

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
2011 DEC 22 P 1:46
REGIONAL HEARING
CLERK

IN THE MATTER OF

Municipality of Aguada

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

Docket No. CWA 02-2011-3602

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. This is a civil administrative proceeding for the assessment of a civil penalty instituted pursuant to Section 309(g)(2)(A) of the Clean Water Act (the "Act"), 33 U.S.C. § 1319(g).
2. The following Findings of Fact are made and Order issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by the Act, as amended, 33 U.S.C. § 1251 *et. seq.*, and in particular Section 309(g) of the Act, 33 U.S.C. § 1319(g). This authority has been duly delegated by the Administrator to the Regional Administrator of Region 2 of EPA, which authority has been duly re-delegated to the undersigned Director of the Division of Environmental Planning and Protection of Region 2 of EPA.
3. EPA is initiating and concluding this proceeding for the assessment of a civil penalty, pursuant to Section 309(g)(2)(A) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §1319(g); and 40 CFR §22.13(b) of 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"), which set forth procedures for simultaneous commencement and conclusion of administrative civil penalty assessment proceedings through issuance of a consent agreement and final order pursuant to 40 CFR §22.18 (b)(2) and (3).

II. FINDINGS OF FACT

1. The Municipality of Aguada (“Respondent”) is a “person” as defined under Section 502 of the Act, 33 U.S.C. §1362.
2. Mr. Luis A. Echevarría Santiago is the Mayor of the Municipality of Aguada.
3. As Mayor of the Municipality of Aguada, Mr. Echevarría Santiago has control over the operations of the Municipal Government of Aguada and authority over its employees.
4. On March 25, 2009, personnel from the U.S. Army Corps of Engineers (“the Corps”), Antilles Regulatory Section made a site visit to investigate a report that the Municipality of Aguada had made a discharge into waters of the United States, including wetlands, without Department of the Army authorization. The wetlands are located south of Cerro Matias, Piedras Blancas Ward, Municipality of Aguada, Puerto Rico. The reported impact was due to the construction of a bypass roadway several kilometers in length (“the Activity”). The Corps personnel observed that the Activity was recently completed.
5. The Activity included the discharge of fill material (“the Fill”) into approximately five acres of waters of the United States, including wetlands adjacent to an unnamed tributary of the Culebras River that flows to Aguadilla Bay and the Atlantic Ocean.
6. The purpose of the discharge of the Fill was to create the bypass roadway.
7. The affected wetlands are waters of the United States, which came under the jurisdiction of the EPA and the Corps effective September 1, 1976. The Act's jurisdiction encompasses “navigable waters” which are defined as “waters of the U.S” in Section 502(7) of the Act, 33 U.S.C. §1362(7).
8. The mechanized construction equipment utilized to complete the Activity is a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. §1362(14).
9. The Fill that was discharged constitutes a “pollutant” within the meaning of Section 502(6) of the Act, 33 U.S.C. §1362(6).
10. The discharge of the Fill into waters of the United States constitutes a “discharge of pollutants” as defined by Section 502(12) of the Act, 33 U.S.C. §1362(12).
11. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of pollutants into waters of the United States except as in compliance with Sections 301, 306, 307, 318, 402 and 404 of the Act.

12. Section 404 of the Act, 33 U.S.C. §1344, authorizes the Secretary of the Army to authorize discharges of dredged and fill material into navigable waters of the United States.
13. The discharge of pollutants, consisting of dredged and fill material, into navigable waters of the United States without authorization from the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. §1344, from a point source, is unlawful under Section 301(a) of the Act, 33 U.S.C. §1311(a).
14. The Secretary of the Army has not issued authorization pursuant to Section 404 of the Act for the discharge of Fill as described in Paragraphs 4 through 6, above.
15. On April 1, 2009, the Corps issued a Cease and Desist Order to Respondent regarding the Activity. The Corps assigned file number SAJ-2009-01133 (CD-JER) to the case.
16. By letter dated September 24, 2009, the Corps referred the case to EPA for further investigation and enforcement action, as a flagrant violation of Section 404 of the Act, 33 U.S.C. §1344, pursuant to the nationwide Memorandum of Agreement between the Corps and EPA concerning enforcement of Section 404 of the Act.
17. On December 21, 2009, the Corps received an application from Respondent seeking retroactive authorization of the Activity. On March 4, 2010 the Corps informed Respondent that the Corps could not accept the application because EPA had already initiated an enforcement action.
18. EPA, simultaneously with this Consent Agreement and Final Order (“CA/FO”), is notifying the Commonwealth of Puerto Rico regarding this proposed action by mailing a copy of this Complaint and Notice to the appropriate Commonwealth officials, and offering an opportunity for the Commonwealth to confer with EPA on the proposed penalty assessment pursuant to 40 C.F.R. § 22.
19. EPA has notified the public of this proposed action by, at least, posting notice of this proposed action on the EPA website.

