

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

DOCKET NO. CWA-02-2009-3462

Desarrollos Altamira I. Inc.
P.O. Box 9021990
San Juan, Puerto Rico 00902-1990

and

Cidra Excavation, Inc.
P.O. Box 11218
Caparra Heights Station
San Juan, P.R. 00922

**Hacienda Altamira Residential
Development**

NPDES PERMIT No. PRU201934,

Respondents.

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

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGIONAL HEARING
CLERK
2009 DEC -9 PM 1:00

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

COMES NOW, Cidra Excavation, Inc. ("Cidra" or "Respondent"), through the undersigned attorneys, and presents its Answer to the Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") issued by the Environmental Protection Agency ("EPA") on September 29th, 2009, and respectfully states, alleges and prays as follows:

I. Statutory Authority

1. The first sentence of Paragraph 1 of the Complaint is a statement of law that requires no admission, denial or explanation and, in the alternative, is denied.

Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of Paragraph 1 of the Complaint and, on that basis, denies the allegations of the same.

2. Paragraph 2 of the Complaint is a statement of law and procedure, or of the application of law and procedure to facts, which requires no admission, denial or explanation and, in the alternative, is denied.

II. Statutory and Regulatory Background

3. Paragraphs 3 through 13 contain statements of law, of law and procedure or of the application of law and procedure to facts which, in general terms, describe the contents of the statutory and regulatory enactments therein cited, and that require no admission, denial or explanation and, in the alternative, are denied.

III. Findings of Violation

A. Findings of Fact

4. Paragraph 14 of the Complaint is directed to both Cidra and to a respondent other than Cidra. Cidra denies the allegations, insofar as these refer to Cidra, and believes that no response is necessary to those allegations directed to a respondent other than itself. To the extent that a response by Cidra to those allegations directed to a respondent other than to itself is deemed necessary, Cidra lacks sufficient knowledge or information to form a belief as to the truth of and, on that basis, denies the allegations of the same.

5. Paragraph 15 of the Complaint is directed to both Cidra and to a respondent other than Cidra. As to Cidra, Paragraph 15 states conclusions of law that require no admission, denial or explanation and, in the alternative, are denied. As to the

other respondent, Cidra believes that no response is necessary to allegations directed to a respondent other than itself. To the extent that a response by Cidra to those allegations directed to a respondent other than to itself is deemed necessary, Cidra understands that Paragraph 15 states conclusions of law that require no admission, denial or explanation and, in the alternative, are denied on that basis.

6. Paragraph 16 of the Complaint is directed to both Cidra and to a respondent other than Cidra. As to Cidra, Paragraph 16 states conclusions of law that require no admission, denial or explanation and, in the alternative, are denied. As to the other respondent, Cidra believes that no response is necessary to those allegations directed to a respondent other than itself. To the extent that a response by Cidra to those allegations directed to a respondent other than to itself is deemed necessary, Cidra understands that Paragraph 16 states conclusions of law that require no admission, denial or explanation and, in the alternative, are denied on that basis.

7. Cidra admits that Hacienda Altamira "is located at State Road PR-957, Km. 0.2, Hato Puerco Ward, in Canóvanas, Puerto Rico 00729, and denies the remaining allegations of Paragraph 17 of the Complaint.

8. Respondent admits the allegations of Paragraph 18 of the Complaint and further avers that, of the 152 houses, only, 43, approximately, were completed and, of these, only 5, approximately, have been sold and delivered; and, at the present, construction activity is not ongoing.

9. Respondent admits that general contractors engaged in the construction of single-family houses are classified under Standard Industrial Classification 1521 and denies the remaining allegations of Paragraph 19.

10. Respondent admits that activities at a construction project may, at different moments, entail those described in Paragraph 20, but absent a specific averment as to time, concerning Hacienda Altamira, Respondent lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 20 and, therefore, denies the same.

11. Respondent, upon information and belief, admits the allegations of Paragraph 21.

12. Paragraph 22 of the Complaint is directed to both Cidra and to a respondent other than Cidra. As to Cidra, Respondent admits, upon information and belief, the allegations of Paragraph 22 of the Complaint. As to the other respondent, Cidra believes that no response is necessary to those allegations directed to a respondent other than itself.

