

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

Tri-Stella Development Group, Inc.
P.O. Box 11918
Caparra Heights Station
San Juan, Puerto Rico 00926

and

Dynamics Engineers, Corp.
P.O. Box 1581
Trujillo Alto, Puerto Rico 00977

Caminos Verdes II Development

RESPONDENTS

Docket No. CWA-02-2011-3454

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

U.S. ENVIRONMENTAL
PROTECTION AGENCY REGION 2
2011 SEP - 6 P 4: 04
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, Dynamics Engineers, Corp. ("DEC"), hereby represented by the undersigned attorneys and respectfully states and prays:

This Answer (the "Answer") is submitted by DEC 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 July 28th, 2011 and received by DEC on July 29th, 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 DEC for allegedly failing to apply for and obtain NPDES permit coverage prior to commencement of construction activities at the Caminos Verdes II development (the "Project") and Respondent Tri-Stella Development Group, Inc.'s ("Tri-Stella") alleged failure to comply with the conditions of EPA's July 1, 2003 NPDES General Permit for Discharges from Large and Small Construction Activities ("NPDES Construction Permit"), and therefore does not require an answer. If the allegation requires a response, then, in terms of all that concerns DEC, it is denied.

3. Paragraphs I. 3, 4 (a) to (e), 5, 6, 7, 8, 9, 10, 11, 12, 13 (a) to (h), 14(a) and (b), 15, 16, 17 and 18 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.

4. Paragraph I. 19 of the Complaint alleging in general terms that Section 3.1.A of the NPDES Construction Permit requires Respondents to prepare a SWPPP prior to submission of the NOI, is admitted.

5. Paragraph I. 20 of the Complaint alleging in general terms that Section 3.1.D of the NPDES Construction Permit requires Respondents to implement the SWPPP as written from commencement of construction activity until final stabilization is complete, is admitted.

II. Jurisdictional Findings

1. Paragraph II. 21 of the Complaint is admitted.
2. Paragraph II. 22 of the Complaint is admitted.
3. Paragraph II. 23 of the Complaint is admitted to the best of DEC's knowledge.
4. Paragraph II. 24 of the Complaint is admitted.
5. Paragraph II. 25 of the Complaint is admitted.
6. Paragraph II. 26 of the Complaint is admitted.
7. Paragraph II. 27 of the Complaint is denied. DEC clarifies that the original concept of the Project contemplated the construction of 70 multi-family residential units. However for reasons outside of the control of DEC, only 30 units were actually constructed and finished by the end of 2009, when the construction agreement was rescinded by Tri-Stella and DEC.
8. Paragraph II. 28 of the Complaint is admitted.
9. Paragraph II. 29 of the Complaint is admitted in part and denied in part. No recreational areas were constructed by DEC.
10. Paragraph II. 30 of the Complaint is admitted.
11. Paragraph II. 31 of the Complaint is admitted.
12. Paragraph II. 32 of the Complaint is directed towards Respondent Tri-Stella and does not require a response from Respondent DEC.
13. Paragraph II. 33 of the Complaint is admitted.

14. Paragraph II. 34 of the Complaint is denied in terms of DEC. Specifically, DEC denies that it discharged pollutants from the Project into an intermittent unnamed creek which in turn discharged into the Río Grande de Loíza. The Water Compliance Inspection Reports prepared by EPA's Inspector, Héctor Ortiz, for the inspections conducted on February 23rd and March 15th, 2007, do not include any specific photographs of the unnamed creek nor of any actual discharges into such body of water.

15. Paragraph II. 35 of the Complaint is admitted.

16. Paragraph II. 36 of the Complaint contains a general citation or re-statement of 40 CFR §122.26(b)(14)(x), therefore does not require a response from DEC. If this allegation were to require a response from DEC, then it is admitted.

17. Paragraph II. 37 of the Complaint is admitted to the best of DEC's knowledge.

18. Paragraph II. 38 of the Complaint is denied in terms of DEC.

III. Findings of Violation

1. Paragraph III. 39 of the Complaint re-alleges paragraphs 21-38, which DEC has already responded to above.

2. In terms of Paragraph III. 40 of the Complaint, it is admitted that on February 23 and March 15, 2007, a representative of the EPA visited the Project to perform inspections (1st and 2nd Inspections). The rest of the allegation is denied by DEC.

