

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2008 OCT -9 PM 3: 24  
REGIONAL HEARING  
CLEVELAND  
DOCKET NUMBER CWA-02-2008-3460

IN THE MATTER OF:

**INVERSIONES DEL MERCADO, INC.**  
P.O. Box 364386  
San Juan, Puerto Rico 00936-4368  
**NPDES GCP Number PRR10B896**

and

**JOFA CONTRACTORS, INC.**  
RR 10 Box 5226  
San Juan, Puerto Rico 00926  
**NPDES GCP Number PRR10BF65**

**Posada del Coronel Housing  
Development**

**RESPONDENTS**

PROCEEDING PURSUANT TO SECTION  
309(G) OF THE CLEAN WATER ACT, 33  
U.S.C. § 1319(G), TO ASSESS CLASS II  
CIVIL PENALTY

**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 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)(B) of the Clean Water Act ("CWA" or "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 Director of CEPD assess a civil penalty against Inversiones del Mercado, Inc. and JOFA

Contractors Corp. (hereinafter, the "Respondents"), as a result of Complainant's determination that Respondents have violated conditions of EPA's National Pollutant Discharge Elimination System-Construction General Permit, in violation of Sections 301 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 "[e]xcept 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 308(a)(A) of the Act, 33 U.S.C. § 1318(a)(A), establishes that whenever required to carry out the objective of the Act, the Administrator shall require the owner or operator of any point source to:
  - a. establish and maintain such records;
  - b. make such reports;
  - c. install, use and maintain such monitoring equipment or methods;
  - d. sample such effluents; and
  - e. provide such other information as may be required.
3. 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(7) defines "navigable waters" as the waters of the United States, including the territorial seas;
  - c. 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;
  - d. 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;

- e. Section 502(12) defines in part "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source.
4. 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.
5. Section 402 of the Act authorizes the Administrator to promulgate regulations for the implementation of the NPDES requirements.
6. Pursuant to the Act, on April 1, 1983, EPA promulgated regulations to implement the NPDES program, under EPA Administered Permit Programs: the NPDES, at 40 C.F.R. Part 122, as amended.
7. 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.
8. 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. An "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 discharge of a pollutant or combination of pollutants into waters of the United States from any point source.
  - f. "Waters of the United States" means all waters such as lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, among others, and their tributaries.
  - g. "NPDES" means National Pollutant Discharge Elimination System under Section 402 of the Act, 33 U.S.C. § 1342. National Pollutant Discharge Elimination System means the national program for, among other things, issuing and enforcing permits.

9. For the purposes of the NPDES storm water general permit for construction activities and in the context of storm water associated with construction activity (57 FR 41190 and 63 FR 7859), the term "Operator" means any party associated with a construction project that meets either of the following two (2) criteria:
  - a. The party has operational control over construction plans and specifications including the ability to make modifications to those plans and specifications; or
  - b. The party has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions.
10. For the purposes of the NPDES General Permit for Discharges from Large and Small Construction Activities" (the "CGP") and in the context of storm water associated with construction activity (68 FR 39087 - Appendix A) the term "commencement of construction activities" means the initial disturbance of soils associated with clearing, grading, excavation activities or other construction-related activities.
11. Owners or operators of construction activities are required to apply and obtain NPDES permit coverage for storm water discharges associated with construction activities. 40 C.F.R. § 122.26(b)(14)(x).
12. An owner or operator of a construction site is required to submit an individual permit application no later than ninety (90) days, before the date on which construction is to commence, unless the owner or operator obtains authorization under an NPDES storm water general permit for construction activities. 40 C.F.R. § 122.21.
13. On July 1, 2003, EPA issued the CGP.
14. The CGP was published in the Federal Register on July 1, 2003 (68 FR 39087). The CGP became effective on July 1, 2003 and shall expire at midnight, July 1, 2008.
15. Section 2.3.A of the CGP establishes application deadlines for owners or operators of new projects. Such owners or operators were required to file a complete and accurate Notice of Intent (NOI) form prior to commencement of construction activities.
16. Section 3.1.A of the CGP requires Respondents to prepare a SWPPP prior to submission of the NOI.
17. Section 3.1.D of the CGP requires Respondents to implement the SWPPP as written from commencement of construction activity until final stabilization is complete.

