



November 19, 2014

Mr. Víctor Morales
P.O. Box 9917
Caguas, Puerto Rico 00726

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Regional Administrator, Region 2
U.S. Environmental Protection Agency
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Ms. Jolie Harrison
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National Marine Fisheries Service
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Ms. Roxanna Hinzman
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U.S. Fish and Wildlife Service, Region 4
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Atlanta, GA 30345

Re: Notice of Violations of Clean Water Act and Endangered Species Act Associated
with Construction Activity on Culebra, Puerto Rico

Dear Mr. Morales and all Named Government Officials:

The purpose of this letter is to notify you of ongoing violations of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, associated with unpermitted construction and land clearing activities at a project site listed as State Road PR-250 interior, Km 1.2, Flamenco Ward, Culebra Municipality, Puerto Rico. These activities are being conducted on land under the control of Víctor Morales. This notice is provided on behalf of CORALations, Inc. pursuant to CWA Section 505(b)(1), 33 U.S.C. § 1365(b)(1).

As described more fully below, Mr. Morales has violated and continues to violate the federal CWA by clearing more than one acre of land in association with construction activities without a National Pollutant Discharge Elimination System (“NPDES”) permit. These illegal clearing activities also have resulted and may continue to result in the discharge of sediment via an intermittent river into waters designated as critical habitat for coral and sea turtle species protected under the ESA. In addition to CWA violations, Mr. Morales has not complied with ESA requirements governing the avoidance and authorization of impacts to listed species, and thus may be criminally and civilly liable for violations of the ESA as well as subject to injunctive relief to alleviate harm to ESA-listed species and their habitats.

BACKGROUND

On or about November 6, 2013, Mr. Morales initiated construction and land clearing activities at a project site listed as State Road PR-250 interior, Km 1.2, Flamenco Ward, Culebra Municipality, Puerto Rico (USACE Permit No. SAJ-2013-02746; Lat. 18.317001° North, Long. -65.302073° West).¹ On October 10, 2013, the U.S. Army Corps of Engineers (“Corps”) granted Mr. Morales authorization under Nationwide Permit Number 14 for the construction of five box culverts in a creek in order to build an access road for a housing development. Letter from Jacksonville District Corps of Engineers to Víctor Morales (Oct. 10, 2013). The permit required Mr. Morales to install and maintain erosion control measures for the duration of the authorized culvert construction in order to stabilize the work area and minimize the transport of materials to the aquatic environment. The letter accompanying the permit specifically did not exempt the project from having to comply with other state and federal permit requirements. *Id.* Mr. Morales installed these box culverts on or about November 6, 2013.

Separate from the culvert construction discussed above, Mr. Morales has proceeded over the past year to clear, without the required permits, more than an acre of steeply sloping land² on both sides of the site, resulting in runoff into the intermittent river bed. Coastal zone managers have long recognized that the disturbance of inland areas poses a direct threat to Culebra’s coastal waters, which is reflected in the fact that the Puerto Rico Coastal Zone Management Plan designates all of Culebra as being within coastal zone management jurisdiction. In this case, the intermittent river onsite feeds into coastal waters that have been designated as critical habitat for multiple species protected under the ESA, including elkhorn and staghorn corals and green sea turtles. There is no sign posting an EPA NPDES permit number at the site; nor permit numbers for the housing project mentioned in the Oct. 10, 2013 Corps documents.

Mr. Morales is well aware of stormwater discharge permit requirements associated with construction projects. In 2008, the U.S. Environmental Protection Agency (“EPA”) undertook enforcement proceedings and assessed civil penalties against Mr. Morales for failing to obtain an individual NPDES stormwater discharge permit or submit a notice of intent to obtain coverage through the Construction General Permit before commencing construction activities and illegally discharging stormwater into waters of the United States. Proceeding to Assess a Class I Civil Penalty, *In the Matter of Victor Morales, Victor Morales Lot Development*, NPDES Permit No. PRU202017, U.S. EPA Region 2 Docket No. CWA-02-2008-3357 (Oct. 9, 2008). As with the current violations, Mr.

