

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
OCT 27 A 10:14  
REGIONAL HEARING  
CLERK

In the Matter of:

**Martex Development, S.E**  
P.O. Box 3402  
Carolina, Puerto Rico 00984

**Villas de La Central Victoria Housing  
Development**  
NPDES CGP Number PRR10BT64

**RESPONDENTS**

Docket No. CWA-02-2011-3359

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

U.S. ENV. PROT. AGENCY  
OCT 25 PM 4:09  
REGIONAL HEARING CLERK

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

**TO THE REGIONAL HEARING CLERK:**

COMES NOW, Martex Development, S.E. (“Martex” or “Respondent”), hereby represented by the undersigned attorney and respectfully states and prays:

This Answer (the “Answer”) is submitted by Respondent in response to the “*Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing*” (the “Complaint”) issued by the U.S. Environmental Protection Agency, Region 2 (“EPA” or the “Complainant”) on September 26, 2011, and received by DEC on September 28, 2011.

For purposes of clarity, DEC’s Answer follows, for the most part, the same order of the Complaint. For those portions of the Answer that do not follow such order, Respondent shall clarify its response.

## **I. Statutory and Regulatory Authorities**

1. The first paragraph (identified as **I.1**) of the Complaint contains conclusions of law concerning the EPA's authority under the Federal Water Pollution Control Act (hereinafter, "Clean Water Act" or "CWA") and its delegation to the Regional Administrator of EPA Region 2 and in turn to the Caribbean Environmental Protection Division ("CEPD"), Region 2, which do not require an answer. If the allegation requires a response, then it is denied.

2. The second paragraph (identified as **I.2**) of the Complaint contains conclusions of law and Complainant's request to the Regional Administrator for the assessment of a civil penalty against Respondent for allegedly failing to comply certain requirements of the NPDES Construction General Permit for discharges associated with construction activities at the Villas de la Central Victoria Housing Development (the "Project"), allegedly in violation of Section 301 of the CWA ("NPDES Construction Permit"), and therefore does not require an answer. If the allegation requires a response, then, it is denied.

3. Paragraphs **I. 3, 4, 5, 6, 7, 8, 9 (a) to (h), 10, 11 (a) to (f), 12, and 13** of the Complaint contain general citations, re-statements and/or definitions from different provisions of the Clean Water Act, the NPDES Regulations found at 40 CFR Part 122, and the NPDES Construction Permit, therefore do not require a response. If these allegations require a response, then these are denied.

## **II. Jurisdictional Findings**

1. Paragraph II. 14 of the Complaint is admitted.
2. Paragraph II. 15 of the Complaint is admitted.
3. Paragraph II. 16 of the Complaint is admitted to the best of DEC's knowledge.
4. Paragraph II. 17 of the Complaint is admitted, except for the last sentence concerning the earth movement activity area alleged to be at 66 acres of land, and the statement concerning that

the project commencement date was September 9, 2010, which are both denied. The fact that respondent initiated to collect rain data on September 9, 2010, does not mean that commencement of project was on that specific date. Respondent's operator was following internal instructions and requirements of the EQB CES Permit which required collection of rain data from effective date of EQB Permit.

5. Paragraph II. 18 of the Complaint is denied. Respondent submitted its initial NOI on September 15, 2010. EPA sent a notice to Respondent on October 1, 2010, indicating that additional information was needed (e-mail data) to clarify the NOI form. A revised NOI Form was submitted in October, 2010. Subsequently, EPA sent a second notice to Respondent on October 27, 2010 indicating that the form needed revision to include Topo-scale, TMDL, and date of signature. Respondent submitted a revised form sent by EPA, and EPA sent the notice of complete application to respondent on November 30, 2010.

6. Paragraphs II. 19 and 20 of the Complaint are denied.

7. Paragraph II. 21 of the Complaint is admitted.

8. Paragraph II. 22 of the Complaint is admitted.

9. Paragraph II. 23 of the Complaint is denied, due to misunderstanding of the term relevant times.

### **III. Findings of Violation**

1. Paragraph III. 24 of the Complaint re-alleges Paragraphs II. 14 to 23 of the Complaint. Responses made by Martex (above) to those same allegations are hereby repeated.