18. Section 3.2.A of the CGP requires the operator that has control over construction plans and specifications to ensure that the SWPPP indicates the areas of the project where it has operational control over project specifications, including the ability to make modifications in specifications.
19. Section 3.2.B of the CGP requires the operator that has control over day-to-day activities to ensure that the SWPPP indicates the areas of the project where it has operational control.
20. Section 3.3.A of the CGP establishes that the SWPPP must identify all operators for the project site and the areas of the site over which each operator has control.
21. Section 3.3.B of the CGP establishes that the SWPPP must describe the nature of the construction activity.
22. Section 3.3.C of the CGP establishes that the SWPPP must contain a legible site map, showing the entire site, identifying:
  - a. Direction(s) of the storm water flow and approximate slopes anticipated after major grading activities (Section 3.3.C.1 of the CGP);
  - b. Locations of major structural and nonstructural best management practices (BMPs) identified in the SWPPP (Section 3.3.C.3 of the CGP);
  - c. Locations of off-site material, waste, borrow or equipment storage areas (Section 3.3.C.5 of the CGP);
  - d. Locations where storm water discharges to a surface water (Section 3.3.C.7 of the CGP); and
  - e. Areas where final stabilization has been accomplished and no further construction-phase permit requirements apply (Section 3.3.C.8 of the CGP).
23. Section 3.4 of the CGP requires Respondents to implement controls to reduce pollutants.
24. Section 3.6 of the CGP requires Respondents to maintain in effective operating conditions all erosion and sediment control and protective measures identified in the SWPPP.
25. Section 3.8 requires that copies of the CGP and of the signed and certified NOI form that was submitted to EPA must be included in the SWPPP.
26. Section 3.10.A of the CGP requires Respondents to specify in the SWPPP the inspection schedule to be followed, after taking into consideration the inspection schedules in Sections 3.10.A through C.

27. Section 3.10.D and G of the CGP requires Respondents to conduct inspections by qualified personnel and to complete an inspection report for each inspection performed.
28. Section 3.10.E of the CGP requires Respondents to perform inspections in all areas of the site disturbed by construction activity and areas used for storage of materials that are exposed to precipitation looking for evidence of, or the potential for, pollutants entering the storm water conveyance system.
29. Section 3.12.A of the CGP requires Respondents to retain at the construction site a copy of the SWPPP, NOI form, and acknowledgement letter from EPA from the date of commencement of construction activities to the date of final stabilization.
30. Section 3.12.B of the CGP requires Respondents to post a sign or other notice conspicuously near the main entrance of the construction site. The sign must contain a copy of the NOI filed for the Project, and the current location of the SWPPP and the name and telephone number of the contact person for scheduling viewing times.
31. Section 3.13.A of the CGP requires that all control measures must be properly selected, installed, and maintained in accordance with any relevant manufacturer specifications and good engineering practices.
32. Section 3.13.B of the CGP requires that if sediments escape the construction site, off-site accumulations of sediment must be removed at a frequency sufficient to minimize off-site impacts.
33. Section 3.13.D of the CGP requires Respondents to provide stabilization measures, as soon practicable, in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than 14 days after the construction activity in that portion of the site has temporarily or permanently ceased.
34. Section 3.13.E of the CGP requires Respondents to implement a combination of sediment and erosion control measures to achieve maximum pollutant removal.
35. Section 3.13.F of the CGP requires Respondents to place velocity dissipation devices at discharge locations and along the length of any outfall channel to provide a non-erosive flow velocity from the structure to a water course so that the natural physical and biological characteristics and functions are maintained and protected.

### **III. Findings of Violation**

#### **A. Findings of Fact**

36. Respondents, Inversiones del Mercado, Inc. (Respondent IM) and JOFA Contractors Corp. (Respondent JOFA) are corporations organized and authorized to do business under the laws of the Commonwealth of Puerto Rico.
37. Each Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
38. Respondent IM is the owner/operator and Respondent JOFA is an operator, as defined in 40 C.F.R. § 122.2, of a housing construction project known as “Posada del Coronel Housing Development” (the “Project”).
39. Respondents’ Project is located at State Road 250, Km. 2.3, Las Delicias Sector, Flamenco Ward, Culebra, Puerto Rico.
40. The Project is a development which consists of the construction of lots, single family residential units, and a hotel.
41. The construction activities at the Project are best described by the Standard Industrial Classification code 1521 (single-family housing construction).
42. The construction activities at the Project involve, among others, land disturbance, site preparation, utilities installation, and construction of houses and buildings.
43. Earth movement activities at the Project involve clearing, grading and excavation on approximately 37.56 acres of land.
44. Respondents began clearing activities at the Project on or about October 2006.
45. Respondents’ Project is a “construction activity” as defined in 40 C.F.R. § 122.26(b)(14)(x).
46. The Project is a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
47. The Respondents discharge storm water containing “pollutants” from the Project into the “Ensenada del Coronel Bay” which is part of the “Atlantic Ocean”.
48. The “Ensenada del Coronel Bay” and the “Atlantic Ocean” are waters of the United States, pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