¹ This site is also associated with Oficina de Generencia de Permisos Case No. 2013-203650-PCO-91709, and corresponds with the physical location shown on the map attached to the Oct. 10, 2013 letter from Jacksonville District Corps of Engineers to Víctor Morales.

² Based on the project description provided to the Corps, there is also reason to believe that these construction activities are being conducted as part of a larger common plan of development or sale that will ultimately disturb more than one acre of land. *See* 40 C.F.R. § 122.26(b)(15).

Morales committed these prior CWA violations in the course of clearing land and engaging in construction activities for a housing development on Culebra. On March 9, 2009, Mr. Morales and the EPA entered into a Consent Decree requiring Mr. Morales to pay \$6,000 in civil penalties. Consent Agreement and Final Order, *In the Matter of Victor Morales, Victor Morales Lot Development*, NPDES Permit Tracking No. PRR10BH00, U.S. EPA Region 2 Docket No. CWA-02-2008-3357.

The Secretary of Puerto Rico's Departamento de Recursos Naturales y Ambientales (Department of Natural and Environmental Resources) and the Director of La Oficina de Generencia de Permisos (Office of Permit Management) visited the current development site on State Road PR-250 interior on March 17, 2014, after the upland road was constructed, but prior to subsequent expansion of the road and land clearing along and upland of the intermittent river.

Discharges from this site deposit sediment and nutrients into the intermittent river, which feeds into Ensenada Honda during significant rain events. Impacts to coastal resources from sediment runoff can be widespread depending on the oceanographic conditions of the receiving waters at the time of the impact. Coastal water quality degradation as a result of sedimentation compromises diverse coastal marine life and the use of these waters for swimming and fishing.

In addition, coastal waters surrounding Culebra, including Ensenada Honda, have been designated as critical habitat for green turtles and elkhorn and staghorn corals. 63 Fed. Reg. 46693 (Sept. 2, 1998); 73 Fed. Reg. 72210 (Nov. 26, 2008). These waters also provide foraging and other habitat for West Indian manatees, hawksbill sea turtles, and leatherback sea turtles. 63 Fed. Reg. 46693, 46694-95. The Department of Natural and Environmental Resources of Puerto Rico has documented neonatal West Indian Manatee in nearby receiving waters. In addition, two terrestrial endangered snake species, the Puerto Rican tree boa and the Virgin Islands tree boa, have been documented near the project site. All of these species are protected under the ESA.

The sediment and nutrients carried in stormwater discharges from Mr. Morales's construction site threaten to harm sea grass beds adjacent to shore. Increased sedimentation and turbidity from stormwater runoff decreases light penetration in these waters, significantly impairing sea grass growth. Increased nutrient loading from stormwater runoff contributes to the growth of epiphytic macroalgae on sea grass leaves, further reducing sunlight penetration and sea grass productivity. By adversely affecting sea grass beds, runoff also harms listed species that use this habitat to feed and take shelter, including green and hawksbill sea turtles and manatees.

These discharges may also pose a risk to coral habitat and to listed coral species. Both elkhorn and staghorn coral require hard substrate free of sediment for settling, establishment and growth of larval corals, or for the reattachment and growth of coral fragments. 73 Fed. Reg. 72210, 72213 (Nov. 26, 2008). The National Marine Fisheries Service's ("NMFS") critical habitat designation for these corals specifies that one of the most important features of critical habitat is "substrate of suitable quality and availability"

defined as “consolidated hard substrate or dead coral skeleton that is free from fleshy or turf macroalgae cover and sediment cover.” The agency determined that “[s]ubstrate free from macroalgae cover and sediment cover would encompass water quality sufficiently free of nutrients and sediments. Therefore, activities that impact water quality by increasing nutrients or sediments may affect the essential substrate feature.” *Id.* at 72214.

Sediment that is washed into coastal waters from construction sites like this one smothers corals and buries hard substrate, thereby preventing the reproduction of elkhorn and staghorn corals. Sediment can also increase water opacity, reducing sunlight that these corals need for nutrition and growth. Similarly, nutrients washed into coral habitat with stormwater runoff contribute to algae growth, which impedes coral reproduction, growth and survival, and algae blooms in the water column, which also reduce sunlight.