13. Paragraph 23 of the Complaint states a conclusion of law that requires no admission, denial or explanation and, in the alternative, is denied.

14. Paragraph 24 of the Complaint states a conclusion of law that requires no admission, denial or explanation and, in the alternative, is denied.

15. Paragraph 25 of the Complaint states conclusions of law, or of the application of law to facts, that require no admission, denial or explanation and, in the alternative, are denied.

16. Paragraph 26 of the Complaint states a conclusion of law that requires no admission, denial or explanation and, in the alternative, is denied.

17. Paragraph 27 of the Complaint describes, in general terms, regulatory requirements appearing in 40 C.F.R. §122.26(b)(14)(x), but its applicability to this case is denied.

18. Paragraph 28 of the Complaint states a conclusion of law, or of the application of law to facts, that requires no admission, denial or explanation and, in the alternative, is denied.

19. Cidra concurs that Paragraph 29 of the Complaint describes, in general terms, regulatory requirements appearing in 40 C.F.R. § 122.21, as to time to apply requirements, applicable to facilities described under 40 C.F.R. §122.26(b)(14)(x), but denies its applicability to this case.

20. Paragraph 30 of the Complaint is directed to both Cidra and to a respondent other than Cidra. As to Cidra, Paragraph 30 states conclusions of law that require no admission, denial or explanation and, in the alternative, are denied. As to the other respondent, Cidra believes that no response is necessary to those allegations directed to a respondent other than itself. To the extent that a response by Cidra to those allegations directed to a respondent other than to itself is deemed necessary, Cidra understands that Paragraph 30 states conclusions of law that require no admission, denial or explanation and, in the alternative, are denied on that basis.

21. Respondent concurs that Paragraphs 31 and 32 describe, in general terms, the issuance and notification in the Federal Register, effectiveness and duration of the permit therein described, but denies its applicability to this case.

22. Respondent concurs that Paragraph 33 of the Complaint describes, in general terms, requirements contained in Section 2.3 A of the "NPDES General Permit

for Storm Water Discharges from Construction Activities”, but denies its applicability to this case.

23. Respondent concurs that Paragraph 34 of the Complaint describes, in general terms, requirements contained in Section 3.1 A of the “NPDES General Permit for Storm Water Discharges from Construction Activities”, but denies its applicability to this case.

24. Respondent concurs that Paragraph 35 of the Complaint describes, in general terms, requirements contained in Section 3.1 D of the “NPDES General Permit for Storm Water Discharges from Construction Activities”, but denies its applicability to this case.

25. Respondent, upon information and belief admits, as stated in Paragraph 36, that inspections were performed by an EPA officer on the dates therein indicated. Respondent lacks knowledge or information sufficient to form a belief as to whether or not the person that performed the inspection was, as alleged, “a duly authorized EPA enforcement officer” and, likewise, as to whether or not the purpose of the inspector was “to determine Respondent’s compliance with the Act and the applicable NPDES regulations” and, therefore, denies the same.

26. In response to the allegations of Paragraph 37 of the Complaint, Respondent admits that a Water Compliance Inspection Report, dated September 27, 2007, exists but lacks knowledge or information sufficient to form a belief as to whether or not the “findings of the CEIs were included” therein and, therefore, denies the same. Respondent, furthermore, answers that the report speaks for itself.

27. Respondent lacks knowledge or information sufficient to form a belief as to the averments of Paragraph 38 of the Complaint concerning whether an EPA official conducted a review of the EPA National Storm Water Processing Center database on the date therein indicated and as to what was revealed by that review and, therefore, denies the same.

28. In response to the allegations of Paragraph 39 of the Complaint, Respondent admits that Administrative Compliance Order, Docket Number CWA-02-2007-3070, dated September 27, 2007, was issued against Respondents, but lacks knowledge of information sufficient to form a belief as to whether the Order was issued “[b]ased on the observations made by EPA during the CEIS...” and, therefore, denies the same. Respondent furthermore answers that the Order speaks for itself.

