

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2**

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2007 SEP 25 AM 11:04  
REGIONAL HEARING  
CLERK

**IN THE MATTER OF:**

Rio Construction Corporation  
P.O. Box 10462  
Caparra Heights  
San Juan, PR 00922

NPDES Permit Number PRR10B936

Respondent

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

**DOCKET NO. CWA-02-2007-3414**

ICIS No. 7730897

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

**I. STATUTORY AND REGULATORY AUTHORITIES**

1. This Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative 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)(B) of the Clean Water Act (Act or CWA), 33 U.S.C. §1319(g)(2)(B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Division of Enforcement and Compliance Assistance ("DECA") of EPA, Region 2 (Complainant).
2. Pursuant to Section 309(g)(2)(B) 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 CFR Part 22 (2001), a copy of which is attached. Complainant hereby requests that the Regional Administrator assess a civil penalty against Rio Construction Corporation (Respondent), as a result of Complainant's determination that the Respondent is in violation of Sections 301 and 402 of the Act, 33 U.S.C. §1311 and §1342, respectively, for the unlawful discharge of pollutants into navigable waters without authorization by a National Pollutant Discharge Elimination System (NPDES) permit.

3. Section 301(a) of the Act, 33 U.S.C. §1311(a), provides in part that “except 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 308 of the Act, 33 U.S.C. §1318, provides, in relevant part, that the Administrator of EPA may require the owner or operator of any point source to, among other things: maintain such records; make such reports; install, use and monitor such equipment; sample such effluents; and provide such other information as may reasonably be required in order to carry out Section 402 of the Act, 33 U.S.C. §1342.
5. Section 402 of the Act, 33 U.S.C. §1342, authorizes the Administrator to issue a National Pollutant Discharge Elimination System (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.
6. Section 402 (p) of the Act, 33 U.S.C. §1342(p), requires a permit with respect to a discharge associated with industrial activity.
7. The Administrator of EPA has promulgated regulations at 40 CFR §122.26(a)(1)(ii) and §122.26(b)(14), which require operators to obtain an NPDES permit for storm water discharges associated with industrial activity, including construction activity.
8. The regulations at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15)(i) regulate storm water discharges associated with construction sites which include clearing, grading and excavation activities that result in the disturbance of one (1) or more acres of total land area.
9. Construction sites that are less than one acre, but are part of a common plan that is greater or equal to one acre are required to apply for coverage under the Construction General Permit. See 40 CFR §122.26(a)(1)(ii) and §122.26(b)(14)(x) and §122.26(b)(15)(i).
10. The Act and its implementing regulations and applicable NPDES permit contain the following definitions:
  - a. "Navigable waters" means the waters of the United States and territorial seas, pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7). "Waters of the United States" means, but are not limited to, waters which are currently used or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and including wetlands, rivers, streams (including intermittent streams) (40 CFR §122.2).
  - b. "Pollutant" means, but is not limited to, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge, and industrial, municipal and agricultural

waste discharged into water, pursuant to Section 502(6) of the Act, 33 U.S.C. §1362(6).

- c. "Point source" means "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, ..." pursuant to Section 502(14) of the Act, 33 U.S.C. §1362(14).
- d. "Discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, pursuant to Section 502(12) of the Act, 33 U.S.C. §1362(12).
- e. "Person" means, but is not limited to, an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. §1362(5).
- f. "Operator," for the purpose of the NPDES storm water general permit for construction activities and in the context of storm water associated with construction activity, is defined at Appendix A of the CGP to mean any party associated with a construction project that meets either of the following two (2) criteria:
  - i. The party has operational control over construction plans and specifications including the ability to make modifications to those plans and specifications; or
  - ii. The party has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions. See Appendix A of the CGP.

11. EPA first issued a general storm water permit in September 1992; reissued it as the "NPDES General Permits For Storm Water Discharges From Construction Activities" on February 17, 1998, which expired on February 17, 2003 (see Federal Register 63 FR 7858); reissued the permit as "NPDES General Permit For Discharges From Large And Small Construction Activities" on July 1, 2003, which expires on July 1, 2008 (see Federal Register 68 FR 39087). The permit is NPDES Permit No. PRR100000 (hereinafter "the CGP").

- a. Part 3.1 of the CGP requires that a Storm Water Pollution Prevention Plan (SWPPP) must be prepared prior to the submission of the NOI.
- b. Part 3.1.D of the CGP requires that the SWPPP must be implemented as written.
- c. Part 3.3.C of the CGP requires a legible site map, showing the entire site as part of the SWPPP.