3. In terms of Paragraph III. 41 of the Complaint, the first sentence alleging that NPDES Compliance Inspection Reports, dated August 31, 2007, were prepared by EPA's representative relating to the 1st and 2nd Inspections is admitted. The remaining portions of this allegation, included in subparagraphs (a) through (i) are denied. These allegations make reference to the findings included in the Compliance Inspection Reports which, in turn, were the subject of an Administrative Compliance Order (CWA-02-2007-3043) dated September 10, 2007, issued against Respondents Tri-Stella and DEC ("2007

Compliance Order”). All issues included in the 2007 Compliance Order were addressed by the Respondents and a Closure of Administrative Compliance Order letter was issued by the EPA on October 10, 2007 (“Closure Letter”). See, Attachment 1.

4. As to the first sentence of Paragraph III. 42 of the Complaint it is denied at this time for lack of information or belief. With respect to the remaining portion of this allegation, it is admitted to the best of DEC’s knowledge that Respondent Tri-Stella submitted a NOI Form on February 7, 2007 and obtained coverage from the EPA on February 14, 2007. See, Attachment 2.

5. Paragraph III. 43 of the Complaint is denied. DEC clarifies that a NOI Form was filed by the owner and operator of the Project, Tri-Stella on February 7, 2007 and had obtained coverage from the EPA on February 14, 2007. However, pursuant to the 2007 Compliance Order, DEC filed an additional NOI Form before the EPA on November 13, 2007, following the specific instructions of such Order and the conditions and requirements of the NPDES Construction Permit. See, Attachment 3.

6. With respect to Paragraph III. 44 of the Complaint and its Subparagraphs (a) through (j), these allegations make reference to the 2007 Administrative Order, previously mentioned, which was closed pursuant to the Closure Letter issued by the EPA. All the findings included in the 2007 Administrative Order were addressed by the Respondents and subject of a Compliance Plan submitted before the EPA. As a result, the EPA issued the Closure Letter which specifically states that the *“determination is based upon Tri-Stella’s compliance with all provisions of the Order and DEC’s compliance with Provisions 1 thru 4 of the Order”*. Therefore, even though EPA’s Closure Letter provides that it shall not be deemed an election by EPA to forego any further enforcement actions, no additional enforcement actions were taken by the EPA until almost four years later when DEC received the current Complaint.

7. Paragraph III. 45 of the Complaint is admitted by DEC.

8. Paragraph III. 46 of the Complaint is admitted by DEC.

9. Paragraph III. 47 of the Complaint is admitted by DEC. However, as previously stated, a NOI Form was filed by the owner and operator of the Project on February 7, 2007 and had obtained coverage from the EPA on February 14, 2007. Nonetheless, pursuant to the 2007 Compliance Order, DEC filed an additional NOI Form before the EPA on November 13, 2007, following the specific instructions provided by EPA in such Order and the conditions and requirements of the NPDES Construction Permit.

10. In terms of Paragraph III. 48 of the Complaint it is admitted that on May 1, 2008, a representative of the EPA visited the Project to perform an inspection (3rd Inspection). The rest of the allegation is denied by DEC.

11. Paragraph III. 49 of the Complaint is denied by DEC.

12. Paragraph III. 50 of the Complaint is denied by DEC, as specified below:

a. Claim 1 alleging DEC's failure to apply for and obtain permit coverage under the NPDES Construction Permit is denied. The owner and operator of the Project filed a NOI Form on February 7, 2007 and obtained coverage from the EPA on February 14, 2007. Pursuant to the observations of the EPA Inspector and the 2007 Compliance Order, DEC continued to improve and implement all pollution control measures within the site, and comply with the provisions ordered by EPA. In this regard, DEC filed an additional NOI Form before the EPA on November 13, 2007. Moreover, the 2007 Administrative Order was resolved and subject of a Closure Order issued by the EPA. To the contrary, as alleged by the EPA in finding at Paragraph 46 of the Complaint, the determination to close the 2007 Administrative Order was based upon Respondents' substantial compliance with the provisions included in such Order. By the time the 3rd Inspection was conducted, DEC had already obtained

coverage under the NOI, significant preventive measures had been taken at the Project and no further notices were issued by the EPA until years later (i.e., July 29, 2011) when this Complaint was issued.