III. CONCLUSIONS OF LAW AND JURISDICTION

20. Based on the above Findings, this CA/FO alleges that Respondent is in violation of Section 301 of the Act, 33 U.S.C. §1311, for the discharge of pollutants consisting of fill material into waters of the United States from a point source without authorization by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. §1344.
21. EPA has jurisdiction over the subject matter of this action, pursuant to Section 309 of the Act, 33 U.S.C. § 1319, and over the Respondent.

IV. CONSENT AGREEMENT

22. Paragraphs 1-21 are re-alleged and incorporated herein by reference.
23. EPA and Respondent agree that it is in the public interest to resolve the issues alleged in this Consent Agreement without further litigation and the expense and effort that litigation entails.
24. Based upon the foregoing and pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and the CROP, it is hereby agreed by and between EPA and Respondent, and Respondent voluntarily and knowingly agrees as follows:

V. TERMS OF SETTLEMENT

25. This CA/FO shall apply to and be binding upon Respondent, its officers, directors, employees, successors and assigns.
26. Respondent shall provide a copy of this CA/FO to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this CA/FO.
27. In any action to enforce this CA/FO, Respondent shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this CA/FO.
28. For the purpose of this proceeding, Respondent stipulates that:
 - a. EPA has jurisdiction over the subject matter alleged herein and that this Consent Agreement states a claim upon which relief can be granted against Respondent;
 - b. Respondent waives any defenses they might have as to jurisdiction and venue;
 - c. Respondent hereby consents to the terms of this CA/FO and admits the factual and legal allegations contained herein;
 - d. Respondent hereby waives its right to a judicial or administrative hearing or appeal on any issue of law or fact set forth herein; and,
 - e. Respondent consents to the payment of the civil penalty cited in Paragraph 30 below.

29. Pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), the nature of the violations alleged herein and other relevant factors, Complainant and Respondent agree that an appropriate civil penalty to settle this proceeding is in the amount of **thirty thousand dollars and zero cents (\$30,000.00)**

VI. PAYMENT OF CIVIL PENALTY

30. Respondent shall pay, by cashier's or certified check, a civil penalty in the amount of **thirty thousand dollars and zero cents (\$30,000.00)** plus interest, pursuant to the payment plan described below, payable to the "Treasurer, United States of America".
31. Any check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Payment methods are described below:

CHECK PAYMENTS:

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

WIRE TRANSFERS:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045.

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency."

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979077
St. Louis, MO 63101
Contact: Natalie Pearson
Telephone Number: (314) 418-4087.

Respondent shall also send copies of such payment to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007

and to:

Lauren Fischer, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, New York 10007.

32. The effective date of this Consent Agreement and Final Order shall be the date of signature of the Final Order by the Director of the Division of Environmental Planning and Protection.
33. The dates by which payments must be received shall hereafter be referred to as the "due dates."
34. Payments must be received at the above address on or before the due dates described in Paragraph 35, which dates are calculated from the date of signature of the Final Order at the end of this document. The amount owed at each installment payment will bear interest over the unpaid principal from the effective date of this Consent Agreement.
35. Respondent agrees to pay the above stated amount in sixteen (16) payments, plus interest, as follows:

PAYMENT #	PAYMENT AMOUNT	DUE DATES SCHEDULE
1st payment	\$1,875	within 45 days from date of signature of CA/FO
2nd payment	\$1,875	Two months after 1 st payment is due
3rd payment	\$1,875	Four months after 1 st payment is due
4th payment	\$1,875	Six months after 1 st payment is due
5th payment	\$1,875	Eight months after 1 st payment is due
6th payment	\$1,875	Ten months after 1 st payment is due
7th payment	\$1,875	Twelve months after 1 st payment is due
8th payment	\$1,875	Fourteen months after 1 st payment is due
9th payment	\$1,875	Sixteen months after 1 st payment is due
10th payment	\$1,875	Eighteen months after 1 st payment is due
11th payment	\$1,875	Twenty months after the 1 st payment is due
12th payment	\$1,875	Twenty-two months after 1 st payment is due