In all, Mr. Morales has cleared over one acre of land and caused the displacement and likely discharge of significant amounts of sediment into the intermittent river running through the site. Just a year before Mr. Morales initiated his activities, the National Oceanic and Atmospheric Administration’s Restoration Center attempted to stabilize by hydroseeding areas within the same intermittent river bed, including this project’s site, in order to protect coral reef and related habitats by reducing runoff. Mr. Morales’s unlawful clearing activities and failure to implement and maintain proper erosion control measures have defeated the purpose of that restoration project and resulted not only in the waste of limited agency resources, but harm to the very species the restoration project was intended to protect.

LEGAL BACKGROUND

The federal Clean Water Act and its implementing regulations require that any operator of a “small construction activity” obtain permit coverage for the stormwater discharged from that construction project prior to initiating land disturbing activities. 33 U.S.C. § 1342(p)(6); 40 C.F.R. § 122.26(a)(9)(i)(B); NPDES Construction General Permit Parts 1.1(b)(i), 1.4.1. CWA regulations define small construction activity to mean construction activities (including clearing, grading, and excavating) that result in land disturbance of equal to or greater than one acre and less than five acres, or the disturbance of less than one acre of total land area if that area is part of a larger common plan of development or sale that will ultimately disturb equal to or greater than one and less than five acres. 40 C.F.R. § 122.26(b)(15).

A construction operator may obtain stormwater permit coverage by applying for coverage under the EPA’s NPDES Construction General Permit (“CGP”) or applying for an individual NPDES permit. Anyone wishing to obtain permit coverage through the CGP must submit a Notice of Intent to be covered by the CGP to EPA at least 14 days before commencing construction activities. CGP Part 1.4. The CGP requires compliance with applicable effluent limitations as well as erosion and sediment control, site stabilization, and pollution prevention requirements (CGP Part 2), and ESA requirements (CGP App. D). If EPA authorizes CGP coverage for the project, the operator must post a notice of the permit coverage, including the NPDES permit tracking number, at the project site. CGP Part 1.5. If the EPA denies authorization for CGP coverage for the project, the operator

must obtain an individual NPDES permit or coverage under another general permit prior to commencing construction activities. CGP Part 1.4.5.

In order to be eligible for CGP coverage, an applicant must demonstrate, among other things, that the project meets at least one of several ESA-related criteria. CGP App. D.1. The CGP defines “action area” broadly to include “all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action,” including areas downstream from the point of discharge. CGP App. A. For purposes of requiring ESA consultation regarding project effects, if there are listed species or designated critical habitat within the county in which the project is located, the applicant is expected to consult with the NMFS and/or U.S. Fish and Wildlife Service, as appropriate, regarding the effects of the project on the species or critical habitat. CGP App. D.2. Because there is designated critical habitat for federally listed species in Culebra, all applicants must consult with the Services regarding listed species and critical habitat effects before they can obtain CGP coverage.

Separately, Section 9 of the ESA prohibits all activities that cause a “take” of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C); 50 C.F.R. § 17.11(h). Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. *See* S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995. “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NMFS has further defined “harm” as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687 (1995) (upholding similar definition used by U.S. Fish and Wildlife Service). Through regulation, NMFS has applied the take prohibition to threatened elkhorn and staghorn corals affected by Mr. Morales’s actions here. 50 C.F.R. § 223.208.

The ESA contains limited exceptions to the take prohibition. 16 U.S.C. § 1539(a)(1)(B) and (2); 16 U.S.C. § 1536(o). For activities that do not involve a federal action, an “incidental take permit” authorizes a taking “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* § 1539(a)(1)(B). To obtain an incidental take permit, an applicant must submit a habitat conservation plan that, among other things, must specify the alternatives to the take, minimize and mitigate the impacts of the take, assure adequate funding for measures in the plan, and ensure that the take will not reduce the likelihood of survival and recovery of the species. 16 U.S.C. § 1539(a)(2)(A)-(B).

