

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 SEP 21 P 2:28
REGIONAL HEARING
CLERK

IN THE MATTER OF:

BFI of Ponce, Inc.
P.O. Box 7104
Ponce, Puerto Rico 00732

Ponce Municipal Landfill
NPDES Permit Number PR0025844

Respondent.

Docket No. CWA-02-2010-3462

Proceeding Pursuant 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 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 United States Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act ("CWA" or the "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"), July 1, 2000, as amended, 40 C.F.R. Part 22, a copy of which is attached, Complainant hereby requests that the EPA Regional Administrator assess a civil penalty against BFI of Ponce, Inc. ("BFI" or "Respondent") for its failure to meet effluent limitations set forth in the National Pollutant Discharge Elimination System ("NPDES") permit number PR0025844 of the Ponce Municipal Landfill ("Landfill"), in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3. 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.”
4. The Act and its implementing regulations, contain the following definitions:
 - a. “Navigable waters” includes the waters of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7). “Waters of the United States” include, among others, waters which are currently used or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and including wetlands, rivers, streams (including intermittent streams). 40 C.F.R. § 122.2.
 - b. “Pollutant” includes solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge . . . and industrial, municipal and agricultural waste discharged into water, pursuant to Section 502(6) of the Act, 33 U.S.C. § 1362(6).
 - c. “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. . . . pursuant to Section 502 (14) of the Act, 33 U.S.C. § 1362(14).
 - d. “Discharge of a pollutant” means any addition of any pollutant to navigable waters from any point source, pursuant to Section 502(12) of the Act, 33 U.S.C. § 1362(12).
 - e. “Person” includes an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. § 1362(5).
 - f. “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. 40 C.F.R. § 122.2.

II. FINDINGS OF VIOLATION

5. Respondent is a corporation, organized under the laws of the Commonwealth Puerto Rico.

6. Respondent is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
7. Respondent "owns" and "operates" the Landfill.
8. The Landfill is located at State Road No. 500 (End), La Cotorra Ward, in Ponce, Puerto Rico.
9. The Landfill is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
10. On September 27, 2007, EPA issued NPDES Permit No. PR0025844 (the "NPDES Permit") to BFI under Section 402 of the Act, 33 U.S.C. § 1342. By its terms, the Permit became effective on December 1, 2007, and expires on November 30, 2012.
11. The NPDES Permit authorizes BFI to discharge certain pollutants from the Landfill into an unnamed creek, tributary of the Río Pastillo, a water of the United States, within the terms of the NPDES Permit.
12. Part I, Table A-1 of the NPDES Permit, sets forth discharge limitations and monitoring requirements that Respondent is required to meet. Specifically, Table A-1 establishes the measurement frequency and sample type.
13. Special Condition 1 of the NPDES Permit authorizes Respondent to discharge treated waters composed entirely of storm water through outfall serial number 002.
14. Part I, Special Condition 4 of the NPDES Permit prohibits the discharge of toxic substances other than those specified in the NPDES Permit. Those toxic substances included in the permit application, but not regulated by the NPDES permit, shall not exceed the concentrations specified in the applicable regulatory limitations. The discharge of leachate to waters of the United States or a municipal separate storm sewer system is not authorized. Operators with such discharges must obtain authorization or cease the discharge immediately.
15. Part I, Special Condition 13, requires Respondent ("Permittee") to comply with the following requirements:

STORM WATER POLLUTION PREVENTION PLAN (SWPP PLAN)

- A. Within sixty (60) days after December 1, 2007, the Permittee shall submit to the EQB for review and approval a revised and modified

SWPP Plan, to incorporate additional prevention measurements besides the ones included in the SWPP Plan approved by EQB on May 5, 2002. The modified SWPP Plan shall be implemented within ninety (90) days after the EQB approval of the modified SWPP Plan. Failure to review, modify and submit for review and approval, and subsequent implementation of the modified SWPP Plan by the Permittee, subjects the discharge of waters composed entirely of storm water to immediate compliance with the applicable water quality standards at the authorized point of discharge, as established on Table A-2 of the NPDES permit. Meanwhile, the Permittee shall comply with the terms and conditions included in the SWPP Plan as approved by the EQB on May 5, 2002.

