evidence that could have been available is no longer available, thus violating due process of law, both substantive and procedural. The delay caused by EPA is unjustified. Complainant issued no informal communication or formal Notice of Violation from December 19, 2007 to April 8, 2008.

23. CRA's activities were fully authorized and carried out under permits issued by state agencies, including the daily monitoring by rangers from the DNRA of the required and good faith implementation of BEPs and BMPs. Since Respondent's activities were being carried out in rural parcels of agricultural grazing land and/or the fact that the activities of Respondent did not impact more than one (1) acre during the period alleged in the Complaint, Respondent was not required to apply for nor obtain NPDES coverage for stormwater discharges from construction activity.

24. Respondent is not an "operator" as defined under the applicable regulations.

25. Respondent has voluntarily implemented BEPs and BMPs in all of its activities on its agricultural site and cooperated with the EPA in implementing the maintenance and stabilization work required by the AO and offers to continue to cooperate with the EPA in the control of erosion and prevention of sedimentation on its land. CRA also offers to assist in and make the property available for the EPA's and other NGOs' educational and promotional activities to continue to educate and create awareness of the importance of stormwater pollution and sedimentation control measures to natural environment.

26. Complainant lacks jurisdiction over the routine maintenance performed by CRA at the site.

27. There has been no actual harm, imminent or substantial endangerment to the public or the environment from CRA's activities at the site, where, on the contrary, CRA has voluntarily implemented measures for the control of erosion and prevention of sedimentation in order to protect public health and the environment.

28. If CRA is somehow found to be eligible under the July 1, 2003 Construction General Permit (CGP), as an "unpermitted ongoing project" that is meeting the obligations that would have been imposed under the 2003 CGP, Respondent should benefit from the EPA's "low enforcement priority approach" policy that was in place at the time of the Complaint.

29. Under the previously mentioned low enforcement policy adopted by the Claimant, where civil enforcement for lack of permit coverage under the factual situation described above is neither a priority nor preferred course of action, the proposed civil penalty is inadequate.

period alleged in the Complaint (April 1, 2007 to April 1, 2008) or on the date of the off-site inspection, December 19, 2007.

Answer to Findings of Violations

11. CRA re-alleges its answers to paragraphs numbered 11 to 21 above in response to paragraph number 22 of section III of the Complaint.

12. CRA denies as drafted paragraph number 23 of section III of the Complaint and clarifies that a representative of EPA Region 2 conducted an off-site inspection. The inspection report included a photograph of an outflow that is outside the Respondent's property and under the exclusive care and maintenance responsibility of state and/or municipal authorities. At the time of the Respondent's acquisition of the parcels, the state and/or municipal outflow was not visible due to accumulated sedimentation from pre-acquisition non-point stormwater discharge events.

13. CRA denies as drafted paragraph number 24 of section III of the Complaint and clarifies that the findings of the off-site inspection report are not supported by the facts or in accordance to law. CRA further clarifies that it has not filed a NOI and that it is not in violation of the Clean Water Act for the reasons already stated. CRA also clarifies that it has voluntarily implemented BMPs and BEPs for the control of erosion and prevention of sedimentation as part of its routine maintenance and stabilization activities at its agricultural site.

14. CRA admits paragraph number 25 of section III of the Complaint but denies any and all conclusions of law contained therein.

15. CRA denies as drafted paragraph number 26 of section III of the Complaint and clarifies that there are no violations of the Clean Water Act at its site. Notwithstanding, CRA has continued to voluntarily and in good faith carry out maintenance and stabilization as ordered by the AO.

16. CRA admits paragraph number 27 of section III of the Complaint.

17. CRA denies paragraph number 28 of section III of the Complaint since it has not discharged pollutants into waters of the United States through stormwater runoff associated with construction activities for the reasons already stated herein and above.

Answer to Conclusions of Law

18. CRA denies the conclusions of law contained in paragraph number 29, a and b, of the Complaint for the reasons already stated.

Affirmative Defenses

19. Respondent CRA has voluntarily acted in good faith at all times to protect the environment from naturally occurring and/or existing conditions at its rural agricultural grazing site that have the potential of causing erosion and/or sedimentation associated with stormwater runoffs.

30. If CRA is found to be eligible under the July 1, 2003 CGP, Respondent reserves the right to petition a waiver under Part 1.4 of the CGP.

31. CRA reserves the right to use and raise other affirmative defenses, such as that of laches, violation of due process, estoppels, lack of jurisdiction over the subject matter and person, during the discovery procedures.

Request for Informal Settlement Conference

32. Pursuant to EPA policies, CRA has requested an informal settlement conference in writing by letter dated October 27, 2008 and by telephone. In reply an EPA representative advised Respondent that the informal settlement conference would be held after Respondent filed its answer to the Complaint. Respondent hereby reaffirms its request for an informal settlement conference prior to the formal hearing.

Request for Formal Hearing

33. CRA hereby requests a formal hearing.

Contest of the Proposed Penalty

34. CRA contends that there are no economic benefits from the alleged violations. The extent, circumstances and gravity of the alleged violations, if any, prior history of violations, if any, degree of culpability, if any, economic benefit, if any, savings accruing to Respondent by virtue of the violations, CRA's ability to pay the proposed penalty, environmental damages, if any, and/or such other matters as justice may require, demonstrate that CRA should not be penalized or that the proposed penalty amount is inappropriate.

35. The extent of time during which violations have allegedly been committed is denied and/or is overbroad and excessive.

In Guaynabo, Puerto Rico, this November 3, 2008.

WE HEREBY CERTIFY that on this same date copy of this Answer to the Complaint and Request for Hearing has been sent by certified mail to Pedro J. Nieves-Miranda, Esq., Assistant Regional Counsel, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 2, Centro Europa Suite 417, 1492 Ponce de León Ave., San Juan, Puerto Rico 00907-4127; Wanda García, P.E., Chief, Permit Section, Water Quality Division, Environmental Quality Board of PR, P.O. Box 11488, San Juan, PR 00910.



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