

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2011 OCT -4 P 3:41
REGIONAL HEARING
CLERK

IN THE MATTER OF:

Ben-Mald Corp.
d/b/a Cinderella Poultry Farm
Carr 800, Km 4.5
Palmarito Ward,
Corozal, PR 00783

Respondent

NPDES Number PRU020712

Docket No. CWA-02-2011-3357

Proceeding Pursuant Section 309(g) of
the Clean Water Act, 33 U.S.C.
§1319(g) to Assess Class I Civil
Penalty

**COMPLAINT, FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY, AND NOTICE OF
OPPORTUNITY TO REQUEST A HEARING**

I. Statutory and Regulatory Authorities

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 U.S. Environmental Protection Agency ("EPA") by Section 309(g) (2)(A) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §1319(g) (2)(A). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director of the Caribbean Environmental Protection Division, Region 2, EPA ("Complainant").
2. Pursuant to Section 309(g)(2)(A) 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, a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Ben-Mald, Corp., for discharging pollutants into an unnamed creek which discharges into Quebrada Riachuelo which flows into Rio Manati and eventually reaching the Atlantic Ocean, all of which are waters of the United States, in violation of Section 301 of the Act.
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. Section 402 of the Act, defines "National Pollutant Discharge Elimination System"

("NPDES") as the national program for, among other things, issuing and enforcing permits. Section 402 of the Act, authorizes the Administrator to issue a NPDES permit for the discharge of any pollutant, or combination of pollutants, subject to certain requirements of the Act and such conditions as the Administrator determines are necessary.

5. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. §122. Under 40 C.F.R. §122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

6. Section 504(12) of the CWA, defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."

7. Section 502(6) of the CWA, defines "Pollutant" to include, *inter alia*, biological materials and agricultural waste discharged to water.

8. Section 502(14) of the CWA, defines "Point source" to include "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 ... from which pollutants are or may be discharged."

9. "Concentrated Animal Feeding Operations" ("CAFOs") as defined at 40 C.F.R. § 122.23(b) are considered "point sources", subject to NPDES permitting requirements.

10. "Animal Feeding Operations" ("AFO") are defined at 40 C.F.R. § 122.23(b)(1) as a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

- i) Animals (other than aquatic animals) have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
- ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

11. "Concentrated Animal feeding Operation" is defined at 40 C.F.R. § 122.23 (b)(2) as a Large CAFO or as a Medium CAFO or as designated in accordance with 40 C.F.R. § 122.23(c).

12. An AFO is defined as a Large CAFO if it stables or confines as many or more than the number of animals specified at 40 C.F.R. § 122.23(b)(4).

13. A Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in 40 C.F.R. § 122.23(b)(6)(i).

14. A Small concentrated animal feeding operation ("Small CAFO") is an AFO that is

designated as a CAFO and is not a Medium CAFO.

15. The term “land application area” means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied. 40 C.F.R. § 122.23(b)(3).

16. The term “manure” is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal. 40 C.F.R. § 122.23(b)(5).

17. “Process wastewater” means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding. 40 C.F.R. § 122.23(b)(7).

18. “Waters of the United States” includes among others intrastate rivers and streams, and tributaries thereto. 40 C.F.R. §122.2.

19. The EPA is the agency within the Commonwealth of Puerto Rico with the authority to administer the federal NPDES program. The EPA maintains enforcement authority for violations of the CWA.

II. Jurisdictional Findings

20. Ben-Mald, Corp., (“Respondent”), doing business as “Cinderella Poultry Farm” is an owner/operator of an animal feeding operation located at State Road 800 Km 4.5, Radio Oro Sector, Palmarito Ward, Corozal, Puerto Rico, the “Facility”. Ben-Mald, Corp., is a corporation authorized to do business in the Commonwealth of Puerto Rico. Respondent is a “person” within the meaning of Section 502(5) of the Act. Mr. Steven V. Benitez Maldonado is the President of the corporation.