- d. Part 3.4.C of the CGP requires dates of major grading activities occur; dates when construction activities temporarily or permanently cease on a portion of the site; and dates when stabilization measures are initiated.
- e. Part 3.7 of the CGP requires documentation of permit eligibility related to endangered species.
- f. Part 3.10.A. of CGP requires that inspections be conducted at least once every 7 calendar days, or at least once every 14 calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater (0.5 inches of rain results in a wet weather flow).
- g. Part 3.10.G of the CGP requires inspection records be maintained as part of the SWPPP for at least three years from the date that permit coverage expires or is terminated.
- h. Part 3.12 of the CGP requires that the SWPPP be retained at the construction site.
- i. "Commencement of construction activities" means the initial disturbance of soils associated with clearing, grading, excavation activities or other construction activities. See Appendix A of the CGP (Definitions and Acronyms).

## **II. JURISDICTIONAL FINDINGS**

- 12. Rio Construction Corporation (Respondent) is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. §1362(5).
- 13. At all relevant times, Respondent was the operator of the construction site.
- 14. The construction site is a highway construction project known as "Geometric Improvements PR-18 and PR-22, Roosevelt Avenue to Calaf Street, San Juan, PR" (the Site).
- 15. The Site was, and is, at all relevant times, a point source as defined Section 502 (14) of the Act, 33 U.S.C. §1362(14).
- 16. The Site disturbed approximately 5 acres of land.
- 17. Storm water from the site enters storm sewers which discharge directly into Los Muertos Creek.
- 18. Los Muertos Creek is a continuous flowing creek and is a navigable water body of the United States.
- 19. On December 22, 2005, Respondent filed an application with the EPA for coverage under the CGP.

20. On December 29, 2005, Respondent's coverage under EPA's CGP became effective and Respondent was issued NPDES Permit No. PRR10B936 ("Permit") for its industrial discharges of storm water associated with construction activity from the Site into a tributary of the Los Muertos Creek, located in San Juan, Puerto Rico.

### **III. FINDINGS OF VIOLATION**

#### **Claim One - Unpermitted Discharge**

21. Complainant re-alleges Paragraph 12 - 20 above.
22. Respondent commenced construction activities at the Site on or about December 16, 2002.
23. Respondent failed to obtain NPDES permit coverage under the CGP until December 29, 2005.
24. Weather data for the period of construction at the Site indicates that there was .56 inches of precipitation in the area of the Site on December 22, 2002 and wet weather flows on subsequent dates as well.
25. Based on the Findings in Paragraphs 21 -24 above, Respondent was in violation of Section 301 of the CWA from at least December 22, 2002 until December 29, 2005.

#### **Claim Two - Failure To Implement the CGP**

26. Complainant re-alleges Paragraph 12 - 20 above.
27. On September 1, 2006, an EPA representative conducted a Compliance Evaluation Inspection (CEI) at the site.
28. During the September 1, 2006 inspection, the EPA inspector noted the following (all in contravention of the CGP):
- a. Materials Storage - uncovered waste materials were stored at the Site and were susceptible to storm water runoff;
  - b. Construction Activity Not Stabilized - working areas of the Site lacked erosion controls in place and some areas of the Site were clearly unstabilized;
  - c. Site Inspections - Respondent's Site inspection records and conversations with Site employees revealed that Respondent's Site inspections were being conducted only on a monthly basis, rather than once every 7 calendar days, or at least once every 14 calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater. In addition, Respondent's inspection reports failed to include the inspection date, weather information, description of the

Management Practices (BMPs), and any corrective measures required, including any changes to the SWPPP. Respondent's inspection reports did not cover 3 years of continuous records available on Site, as required by the CGP. Respondent's inspection reports did not identify incidents of noncompliance or certification that the project or Site is in compliance with the CGP. See Part 3 of the CGP.

29. Based on the above Findings in Paragraph 26-28 above, Respondent was in violation of Sections 301 and 402 of the CWA from at least December 29, 2005 until September 1, 2006.

### **Claim Three - Failure To Retain A Copy Of The SWPPP At The Site**

30. Complainant re-alleges Paragraph 12 - 20 above.
31. On September 1, 2006, an EPA representative conducted a Compliance Evaluation Inspection (CEI) at the Site.
32. At the time of the September 1, 2006, inspection, a copy of the SWPPP was not available to the inspector and not retained at the Site.
33. At the time of the September 1, 2006 inspection, the inspector was told by a representative of Respondent that no SWPPP had been developed.
34. Based upon the Findings in Paragraphs 30 - 32 above, Respondent was in violation of the CGP, and therefore in violation of the CWA, from December 29, 2005 through at least September 1, 2006, by failing to develop and retain a SWPPP at the Site (the CGP implements Section 301 of the CWA).