VIOLATIONS

I. MR. MORALES IS VIOLATING THE CLEAN WATER ACT

Mr. Morales has cleared more than one acre of land in association with his ongoing construction project without having obtained coverage under the CGP or an individual NPDES permit. In addition, it appears that these construction activities are being conducted as part of a larger common plan of development or sale that will ultimately disturb more than one acre of land. Undertaking these activities without permit coverage violates the Clean Water Act and its implementing regulations, as outlined above. 33 U.S.C. § 1342(p)(6); 40 C.F.R. §§ 122.26(a)(9)(i)(B) and (b)(15); NPDES CGP Parts 1.1(b)(i), 1.4.1. Mr. Morales's ongoing violations of the CWA subject him to daily penalties starting with the date he began land clearing activities without any NPDES permit.

As noted above, Mr. Morales is in knowing violation of CWA requirements. EPA assessed \$6,000 of civil penalties against him in 2009 for commencing construction activities without having obtained an individual NPDES permit or submitted a notice of intent to be covered by the CGP, and for illegally discharging stormwater into waters of the U.S. Just a few years later, Mr. Morales is committing the same violations at a different site. Clearly, swift and strong action is necessary to stop these ongoing violations and deter future violations.

CORALations provides this Notice for the violations outlined above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this Notice. This Notice is given pursuant to 33 U.S.C. § 1365 and 40 C.F.R. § 135.3(a). Under the CWA, 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, each of the violations described herein occurring on or after January 2009 is subject to a civil penalty of up to \$37,500 per day per violation. Mr. Morales is also potentially subject to injunctive relief, which could include restoration or mitigation for the stormwater impacts of this unpermitted project. Moreover, under 33 U.S.C. § 1365, prevailing parties may recover costs of litigation, including attorneys' fees.

II. MR. MORALES IS VIOLATING THE ENDANGERED SPECIES ACT

Mr. Morales's ongoing construction and land clearing activities may cause harm to multiple ESA-listed species, including the Virgin Island and Puerto Rican tree boas, green and hawksbill sea turtles, elkhorn and staghorn corals, and West Indian manatees. As described above, these actions, and the failure to properly mitigate their effects, results in increased sediment delivery to an intermittent river and contributes to harmful sediment and nutrient discharges to Ensenada Honda, which provides important habitat for these species and comprises designated critical habitat for green turtles and elkhorn and staghorn corals. Such harm to sea turtles, corals, manatees, and their habitat is a take of these threatened and endangered species. 50 C.F.R. § 222.102 (defining "harm" as used in the definition of "take" to include habitat modification that "significantly impair[s] ... breeding, spawning, rearing, migrating, feeding or sheltering").

Mr. Morales has a duty to avoid “take” of all federally listed species. While take incidental to an otherwise lawful activity may be permitted through a valid Incidental Take Statement or Incidental Take Permit, Mr. Morales has neither sought nor received such a permit. Mr. Morales is therefore liable for all “take” occurring as a result of the ongoing construction and land clearing activities, in violation of ESA Section 9. 16 U.S.C. § 1538(a)(1)(B); *id.* at 1536(o)(2); 50 C.F.R. § 223.208(a). CORALations requests that NMFS and the U.S. Fish and Wildlife Service take any and all actions necessary to prevent and mitigate the harm to listed species and their habitat caused by Mr. Morales’s activities.

CONCLUSION

CORALations requests that Mr. Morales fully comply with the law and halt all construction activities until he satisfies all applicable legal requirements and secures the permits described above. CORALations also requests that Mr. Morales immediately consult the appropriate regulatory agencies and undertake full restoration of the natural resources that have been harmed by his unlawful activities. Unless these violations are cured within sixty days, CORALations reserves the right to take appropriate legal action to compel compliance with the Clean Water Act. We look forward to the expeditious resolution of this matter.

Sincerely,



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Ms. Maria Coral Sanchez Parrilla, Executive Director, Authority for the Conservation and Development of Culebra