21. Respondent is an owner of the Facility as that term is defined at 40 C.F.R. § 122.2

22. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1), and as that phrase is used in Section 502(14) of the CWA.

23. To the best of EPA’s knowledge the Facility was confining approximately 23,000 laying hens. The number of laying hens confined and fed at the Facility is smaller than 25,000, therefore the Facility is a small CAFO as that term is defined in 40 C.F.R.

§ 122.23(b)(9).

24. Based on information and belief, runoff from Respondent's dry manure storage handling facility overflowed to an adjacent strip of land next to the laying hen barn into a storm water ditch which flows into Quebrada Riachuelo then flowing into Rio Manati and eventually reaching the Atlantic Ocean which is a water of the United States.

25. At all relevant times Respondent's Facility was a "point source" within the meaning of Section 502(14) of the CWA.

26. At all relevant times "Process wastewater" was generated in the operation of Respondent's Facility as that term is defined at 40 C.F.R. § 122.23(b)(7).

27. At all relevant times Respondent's Facility was an AFO subject to the requirements and conditions of the NPDES permit.

28. The Atlantic Ocean is a water of the United States, as defined by 40 C.F.R. § 122.2.

III. Findings of Violation and Conclusions of Law

29. Complainant re-alleges Paragraphs 20-28 above.

30. On March 24, 2011 an EPA representative conducted a Compliance Evaluation Inspection (the "Inspection") at the Facility to determine if Respondent's operation of the Facility was in compliance with the Act and the applicable NPDES regulations. At the time of the Inspection EPA found that:

- a) Respondent's Facility did not have an NPDES permit;
- b) There were discharges from the Facility into the Quebrada Riachuelo;
- c) Respondent did not have in place adequate operations of waste control facilities in order to prevent the discharge of animal waste to the Quebrada Riachuelo;
- d) Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas;
- e) The dry manure storage handling facility shows signs of exceeded volume capacity and exposure to rain creating a mix liquid manure, and significant evidence of overflows and
- f) Respondent had failed to properly operate and maintain the manure

storage treatment system, which resulted in the discharge of pollutants into the Quebrada Riachuelo.

31. Based on the size of the Facility, the distance from the Facility to Quebrada Riachuelo, and the slope and condition of the land across that distance, wastewater, containing pollutants from open manure handling areas at the Facility discharged into Quebrada Riachuelo as a result of significant precipitation events.
32. Discharges of animal manure runoff from the Facility contain ammonia, fecal coliforms and other pollutants typically associated with laying hen operations.
33. To EPA's knowledge, manure discharges occurred at least on one instance on March 24, 2011 date when EPA inspected the Facility. During this period of time, the Facility discharged pollutants directly into the Quebrada Riachuelo flowing into Rio Manati and eventually reaching the Atlantic Ocean.
34. The ongoing flow of wastewater from Respondent's Facility into Quebrada Riachuelo then flowing into Rio Manati and eventually reaching the Atlantic Ocean constitutes unauthorized discharges of pollutants from a point source to waters of the United States. This is a violation of Section 301 and 402 of the Clean Water Act, and implementing regulations.
35. At the time of the Inspection, Respondent at all relevant times did not have a NPDES permit to discharge pollutants into the Atlantic Ocean.
36. Respondent is a person as that term is defined under Section 1362(5) of the Act.
37. Manure, is a pollutant as that term is defined under Section 1362(6) of the Act.
38. The Atlantic Ocean is a water of the United States. Section 1362(7) of the Act defines the term "navigable waters" to mean the waters of the United States, including the territorial seas.
39. Section 1362(12) of the Act defines the term "discharge of a pollutant" and the term "discharge of pollutants" to mean each "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."
40. The Facility operated by Respondent, which discharged pollutants into the Atlantic Ocean, is a "point source" as defined by Section 502(14) of the Act. Section 1362(14) of the Act defines the term "point source" to mean 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.