49. Respondents' Project is covered by the NPDES permit application regulations for construction activities. 40 C.F.R. § 122.26(b)(14)(x).
50. Respondents are the owners and/or operators of the Project, as defined in 40 C.F.R. § 122.2. Respondents are subject to the provisions of the Act, 33 U.S.C. § 1251, *et seq.*, and the applicable NPDES permit application regulations found at 40 C.F.R. Part 122. Respondents were required to apply for and obtain NPDES permit coverage for the storm water discharges from the Project pursuant to 40 C.F.R. § 122.26(b)(14)(x).
51. On January 11, 2007 a duly authorized EPA enforcement officer performed an inspection (Inspection) at the Project to determine Respondents' compliance with the Act and the applicable NPDES regulations.
52. The findings of the Inspection were included in the NPDES Water Compliance Inspection Reports, dated August 6, 2007. The findings of the Inspection revealed that:
  - a. Respondent IM hired Respondent JOFA to conduct construction activities at the Project.
  - b. Respondent JOFA began earth movement activities at the Project in October 2006.
  - c. Respondent IM was/is the owner/operator and Respondent JOFA was/is the operator conducting construction activities at the Project.
  - d. A copy of the SWPPP was not available at the Project nor the inspection reports performed as required by Part 3.12.A of the CGP.
  - e. Respondents did not implement adequate storm water pollution prevention measures at the Project as required under Part 3 of the CGP.
  - f. Uncontrolled storm water runoffs from the Project were being discharged into the Ensenada del Coronel Bay in violation of Part 3 of the CGP.
  - g. Respondents did not adequately install and maintain the erosion and sediment control measures and other protective measures at the Project as required under Part 3 of the CGP.
  - h. Unstable slopes were observed throughout the Project.
  - i. Respondents did not post a sign or other notice at the Project concerning the NOI and the location of the SWPPP as required by Section 3.12.B of the CGP; among others.

53. On August 2, 2007, an EPA official conducted a review of the EPA National Storm Water Processing Center database<sup>1</sup> and the EPA files (EPA Review). The EPA Review revealed that on September 22, 2005, Respondent IM filed a NOI form seeking CGP coverage for its construction activities as an owner and operator at the Project. Respondent IM obtained coverage under the CGP on September 29, 2005, and was issued NPDES Permit No. PRR10B896 for its industrial discharges of storm water associated with construction activity from the Project into the Ensenada Posada del Coronel Bay. The NPDES permit number assigned is PRR10B896.
54. The EPA Review also revealed that as of such date Respondent JOFA had not filed a NOI form seeking coverage under the CGP nor had it filed an individual NPDES permit for its construction activities as an operator at the Project.
55. Based on the observations made by EPA during the Inspection, EPA issued the Administrative Order CWA-02-2007-3075 ("Compliance Order" or "Order"), dated September 11, 2007, against Respondents to address the violations mentioned above.
56. The Compliance Order incorporated findings of violations and ordered Respondents to:
  - a. cease and desist all clearing, grading and/or excavation activities at the Project;
  - b. cease the discharge of pollutants from the Project into waters of the United States;
  - c. submit a compliance plan for the Project in order to bring Respondents into compliance with the CWA, the NPDES storm water regulations and the CGP;
  - d. provide temporary stabilization to areas where clearing, grading and/or excavation activities had been temporarily ceased;
  - e. provide final stabilization to areas where clearing, grading and/or excavation activities will no longer be performed;
  - f. construct and/or install erosion and storm water management controls; and
  - g. provide maintenance to the erosion and storm water management controls;
  - h. for Respondent JOFA, file a NOI form seeking coverage under the CGP for its construction activities at the Project; among others.

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<sup>1</sup> <http://www.epa.gov/npdes/stormwater>

57. On October 1, 2007, Respondents submitted a Compliance Plan to EPA in response to the Compliance Order. As part of the Compliance Plan, Respondents provided, among other:
- a. EPA email certifying that on October 1, 2007, Respondent JOFA filed a NOI form seeking coverage under the CGP for its construction activities as an operator at the Project, and obtained coverage on October 8, 2007;
  - b. an Amended SWPPP, dated September 2007.
58. EPA reviewed the Amended SWPPP and determined that it complied with the requirements of Part 3 of the CGP.

**B. Conclusions of Law**

59. 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 retain a copy of the SWPPP at the Project**  
Respondents failed to retain a copy of the SWPPP at the Project as required by Part 3.12.A of the CGP. This violation is for January 11, 2007, the date when EPA performed the Inspection at the Project.
  - b. **Claim 2 – Failure to post a sign**  
Respondents did not post a sign or other notice at the Project concerning the NOI and the location of the SWPPP as required by Section 3.12.B of the CGP. This violation is for January 11, 2007, the date when EPA performed the Inspection at the Project.
  - c. **Claim 3 – Failure to develop a complete SWPPP**  
Respondents did not prepare a complete SWPPP, in order to provide storm water pollution prevention for the Project, as required under Part 3 of the CGP. The SWPPP remained incomplete from October 1, 2006 (date when earth movement activities began at the Project) until October 1, 2007 (date when Respondents submitted a complete SWPPP). The number of days that Respondents failed to have a complete SWPPP are 366.
  - d. **Claim 4 – Failure to implement SWPPP**  
Respondents did not implement the SWPPP at the Project, as required under Part 3 of the CGP, from October 1, 2006 (date when earth movement activities began at the Project) until September 11, 2007 (date when EPA issued the Compliance Order). The number of days that Respondents failed to implement the SWPPP are 346.