2. In terms of Paragraph III. 25 of the Complaint, it is admitted that an EPA inspector conducted an inspection on February 22, 2011, but respondent denies (a) that it failed to implement erosion and sediment controls to avoid discharge of pollutants from the site. EPA's statement is too general, and implies incorrectly that the project was not implementing any controls. Respondent denies section (b), but clarifies that it was making improvements to the retention pond and raising the overflow control. EPA conducted a second inspection in late March 2010, and confirmed during the visit that his recommendations made in February 22, 2010 were implemented. He recommended

Respondent to raise the overflow of the retention pond, and such work was completed during the first week of April 2010. No discharges occurred during said time (rain event recordings confirmed that rain events were not sufficient to create a discharge from the retention pond which is the main collection area based on the site contour/elevation. Section (c) is admitted that on February 22, 2011 construction was ongoing; and Section (d) is admitted in part and denied in part since the project's CES Plan was available, rain-event recordings, CES Plan Reports of inspection from September 30, 2010 to such date.

3. In terms of Paragraph III. 26 of the Complaint alleging that Respondent initiated construction activities before filing a NOI is denied. Respondent submitted its initial NOI on September 15, 2010. EPA sent a notice to Respondent on October 1, 2010, indicating that additional information was needed (e-mail data) to clarify the NOI form. A revised NOI Form was submitted in October, 2010. Subsequently, EPA sent a second notice to Respondent on October 27, 2010 indicating that the form needed revision to include Topo-scale, TMDL, and date of signature. Respondent submitted a revised form sent by EPA, and EPA sent the notice of complete application to respondent on November 30, 2010.

4. Paragraph III. 27 of the Complaint is denied. EPA does not allege any specific period.

5. Paragraphs III. 28 (a)-(d), 29, 30 and 31 of the Complaint contains conclusions of laws and regulatory references which do not require an answer. If the allegation requires a response, then, all are denied.

6. With respect to Paragraph III. 32 of the Complaint contain, in part, conclusions of laws and regulatory references which do not require an answer. If the allegation requires a response, then, it is denied. With respect to the allegation of the SWP3, is admitted that the SWP3 was not available in the site office on the date of the February inspection, but was provided to the inspector in March 2011, when the inspector return to pick-up personal belongings left at the site, and took advantage to walk-through the site. Respondent clarifies that the project's CES Plan (equivalent to an SWP3), CES inspection reports, rain event data recording, were all available at the site on the date of the February 2011 inspection.

7. Paragraph III. 33 of the Complaint is admitted.

8. Paragraph III. 34 of the Complaint is admitted.

9. Paragraph III. 35 of the Complaint is admitted that EPA included such allegations in the Compliance Order (CO) of July 18, 2011. However, the discrepancies included in the CO were address by Respondent after the February and March inspections.

10. In terms of Paragraph III. 36 (a) of the Complaint it is denied. Respondent's SWP3 was adequate in describing and reflecting the actual project in Section III of the SWP3, and the schedule of activities and sequence of the construction and implementation of control measures were included in Section V of the SWP3.

11. Paragraph III. 36 (b) of the Complaint is denied. The allegation that Respondent's site map did not have eligible site map is a mere difference in how professionals interpret and read the maps/plans. Respondent's site map did identified the slopes and contour elevations of the entire project showing with "dash---lines" the flow of stormwater and location of headwalls (H. W.) where water will be transported to the BMP areas (retention pond, etc.). Section 5.2 (C) (1) of the General Permit requires the showing of direction of stormwater flow and slopes.

12. Paragraph III. 36 (c) of the Complaint is admitted that the copy provided to the EPA inspector was not signed.

13. Paragraph III. 36 (d) of the Complaint is admitted only that the copy of the SWP3 provided to the inspector did not have the inspection reports inserted in the binder, but Respondent did conduct all erosion and sedimentation inspections (since September 30, 2010) and records were available at the site. The inspection reports used for the CES Plan also covered the SWP3 equivalent inspections.