13th payment	\$1,875	Twenty-four months after 1st payment is due
14th payment	\$1,875	Twenty-six months after 1st payment is due
15th payment	\$1,875	Twenty-eight months after 1st payment is due
16th payment	\$1,875	Thirty month's after the 1st payment is due

36. These sixteen (16) payments satisfy the totality of the civil penalty of **thirty thousand dollars and zero cents (\$30,000.00)** that Respondent has requested to satisfy payment.
37. The checks shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Payment methods are described below:

Respondent shall also send copies of this payment to each of the following:

Lauren Fischer, Esq.
Water and General Law Branch
Office of Regional Counsel, 16th Floor
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007-1866,

And
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007.

38. Failure to pay the penalty in full according to the above provisions may result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for Collection.
39. Further, if the payment is not received on or before the due dates, interest will be assessed at the annual rate established by the Secretary of Treasury pursuant to the Debt Collection Act, 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$15.00 will be assessed for each 30-day period (or any portion thereof) following the due date in which the balance remains unpaid. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of the due date.
40. Pursuant to Section 309(g)(9) of the Clean Water Act, 33 U.S.C. § 1319(g)(9), if payment is not received by the due date, a quarterly nonpayment penalty will be imposed for each calendar quarter during which such nonpayment persists. The quarterly nonpayment penalty is 20% of the aggregate amount of penalties and quarterly nonpayment penalties, which are unpaid as of the beginning of such quarter. You also may be required to pay attorneys fees and costs for collection proceedings in connection with nonpayment.

41. The penalty to be paid is a civil penalty assessed by the EPA and shall not be deductible from Respondent's federal or Commonwealth of Puerto Rico taxes.

VII. GENERAL PROVISIONS

42. The provisions of this Consent Agreement shall be binding upon Respondent, its officers, directors, agents, servants, authorized representatives and successors or assigns, including but not limited to, subsequent purchasers. The Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Director where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.
43. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or, except for the specific violations alleged herein, of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.
44. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.
45. This CA/FO shall constitute a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act for the violations alleged herein. Nothing in this CA/FO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent. Compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.
46. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Consent Agreement and to execute and legally bind that party to it.
47. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this Consent Agreement and Order.


For Respondent: **Municipality of Aguada** hereby consents to the issuance of the ORDER and agrees to be bound thereby.

BY: 

Hon. Luis A. Echevarría Santiago
Mayor
Municipality of Aguada
P.O. Box 517
Aguada, Puerto Rico 00602

DATE: 12/9/11

For the Complainant, the United States Environmental Protection Agency:

BY: 

Kevin Bricke, Acting Director
Division of Environmental Planning and Protection
U.S. EPA, Region 2
290 Broadway
New York, New York 10007

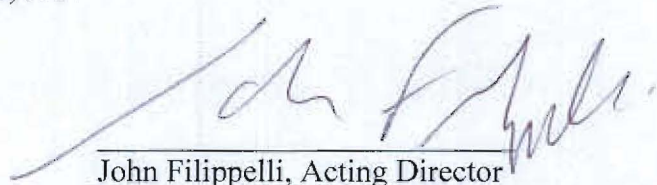
DATE: 9/26/11

III. FINAL ORDER

The Director of the Division of Environmental Planning and Protection, U.S. Environmental Protection Agency Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, NY.

Date

DEC 20 2011



John Filippelli, Acting Director
Division of Environmental Planning and Protection
U.S. EPA, Region 2
290 Broadway
New York, New York 10007

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Docket No. CWA 02-2011-3602

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I served the foregoing fully executed Consent Agreement and Final Order, bearing the above-referenced docket number, in the following manner.

Copy by Certified Mail Luis J. Sánchez Mercado
Return Receipt Requested: Legal Advisor
 Municipality of Aguada
 Sanchez Mercado Law Offices, PSC
 Mayaguez, Puerto Rico 00681-6551

Original and One Copy Regional Hearing Clerk
By Internal Mail (pouch): U.S. Environmental Protection Agency
 290 Broadway, 16th floor
 New York, New York 10007-1866

Copy By Facsimile and Helen S. Ferrara, Regional Judicial Officer
Internal Mail (pouch) : U.S. Environmental Protection Agency
 290 Broadway, 16th floor
 New York, New York 10007-1866

Date: 12/22/11

David J. Adun