29. Paragraph 40 of the Complaint is directed to both Cidra and to a respondent other than Cidra. As to Cidra, Respondent admits receiving the September 27, 2007, EPA Compliance Order on or about October 18, 2007, as therein indicated. As to the other respondent, Cidra believes that no response is necessary to those allegations directed to a respondent other than itself. To the extent that a response by Cidra to those allegations directed to a respondent other than to itself is deemed necessary, Cidra lacks sufficient knowledge or information sufficient to form a belief as to if and when the Order was received by the other respondent and, on that basis, denies the allegation.

30. Respondent, upon information and belief admits, as stated in Paragraph 41, that an inspection was performed by an EPA officer on the date therein indicated. Respondent lacks knowledge or information sufficient to form a belief as to whether or

not the person that performed the inspection was, as alleged, "a duly authorized EPA enforcement officer" and, likewise, as to whether or not the purpose of the inspector was "to determine Respondent's compliance with the Act, the applicable NPDES regulations, and the Compliance Order" and, therefore, denies the same.

31. Cidra admits receiving a letter, dated November 6, 2007, informing that the Compliance Order described in Paragraph 42 of the Complaint was closed because of the reasons described in said paragraph.

B. Conclusions of Law

Paragraphs 43 a and b of the Complaint state conclusions of law, or of the application of law to facts, that require no admission, denial or explanation and, in the alternative, are denied. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the averment after Paragraph 43 b. concerning notification to the Commonwealth of Puerto Rico and, therefore, denies the same.

IV. Notice of Proposed Order Assessing a Civil Penalty

In response to this section, Respondent alleges that the proposed final order assessing administrative penalties in the amount of \$146,425.49, has no basis in law or in fact.

In addition, the proposed penalty assessment is excessive, unwarranted, burdensome, and fails to take into account the factors identified in Section 309(g)(3) of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., §1319(g)(3).

Except as specifically admitted, all factual allegations contained in Part IV of the Complaint are denied.

V. Procedures Governing This Administrative Litigation

No response to the allegations of Part V is requested and, thus, none is proffered.

VI. Informal Settlement Conference

No response to the allegations of Part VI is requested and, thus, none is proffered.

VII. Resolution of this Proceeding Without Hearing or Conference

No response to the allegations of Part VII is requested and, thus, none is proffered. Respondent restates the Request for Hearing made as part of its "Notification of Appearance, Request for Hearing and Request for Extension of Time to File Responsive Pleadings, dated November 4, 2009, notified in the captioned matter.

VIII. Filing of Documents

No response to the allegations of Part VIII is requested and, thus, none is proffered.

IX. General Provisions

No response to the allegations of Part IX is requested and, thus, none is proffered.

AFFIRMATIVE DEFENSES

In the form of Affirmative Defenses, Respondent states and avers as follows:

1. The Complaint fails to state a claim upon which relief can be granted against Respondent.

2. The Environmental Protection Agency ("EPA") lacks jurisdiction under the Clean Water Act. 33 U.S.C §§ 1251 et seq.

3. At no time herein relevant was Respondent the "owner" of a "facility" or "activity" at the Hacienda Altamira residential development ("Facility" or "Site") within the meaning of the Clean Water Act, 33 U.S.C. §§1251 et seq., and regulations issued thereunder.

4. At no time herein relevant was Cidra the "operator" of a "facility" or "activity" at the Site within the meaning of the Clean Water Act, 33 U.S.C. §§1251 et seq., and regulations issued thereunder.

5. At no time herein relevant did Cidra possess or retain responsibility for operation of the Facility or construction project as a whole.

6. At no time herein relevant did Cidra possess or retain responsibility for obtaining coverage under the National Pollutant Discharge Elimination System ("NPDES") permit applicable to facilities or activities generating stormwater subject to Section 402 (p) of the Clean Water Act, 33 U.S.C. §1342 (p), and related regulations issued thereunder pursuant to 40 C.F.R. Part 122.