b. Claim 2 alleging DEC's illegal discharge of pollutants (storm water) into waters of the United States without NPDES coverage is denied. As stated above, the owner and operator of the Project filed a NOI Form on February 7, 2007 and obtained coverage from the EPA on February 14, 2007. Pursuant to the 2007 Compliance Order, DEC filed an additional NOI Form before the EPA on November 13, 2007. Moreover, as previously mentioned, there is no actual evidence that any discharge reached the unnamed intermittent creek located at a considerable distance from the project work-site. Allegedly, the Inspector did not visit the mentioned creek or its immediate areas to inspect conditions. Furthermore, an SWP3 was being implemented at the site and SWP3 Inspection Reports were completed since the commencement of the activities on February 14, 2007. See, Attachment 4, Stormwater Construction Site Inspection Reports. These Inspection Reports describe all BMP's taken at the site including photographs of such measures. In addition, a Plan for the Control of Erosion and Sedimentation ("CES Plan") was also being implemented at the Project, for which inspection reports were being submitted at the PR Environmental Quality Board on a monthly basis, describing the control measures undertaken and photographs of the same. See, Attachment 5, CES Reports.

c. Claim 3 is addressed to Respondent Tri-Stella and does not require a response from DEC. Tri-Stella has or will respond separately. If such claim requires a response from DEC, then the allegations are denied.

d. Claim 4 is addressed to Respondent Tri-Stella and does not require a response from DEC. Tri-Stella has or will respond separately. If such claim requires a response from DEC, then the allegations are denied.

e. Claim 5 is addressed to Respondent Tri-Stella and does not require a response from DEC. Tri-Stella has or will respond separately. If such claim requires a response from DEC, then the allegations are denied.

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. DEC 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, DEC's good faith efforts to cooperate with EPA and DEC's size and previous compliance history.

In addition to the foregoing and for EPA's consideration, DEC finds it necessary to provide a brief history of the Project and its development. In October 2006, Respondents Tri-Stella and DEC executed two construction agreements for the construction and development of the residential complex named Caminos Verdes II, located at State Road 844, Km 3.2, Int. State Road 199, El Capá Sector, Cupey Ward, San Juan, Puerto Rico. Originally, the development contemplated the construction of seventy (70) units of which only thirty (30) were actually developed and constructed due to reasons outside of DEC's control (i.e., the economic downfall of the construction industry, among others). Since the commencement of the activities, the Project, owner/ operator, filed and obtained coverage under the ND PES Construction Permit by February 14, 2007. As previously explained, a SWPPP was being implemented at the site and SWPPP Inspection Reports were completed dating back to February 14, 2007.

See, Attachment 4, Stormwater Construction Site Inspection Reports. These Inspection Reports detail all site-specific BMP's taken at the site, including photographs of the measures undertaken as a result of EPA's Inspections and the 2007 Compliance Order. In addition, a CES Plan was also being implemented at the Project since the beginning, for which inspection reports were being submitted at the PR Environmental Quality Board on a monthly basis, describing the control measures undertaken and photographs of the same. See, Attachment 5, CES Reports.

During the clearing, grading and earth movement activities, preventive measures (such as the stabilization of slopes, placement of silt fences and hay stacks, among others) were taken in order to prevent any sediments from ever reaching the unnamed creek. See, Attachment 6, Aerial Photographs. Allegedly, during the EPA Inspections, the inspector did not visit the unnamed creek and immediate area to verify conditions and environmental footprints to support the allegation of actual discharge of pollutants into waters of the United States.