14. The first part of Paragraph III. 37 of the Complaint is admitted

15. Responses to claims a, b, c, d and e of Paragraph III. 37 are provided below:

a. **Claim 1** alleging failure to apply for and obtain permit coverage under the NPDES Construction Permit before commencement of construction activities is denied. Respondent was not required to file an individual NPDES Permit, but a NPDES General Permit. Respondent construction project began at the end of September 2010. Respondent did file the NOI on September 15, 2010, before commencement of construction, but due to processing errors found, actual authorization under Section 2.3 of the General Permit was 7-calendar days after November 30, 2010.

b. **Claim 2** alleging illegal discharges of stormwaters into waters of the United States without an NPDES permit coverage is denied. EPA claims that discharges occurred every single day for the period mentioned, and there is no allegation or evidence to sustain that actual stormwaters ever reached a water of the U.S. Respondent maintains rain-event data since September 2010 to the present, and there is no evidence that a rain event recorded resulted in an actual discharge to waters of the U.S. through the retention pond, which is the main collection area where waters are collected and discharged through the overflow that crosses the old train levee that runs through the property.

c. **Claim 3** alleging failure to develop a complete and adequate SWP3 is denied. A legible (or eligible) site map/plan was provided in the SWP3 and any professional engineer or SW professional would be able to understand it. EPA's statement is based on difference of opinion, not on actual specific or regulatory requirement. Site-maps/plans are flexible as long as listed requirements from the General Permit are followed. The map followed Section 5.2(C) of the General Permit. EPA arbitrarily and unfairly includes that Respondent was in non-compliance for a total 252 days (violations) (December 7, 2010-August 15, 2011) for allegedly failing to have an adequate and complete SWP3. This is not correct. Respondent does not understand the reason to include so many days and close the date in August 15, 2011, when Respondent confirmed that it ceased and desisted on the items mentioned in the Compliance Order. EPA's allegation is too broad and implies that the entire SWP3, improvements and BMP implementation made in the spring and summer 2011 were inadequate. Such statement is contrary to EPA's inspector comments during the visits to the site. The Compliance Order was issued in July 2011, and most of discrepancies if not all were corrected in February and March 2011.

d. **Claim 4** concerning the alleged failure to design implement or maintained BMPs for a period of 175 days (February 22, 2011 – August 15, 2011) is denied. Again, Respondent hereby clarifies that implementation of the control improvements recommended by EPA's inspector during the February 2011 inspection, were completed in less than one month and the only recommendation provided in the March 2011 concerning the retention pond overflow was completed during the first week of April 2011.

e. **Claim 5** concerning the alleged failure to conduct inspections is denied. Respondent conducted inspections on a weekly basis but some were not documented, since the operator would conduct the walk-through and order the correction of any discrepancies with conditions of silt fences and other BMPs. This is evidenced by the daily log of rain event recordings (pluviometer) maintained, purchase orders of BMP control materials, and contractor billings. In addition, Respondent conducted inspections under the CES Plan on a monthly basis since September 30, 2010 and monthly reports with photos of each inspection is at the site and could be supplemented to EPA. Such inspections include the same requirements of the General Permit, and are used also for compliance under both programs.

#### **IV. Notice of Proposed Order Assessing a Civil Penalty**

This entire section IV is denied. Respondent hereby incorporates by reference all applicable averments submitted in the answers provided in sections II and III above. Respondent asserts that the proposed civil penalty is contrary to law and unwarranted. In the alternative, it is excessive and in violation of the criteria established in Section 309 (g) of the Clean Water Act and in violation of DEC's due process rights under Amendment V of the Constitution of the United States, and of section 558(b) of the Administrative Procedure Act, 5 U.S.C. §558(b). The factual analysis used to establish the proposed civil penalty for the alleged violations fails to take into consideration the nature, circumstances, degree of seriousness of the alleged violations, degree of actual threat to human health or the environment, Respondent's good faith efforts to cooperate with EPA and size and previous compliance history.