7. At all times herein relevant Respondent acted under the understanding that coverage for activities at the Facility, under the NPDES permit applicable to facilities or activities generating stormwater subject to Section 402 (p) of the Clean Water Act, 33 U.S.C. §1342 (p), and applicable regulations issued thereunder pursuant to 40 C.F.R. Part 122, had been requested and obtained.

8. Respondent activities at the Site did not result in the discharge of stormwater or pollutants to "waters of the United States".

9. At all times herein relevant stormwaters from the Site which may have, without either so admitting or denying, gone beyond the Facility boundary, flowed onto terrain or land located between the Site and the “unnamed creek” described in the Complaint as a tributary of the “Río Canóvanas”

10. Any and all stormwaters that at all times herein relevant may have, without either so admitting or denying, gone beyond Facility property boundaries, flowed from the Site to terrain or land that is not a wetland, jurisdictional or otherwise.

11. The waterbody described in the Complaint as an “intermittent creek” is actually an ephemeral creek.

12. The “intermittent creek” described in the Administrative Complaint is not a relatively permanent, standing or continuously flowing body of water, forming geographic features that are described in ordinary parlance as streams, oceans, rivers or lakes.

13. Any terrain that, at all times herein relevant, may have, without either so admitting or denying, received stormwaters from the Site, was not adjacent to waters considered “waters of the United States” pursuant to Environmental Protection Agency regulations at 40 C.F.R. 230.3.

14. Any terrain that, at all times herein relevant, may have, without either so admitting or denying, received stormwaters from the Site, did not have a continuous surface connection to waterbodies that are “waters of the United States”.

15. There is no “significant nexus” between terrain that at all times herein relevant may have, without either so admitting or denying, received stormwaters from the Facility and the closest “traditional navigable waters”.

16. To the extent that Respondent's acts or omissions may, without either so admitting or denying, been in non compliance with Section 401 of the Clean Water Act, 33 U.S.C. § 1342, those failures are de minimis in nature, have created no danger to health and public safety or human welfare, a danger to the environment, or adversely impacted the hydrological or ecological functions and attributes of "waters of the United States".

17. Any and all actions or omissions concerning compliance with "Clean Water Act" Sections 301 and 402, 33 U.S.C. §§1311, 1342, have not resulted in any economic benefit to Respondent.

18. Respondent has, at all times, acted in good faith.

19. Respondent reserves the right to amend these pleadings and to add such further affirmative defenses as discovery and development of the case should disclose.

WHEREFORE, it is respectfully requested a hearing in the instant matter be held and that the Administrative Complaint be dismissed.

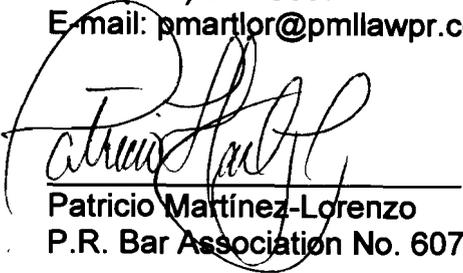
CERTIFICATE OF SERVICE: This Answer to Administrative Complaint has been notified by certified mail, return receipt requested, original and copy, to Regional Hearing Clerk, U.S. EPA, Region II, 290 Broadway - 16th Floor, New York, New York 10007; copies, return receipt requested, were notified to: Mr. Roberto M. Durango, Office of Regional Counsel, U.S. Environmental Protection Agency - Region 2, 1492 Ponce de León Ave., Suite 417, San Juan, Puerto Rico 00907-4127; and, Messrs. José Raúl Cancio & Rodney W. Colón-Ortíz, Cancio, Covas & Santiago LLP, 255 Ponce de León Ave., Suite A-267, Hato Rey, PR 00917; Mr. José A. Hernández Mayoral, Bufete Hernández Mayoral CSP, 206 Tetuán Street, Suite 702, San Juan, Puerto Rico 00901.

In San Juan, Puerto Rico this ^{14th} day of November, 2009.

Respectfully submitted.

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