### **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, 33 U.S.C. §1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties (Final Order) to Respondent assessing a penalty of **\$124,407**. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). EPA has taken account of 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. Based on the Findings set forth above, the Respondent has been found to have violated the Act in five hundred and eleven (511) instances. EPA may issue the 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 ACTION**

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, 40 CFR 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 CFR § 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 CFR §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 the Respondent has any knowledge. 40 CFR §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied. 40 CFR §22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intend to place at issue in the proceeding), (3) the basis for opposing the proposed relief and (4) whether Respondent requests a Hearing. 40 CFR §22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of a 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 CFR §22.15(c). If, however, Respondent does not request a Hearing, the Presiding Officer (as defined in 40 CFR §22.3) may hold a Hearing if the Answer raises issues appropriate for adjudication. 40 CFR §22.15(c).

Any Hearing in this proceeding will be held at a location determined in accordance with 40 CFR §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. §§551-59, and the procedures set forth in Subpart D of 40 CFR 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 comment 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 any Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 CFR §22.15(d). If Respondent fails to file a timely [*i.e.* in accordance with the 30-day period set forth in 40 CFR §22.15(a)] an Answer to the Complaint, Respondent may be found in default upon motion. 40 CFR §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 CFR §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 CFR §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 CFR §22.27(c). 40 CFR §22.17(d). 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 CFR §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 is believed to be 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 Respondent's 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 CFR §22.18.



Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Nina Dale, Esq.  
Assistant Regional Counsel  
Water and General Law Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866  
Telephone (212) 637-3231

The parties may engage in settlement discussions irrespective of whether Respondent has requested a Hearing. 40 CFR §22.18(b)(1). Respondent's requesting a formal Hearing does not prevent Respondent 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 CFR §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 CFR §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 CFR §22.18(b)(2). In accepting the Consent Agreement, Respondent waives any right to contest the allegations in the Complaint and waive any right to appeal the Final Order that is to accompany the Consent Agreement. 40 CFR §22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 CFR §22.18(b)(3).

Entering into a settlement through the signing of such Consent Agreement and complying with the terms and conditions set forth in such Consent Agreement and Final Order terminates this administrative litigation and these civil proceedings against Respondent (note that a new enforcement action may be initiated based on continued non-compliance). Entering into a settlement agreement 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.

## **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 (\$157,500) within 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 CFR §22.18(a). A copy of the check or other instrument of

payment should be provided to the EPA Attorney identified in Section VI above. 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:

Regional Hearing Clerk  
U. S. Environmental Protection Agency, Region 2  
P.O. Box 360188M  
Pittsburgh, Pennsylvania 15251

Pursuant to 40 CFR §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 CFR §22.18(a)(3). In accordance with 40 CFR §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 (note that a new enforcement action may be initiated based on continued non-compliance). Further, pursuant to 40 CFR §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.

#### **VII. Filing of Documents**

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

A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Nina Dale, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866  
Telephone (212) 637-3231  
Fax: (212) 637-3202

**VIII. 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.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondent's continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a), for the violations alleged herein.

ISSUED THIS 24<sup>th</sup> DAY OF September, 2007.



---

Dore LaPosta, Director  
Division of Enforcement and  
Compliance Assistance  
U. S. Environmental Protection Agency - Region 2  
290 Broadway  
New York, New York 10007

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2**

**IN THE MATTER OF:**

Rio Construction Corporation  
P.O. Box 10462  
Caparra Heights  
San Juan, PR 00922

NPDES Permit Number PRR10B936

Respondent

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

**DOCKET NO. CWA-02-2007-3414**

ICIS No. 7730897

**CERTIFICATE OF SERVICE**

**SEP 24 2007**

I certify that on \_\_\_\_\_, 2007, I served the foregoing fully executed Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing, bearing the above referenced docket number, on the persons listed below, in the following manner:

Original and One Copy  
By Hand:

Office of Regional Hearing Clerk  
U.S. Environmental Protection  
Agency - Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866

Copy by Certified Mail  
Return Receipt Requested:

Gregory Mazza, Vice President,  
Rio Construction Corporation  
P.O. Box 10462  
Caparra Heights, San Juan, PR 00922

Copy by Certified Mail  
Return Receipt Requested:

Wanda E. García Hernández, Director  
Environmental Quality Board  
P.O. Box 11488  
Santurce, Puerto Rico 00910

Dated: 9/24/07 Marie St. Germino  
Secretary  
New York, New York