41. Section 1362(16) of the Act defines the term "discharge," when used without qualification, to include a discharge of a pollutant, and a discharge of pollutants.

42. Respondent, at all relevant times, has failed to provide adequate operation of the manure storage facility.

43. The discharges of manure as described above are "discharges of a pollutant" as defined by Section 502(12) of the Act.

44. Respondent failed to provide effective operation and maintenance to the manure storage area that resulted in discharges into the Atlantic Ocean. Respondent is subject to the provisions of the Act, 33 U.S.C. §1251 et seq.

45. EPA issued the Administrative Order CWA-02-2011-3113 ("Compliance Order"), dated March 30, 2011, against Respondent to address the violations mentioned above. The Compliance Order incorporated findings of violations, and ordered Respondent among other things, to cease and desist the discharge of pollutants into waters of the United States from the Facility and to submit a compliance plan that addresses the deficiencies in the operation of the manure storage area.

46. Based on the Findings detailed above, Complainant hereby finds that the Respondent violated Section 301 of the Act, by discharging pollutants from its Facility into waters of the United States without the appropriate permit to do so.

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, EPA, Region 2, hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a penalty of **\$11,525.00**. The proposed penalty has been determined in accordance with the applicable factors under Section 309(g)(3) of the Act. 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 Act of 1996, which requires EPA to adjust penalties for inflation on a periodic basis.

Based on the Findings set forth above, Respondent has been found violating Section 301 of the Act, by discharging pollutants into waters of the United States without a

NPDES permit. Respondent failed to take appropriate measures to prevent the

EPA may issue a final Order Assessing Administrative Penalties thirty (30) days after Respondent's receipt of this Notice, unless Respondent, 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, 16th 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 the 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 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).

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. §§ 51-59, 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 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

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 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). 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 Respondents' 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:

**Lourdes del Carmen Rodriguez
Assistant Regional Counsel
Office of Regional Counsel/CT
U.S. Environmental Protection Agency, Region 2
Centro Europa Building Suite 417
1492 Ponce de León Avenue
San Juan, Puerto Rico 00907-4127
Tel. (787) 977-5819**

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent 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 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).

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 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 Assistant Regional Counsel identified on the previous page. 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 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 - 16th 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:

**Lourdes del Carmen Rodriguez
Assistant Regional Counsel
Office of Regional Counsel/CT
U.S. Environmental Protection Agency, Region 2
1492 Ponce de León Avenue, Suite 417
Centro Europa Building
San Juan, Puerto Rico 00907-4127
Tel. (787) 977-5819**

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 there under, or any applicable permit.

ISSUED THIS 29th DAY OF September, 2011.



Carl Axel P. Soderberg, P.E
Director
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
1492 Ponce de León Avenue, Suite 417
Centro Europa Building
San Juan, Puerto Rico 00907-4127

To: Mr. Steven V. Benitez Maldonado
President
Ben-Mald Corp.
PO Box 650
Corozal, Puerto Rico 000783

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

<p>IN THE MATTER OF:</p> <p>Ben-Mald Corp. d/b/a Cinderella Poultry Farm Carr 800, Km 4.5 Palmarito Ward, Corozal, PR 00783</p> <p>Respondent</p> <p>NPDES Number PRU020712</p>	<p>Docket No. CWA-02-2011-3357 Proceeding to Assess Class I Civil Penalty under Section 309(g) of the Clean Water Act</p>
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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 , to the following person at the address listed below:

Mr. Steven V. Benitez Maldonado
President
Ben-Mald Corp.
PO Box 650
Corozal, Puerto Rico 000783

I sent the original and a copy of the foregoing Complaint for filing, by overnight mail to:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, R 2
290 Broadway, 16th Floor
New York, NY 10007-1866.

Date:

September 30, 2011



San Juan, Puerto Rico
Aileen Sanchez