- B. A copy of the most recent version of the approved SWPP Plan shall be maintained at the facility and shall be available upon request.
- C. Whenever a construction or a change in design, operation, or maintenance at your facility significantly changes the nature of pollutants discharged in storm water from your facility, or significantly increases the quantity of pollutants discharged, the SWPP Plan shall be modified to include preventive measurements in order to address those situations.
- D. If a modification of the SWPP Plan is necessary, the Permittee shall submit the modified SWPP Plan to EQB for review and approval within ninety (90) days from the date when the Plan was modified by BFI. The modified SWPP Plan shall be implemented within ninety (90) days after the date when EQB has approved the modified SWPP Plan.

16. Part II, General Condition B.1 of the NPDES Permit, requires BFI to comply with all conditions of the NPDES Permit. Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; permit termination, revocation and reissuance, or modification; denial of a permit renewal application.

17. Part II, General Condition B.5 of the NPDES Permit, states that the Permittee shall at all times maintain in good working order and operate as efficiently as possible all facilities and systems and related appurtenances for collection and treatment, which are installed or used by the Permittee for water pollution control and abatement to achieve compliance with the terms and conditions of the NPDES Permit. Proper operation and maintenance includes, but is not limited to, effective performance based on designed facility removals, adequate funding, effective management, adequate operator staffing, adequate training, and adequate laboratory

and process controls, including appropriate quality assurance procedures.

18. On July 18, 2008, EPA conducted a Compliance Evaluation Inspection (the "Inspection") of the Landfill. The results of the Inspection are summarized in the Water Compliance Inspection Report dated March 18, 2009 (See Attachment I). During the Inspection, EPA interviewed Mr. Jose Soto, Landfill Manager. Based upon the Inspection, the interview of Mr. Soto, and a review of BFI's files, EPA found, among others, the following:
- a. leachate from one of the old cells of the municipal portion of the landfill was observed flowing through the Storm Water Channel and reaching the Storm Water Retention Pond in violation of Part I Table A-1, Effluent Limitations and Monitoring Requirements and Special Condition 5 of the NPDES Permit;
 - b. Respondent failed to implement the SWPP Plan according to the conditions contained in the NPDES Permit, by not complying with the requirement of testing or evaluating the discharge for non storm water discharges, including leachate in violation of Part I, Special Condition 13 of the NPDES Permit;
 - c. the DMRs Respondent submitted to EPA, for the period between August 2008 and December 2009, indicate that the Landfill exceeded effluent limitations for Chemical Oxygen Demand in August, September, and October of 2008, and in March, May, November, and December 2009 in violation of Part I, Table A-1 of the NPDES Permit; and
 - d. the DMRs Respondent submitted to EPA, for the period between October 2007 and May 2009, also indicate that the Landfill exceeded effluent limitations for Total Suspended Solids in October 2007, September 2008, and March and May of 2009 in violation of Part I, Table A-1 of the NPDES Permit.

19. Part 40 Part 40 C.F.R. § 122.41(a) states that: "The Permittee must comply with all conditions of this permit. Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application."

III. CONCLUSIONS OF LAW

20. As described in the above paragraphs, Respondent violated Section 301(a) of the Act, 33 U.S.C. §1311(a), for its failure to:

Claim 1 – comply with the effluent limitations established in the NPDES Permit for the Chemical Oxygen Demand (7 violations), Total Suspended Solids (4 violations) parameters;

Claim 2 – implement the Storm Water Pollution Prevention Plan according to permit conditions by not complying with the requirement of testing or evaluating the discharge for non storm water discharges including leachate

21. EPA has notified 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

22. 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 Respondent assessing a penalty of **\$100,000.00**.