**e. Claim 5 – Failure to file for NPDES coverage**

Respondent JOFA's failure to timely apply for a NPDES storm water permit for coverage of its construction activities at the Project from October 1, 2006 (date when Respondent JOFA began to perform earth movement activities at the Project) until October 1, 2007 (date when JOFA submitted a complete NOI seeking coverage). The number of days that Respondents failed to implement the SWPPP are 366.

60. 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), EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a penalty of **\$60,050.00**. 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 by the Debt Collection Improvement Act of 1996, which requires EPA to adjust penalties for inflation on a periodic basis.

The penalty amounts were amended for violations occurring between January 1, 1997 and March 14, 2004. The maximum administrative penalty under Section 309(g) of the Act, 33 U.S.C. § 1319(g), for those violations is \$11,000 per day per violation and a \$137,500 for a maximum penalty amount. For violations after March 15, 2004, the maximum administrative penalty is \$11,000 per day per violation and \$157,500 for a maximum penalty amount.

Based on the Findings set forth above, Respondents have been found to have violated in numerous occasions the NPDES regulations and the Act. Respondents failed to perform prepare and implement an adequate SWPPP, retain a copy of the SWPPP at the Project, and post a notice at the Project, as required by the CGP. Respondents are culpable for the violations. EPA took into account Respondents' knowledge of the NPDES regulations, the CGP, and the risks to human health and the environment posed by the uncontrolled discharges of storm water runoff from the Project into the Ensenada del Coronel Bay, a water of the United States.

The violations discussed in this Complaint are serious since Respondents' failure to develop and implement storm water pollution prevention at the Project caused a significant amount of sediments to reach surface water that could cause direct and indirect negative effects on human health and the environment. Respondents knew of their obligations under the NPDES regulations, CGP, and the Act. Respondents do not have a prior history of violations under the NPDES program. EPA may issue a final Order Assessing Administrative Penalties thirty (30) days after Respondents' receipt of this Notice, unless Respondents, 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 intends 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 disputes (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(b).

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, 33 U.S.C. § 1319(g)(4)(B), 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 does not prevent it 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 its 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 within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address noted 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. 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:

**U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P. O. Box 979077  
St. Louis, MO 63197-9000.**

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:

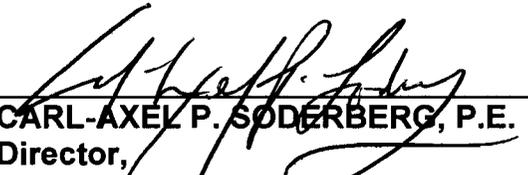
**Héctor L. Vélez Cruz, Esq.  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
1492 Ponce de León Ave., Suite 417  
San Juan, Puerto Rico 00907-4127  
Telephone: (787) 977-5850  
Fax: (787) 729-7748.**

**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 30<sup>th</sup> DAY OF September, 2008.



CARL-AXEL P. SODERBERG, P.E.

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: Jorge R. Arce  
Inversiones del Mercado, Inc.  
P. O. Box 364386  
San Juan, Puerto Rico 00936-4368

Jorge Falero  
JOFA Contractors, Inc.  
RR 10 Box 5226  
San Juan, Puerto Rico 00926

cc: Wanda García  
Director  
Water Quality Area  
PR Environmental Quality Board  
P.O. Box 11488  
San Juan, PR 00910

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2**

IN THE MATTER OF:

**INVERSIONES DEL MERCADO, INC.**  
and

**JOFA CONTRACTORS, INC.**

**Posada del Coronel Housing  
Development**

**RESPONDENTS**

**DOCKET NUMBER CWA-02-2008-3460**

PROCEEDING PURSUANT TO SECTION  
309(G) OF THE CLEAN WATER ACT, 33  
U.S.C. § 1319(G), TO ASSESS CLASS II  
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," (40 CFR Part 22, July 1, 2000) to the following persons at the addresses listed below:

Mr. Jorge Arce  
President  
Inversiones del Mercado. Inc.  
P.O. Box 364386  
San Juan, Puerto Rico 00936-4368

Mr. Jorge Falero  
President  
JOFA Contractors Corp.  
RR 10 Box 5226  
San Juan, Puerto Rico 00926

I sent by certified mail/return receipt the original and a copy of the foregoing Complaint for filing, to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Date: 10/6/08

  
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