The Complaint also indicates that the EPA took into account Respondent's knowledge of the NPDES Regulations, the NPDES Construction Permit and the risks to human health and the environmental posed by the uncontrolled discharges of storm water runoff from the Project into the Rio Gurabo, which discharges into the Rio Grande de Loíza. Respondent denies this allegation and asserts that measures implemented at the site were consistent with those required by the federal rules and controlled or minimized pollutant discharges. The NPDES permit and the CES regulations for

storm water discharges require sources to implement pollution control measures to control pollutants in storm water discharges. Pollutant discharges are to be reduced to the extent feasible. There is no evidence of actual discharges from the project site, which has a retention pond as the main control collection area. All the erosion and sedimentation control measures and other protective measures identified in the CES Plan and the SWPPP must be maintained in effective operating condition. All sources are required to conduct periodical site inspections to identify whether measures are operating effectively. When deficiencies are found, maintenance must be performed as soon as practicable. Respondent did act promptly to made improvements and corrections.

Erosion and sedimentation BMP inspections were conducted every almost weekly and CES inspection was duly recorded since the start of the project Respondent understands that the measures implemented effectively minimized pollutant discharges.

The Complaint indicates that the violations discussed in this complaint are serious since Respondent's failure to apply for CPG coverage, to develop and implement an adequate storm water pollution prevention plan and effective BMPs, and conduct inspections at the Project caused significant amounts of sediments to reach surface water that could cause direct and indirect negative effects on human health and the environment. Respondent denies this allegation, and asserts that no actual discharges occurred and no impact has been caused. To the contrary, respondent implemented control measures that were consistent with EPA rules and that achieve substantial control.

In addition, Respondent did not obtain any economic benefit from the alleged violations. All required measures have been implemented and all notification, filings, records and reports have been prepared. Moreover, the EPA seeks a penalty violation of \$28,303.00, without even allocating the penalty between the violations alleged against each Respondent. Nor does the EPA take into consideration the hardship endured by the construction industry, which as of this date, represent an economic crisis for this company. Respondent is unable to pay for any penalty suggested. The EPA has not taken into consideration the fact that DEC has no prior history of non-compliance with the exception of this matter. Respondent firmly believes that EPA could have opted for the method of



an Expedited Settlement process, for cases like this one, instead of issuing a formal administrative complaint to complicate the process.

Finally, Respondent has not been informed or provided with any detail, supporting documentation or information on how EPA calculated the proposed penalty. Respondent is a small contractor for the construction of low/medium income families.

## **V. Procedures Governing This Administrative Litigation**

This section contains instructions provided by EPA pursuant to the Civil Rules of Procedure, codified at 40 C.F.R. Part 22, which do not require an answer.

### **A. Answering the Complaint**

Respondent is hereby submitting its response to the Complaint with the intention of contending that the proposed penalty is inappropriate. The response shall be filed by Respondent as instructed.

### **B. Opportunity to Request a Hearing**

Respondent hereby requests a formal hearing before an Administrative Law Judge pursuant to 40 C.F.R. Part 22, and requests that every possible effort be made to have the hearing in Puerto Rico, since all the witnesses, documents and the site in question are located in Puerto Rico. One of the main witnesses is currently in bad health and we may proceed to take sworn statements concerning this matter. The purpose of the hearing is to contest the Complaint, the proposed penalty, and the matters of law and material facts that were not admitted above, and which were set forth in the Complaint. Respondent's legal grounds for contesting the Complaint, and the proposed penalty are set forth in this Answer and in the Affirmative Defenses listed below. Respondent reserves the right to present additional factual circumstances, arguments, and Affirmative Defenses that constitute the grounds for defense of the claims made in the Complaint, if and when such circumstances or arguments become known to Respondent through discovery or other means. In addition, it reserves the right to modify its responses if additional information is obtained that clarify any particular allegations of Respondent or the Complainant.

**C. Failure to Answer**

Respondent is hereby submitting its response to the Complaint in a timely manner.