23. 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 the nature, circumstances, extent and gravity of the 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. Based on the Findings set forth above, Respondent has been found to have violated in numerous occasions the permit and therefore, the Act. Respondent violated the effluent limitations contained in Table A-1 of the permit 11 times. Respondent obtained an economic benefit as a result of their effluent limits violations from August 2007 to December 2009, and its failure to properly implement the SWPPP to control non-storm water discharges at least from August 2007 to December 2009, a total of 330 consecutive days. Respondent has a prior history of violations under the NPDES program. Respondent is responsible for the violations.

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

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

A. Answering the Complaint

25. 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).

26. The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th floor
New York, New York 10007-1866.**

27. 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).

28. 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 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 defense, (2) the facts that Respondent disputes (and thus intend 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).

29. Respondent's failure to affirmatively raise in the Answer facts that constitute, or that might constitute, the grounds of their 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

30. If requested by Respondent in its 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).
31. 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.
32. 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 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

33. If Respondent fails in its 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 CFR § 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 CFR § 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).
34. 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

35. 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.
36. 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 of this Complaint (below).
37. 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 request for 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).
38. 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.
39. 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 its 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).

40. Respondent 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 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

41. Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within thirty (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 attorney named in Section VII, 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:

**Regional Hearing Clerk
U. S. Environmental Protection Agency, Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251.**

42. 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 be issued until at least ten (10) days after the close of the comment

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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

43. 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, 17th Floor
New York, New York 10007.

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

Silvia Carreño, Esq.
Assistant Regional Counsel
Office of Regional Counsel, Caribbean Team
U.S. Environmental Protection Agency, Region 2
1492 Ponce de Leon Ave., Suite 207
San Juan, Puerto Rico 00907-1866
Tel.: (787) 977-5818;
Fax: (787) 729-7748

IX. GENERAL PROVISIONS

45. Respondent has a right to be represented by an attorney at any stage of these proceedings.

46. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated hereunder, or any applicable permit.

47. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondent's continuing

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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 16 DAY OF September, 2010.



Carl-Axel P. Soderberg, P.E., Director
Caribbean Environmental Protection Division
U. S. Environmental Protection Agency, Region 2
1492 Ponce de Leon Ave, Suite 417
San Juan, Puerto Rico 00907-1866

To: Mr. Alfredo Gerena
District Manager
BFI of Ponce, Inc.
G.P.O. Box 7104
Ponce, Puerto Rico 00732

ATTACHMENT

cc: Roberto Ayala, EQB (w/ Complaint)

Attachment 1

The following Table includes the effluent limitations violations reported by BFI during the period indicated herein:

Reporting Period	Parameter Violated	Permit Limit	Reported Value	Percentage of Exceedances
October-07	TSS	50	54	8%
August-08	Chemical Oxygen Demand	100	160	60%
September-08	Chemical Oxygen Demand	100	2273	2173%
	TSS	50	294	488%
October-08	Chemical Oxygen Demand	100	601	501%
March-09	Chemical Oxygen Demand	100	270	170%
	TSS	50	109	118%
May-09	Chemical Oxygen Demand	100	159	59%
	TSS	50	268	436%
November-09	Chemical Oxygen Demand	100	137	37%
December-09	Chemical Oxygen Demand	100	137	37%

CERTIFICATE OF SERVICE

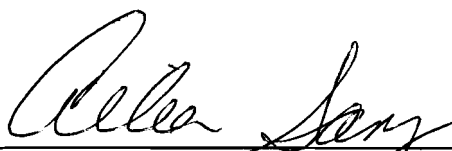
I certify that, on the date noted below, I caused to be mailed, by certified mail, return receipt requested, a copy of the foregoing "ADMINISTRATIVE COMPLAINT" and a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R., Part 22, as amended, to the following persons at the address listed below:

Mr. Alfredo Gerena
District Manager
BFI of Ponce, Inc.
G.P.O. Box 7104
Ponce, Puerto Rico 00732

Mr. Roberto Ayala
Director
Water Quality Area
Environmental Quality Board
P.O. Box 11488
San Juan, Puerto Rico 00910.

I mailed the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States EPA, Region 2.

Dated: 9/17/10



Aileen Sánchez, Program Support Assistant
EPA, Region 2, Office of Regional Counsel