**VI. Informal Settlement Conference**

Respondent shall take the opportunity to hold an Informal Settlement Conference with Lourdes Rodríguez, Esq, Office of the Regional Counsel, U.S. Environmental Protection Agency, Region 2, Caribbean Division, in order to comment on the charges made in the Complaint, and provide additional information relevant to the disposition of the matter, including: (1) actions Respondent has taken to correct any or all of the violations alleged; (2) any information relevant to the Complaint's calculation of the proposed penalty; (3) the effect the proposed penalty will have on Respondent's ability to continue business; and/or (4) any other special facts or circumstances Respondent wishes to raise. Therefore, Respondent hereby pursues, simultaneously with the request for a hearing, an informal conference procedure.

**VII. Resolution of this Proceeding Without Hearing or Conference**

Respondent has opted for submitting a response to the Complaint with the intention of contending that the proposed penalty is inappropriate, and shall not pursue a resolution of this proceeding without exercising its right for a hearing or conference.

**VIII. Filing of Documents**

This section contains instructions provided by EPA which do not require an answer. However, all documents shall be files as per EPA instructions.

**IX. General Provisions**

This section contains instructions provided by EPA and conclusions of law, which do not require an answer.

**X. Affirmative Defenses**

1. The proposed penalty is excessive, unreasonable, arbitrary and capricious, and constitutes an abuse of discretion, unwarranted and contrary to law because the factual analysis used by Complainant to establish the proposed civil penalty for the alleged violations is erroneous and fails to take into consideration the nature, circumstances, degree of seriousness of the alleged violations, degree of actual threat to human health or the environment and, Respondent's good faith efforts to cooperate with EPA.

2. The Complaint and the proposed penalty are contrary to law, arbitrary and capricious, an abuse of discretion and unwarranted given that Respondent's activities substantially complied with the EPA rules and did not cause harm to persons or the environment. Furthermore, Respondent acted in good faith and cooperated fully with EPA representatives, continued to monitor its storm water discharges during all stages of the Project and filed a NOI to seek coverage NPDES permit and prepared a SWPPP. Furthermore, respondent always had in effect a CES Plan under the Puerto Rico rules that essentially achieved the same results.

3. The Complaint and proposed penalty are contrary to law, arbitrary and capricious, an abuse of discretion and unwarranted because Respondent has not been informed or provided with any detail, supporting documentation or information on how EPA calculated the proposed penalty.

4. Respondent hereby reiterates all the responses included within this Answer as part of the Affirmative Defenses.

WHEREFORE, Respondent respectfully requests that EPA to opt for the use the Expedited Settlement process under the CWA, and dismiss this Complaint without prejudice including the proposed order assessing civil penalties. In the alternate, dismissed the Complaint.

**Respectfully submitted** this 26th day of October, 2011.

**CERTIFICATE OF SERVICE**

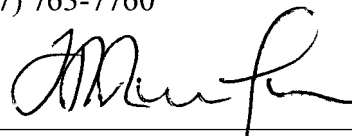
I hereby certify that on this same day, a true and correct copy of this motion was sent upon the Assistant Regional Counsel for EPA by e-mail, and courier addressed to:

Lourdes Rodríguez, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel-Caribbean Team  
U.S. Environmental Protection Agency, Region 2  
Centro Europa Building Suite 207  
1492 Ponce de León Avenue  
San Juan, Puerto Rico 00907-4127

The original and a copy of this motion were sent on this same date via certified mail to the EPA Region 2 Regional Hearing Clerk's Office at 290 Broadway Avenue, 17<sup>th</sup> Floor, New York, New York 10007-1966, Attention: Ms. Karen Maples at [maples.karen@epa.gov](mailto:maples.karen@epa.gov).

**Attorneys for Respondent:**  
**TORO, COLON, MULLET,**  
**RIVERA & SIFRE, P.S.C.**  
PO Box 195383  
San Juan, PR 00919-5383  
Tel: (787) 751-8999\  
Cel: (787) 647-1913  
Fax: (787) 763-7760

By:



Rafael Rivera Yankovich, Esq.  
rryanko@tcmrslaw.com  
RUA 10558