In terms of DEC, the Complaint refers to its alleged failure to apply for NPDES permit coverage for its construction activities. However, EPA fails to take into consideration that the owner and operator of the Project indeed had permit coverage since February 14, 2007, that an SWPPP and a CES Plan were actually being implemented at the site, that all the issues hereing brought were already addressed through the 2007 Compliance Order, and that a Closure Letter in relation to such was issued by the EPA, and that no actual harm ever resulted neither to the environment nor any human health. To the contrary, the project has, at all relevant times, implemented and maintained measures that parallel, comply with or exceed any of the control measures required by the relevant regulations. The SWPPP and the CES Plan include all the pollution control measures implemented in accordance with the CES Regulations and the NPDES Regulations.

Complainant also alleges that Respondents did not comply with the related NPDES storm water regulations (development and implementation of a SWPPP; monitoring, sampling and reporting of its discharges, etc.) developed to ensure prevention and minimization of contamination of storm water by the facility's construction activities. However, as indicated previously, since February 2007, DEC has implemented a CES Plan as required by the Puerto Rico regulations also designed to control the erosion and sedimentation caused by storm water events at construction sites. As in the NPDES storm water provisions, CES Plan provisions seek to control the erosion of the soil resulting from human activities and the sedimentation caused by such activities. These regulations were the result of an inter agency committee composed by representatives of the Puerto Rico and federal environmental and natural resource agencies. The CES plan requires the implementation of an erosion and sedimentation control plan with periodic monitoring and reports. The implementation of the CES plan and the measures already described achieved the same objectives of SWPPP Plan.

The Complaint also indicates that the EPA took into account DEC'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 an unnamed creek discharging into the Rio Grande de Loíza. DEC denies this allegation and asserts that measures implemented at the site were consistent with those required by the federal rules and controlled or minimized run-off. 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. 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 possible and before the next storm event.

The Project was constantly revising and modifying its storm water control measures to achieve better results. Plan CES and SWPPP inspections were conducted every month since the start of the project and DEC understands that the measures implemented effectively minimized any run-off.

The Complaint indicates that the violations discussed in this complaint are serious since DEC's failure to develop and implement storm water pollution prevention 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. DEC denies this allegation, 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, DEC 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 at a substantial cost. Moreover, the EPA seeks a penalty violation of \$56,454, without even allocating the penalty between the violations alleged against each Respondent, or explaining how it came to calculate such penalty. Nor does the EPA take into consideration the hardship endured by the construction industry, which as of this date, represents an economic crisis for both of this companies to the point that DEC has not been awarded a single project since the year 2009, and the fact that the parties are involved in a litigation filed by DEC against the project owner/operator for amounts owed as a result of the work conducted by DEC at the Project. DEC 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.

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 and medium income family housing.

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

DEC 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 DEC as instructed.

B. Opportunity to Request a Hearing

DEC 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. 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. DEC's legal grounds for contesting the Complaint, and the proposed penalty are set forth in this Answer and in the Affirmative Defenses listed below. DEC 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 DEC 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 DEC or the Complainant.

C. Failure to Answer

DEC is hereby submitting its response to the Complaint in a timely manner. In this regard, on August 26th, 2011, DEC submitted a Motion Requesting an Extension of Time of five (5) additional days to submit its response due to the unforeseen circumstances caused by Tropical Storm Irene and the power shortage and damages suffered by our law offices. In this regard, we consulted such matter with Mr. Héctor L. Vélez Cruz, Office of the Regional Counsel, EPA Region 2, whom expressed no objection to the time extension requested for filing DEC's response to the Complaint.

VI. Informal Settlement Conference

DEC shall take the opportunity to hold an Informal Settlement Conference with Mr. Héctor L. Vélez Cruz, Office of the Regional Counsel, 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 DEC 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 DEC's ability to continue business; and/or (4) any other special facts or circumstances DEC wishes to raise. Therefore, DEC hereby pursues and hereby request, simultaneously with the request for a hearing, an informal conference procedure.

VII. Resolution of this Proceeding Without Hearing or Conference

DEC 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 filed 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, DEC'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 DEC's activities substantially complied with the EPA rules and did not cause harm to persons or the environment. Furthermore, DEC 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, the Project 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 DEC has not been informed or provided with any detail, supporting documentation or information on how EPA calculated the proposed penalty.

WHEREFORE, DEC respectfully requests that the Complaint be dismissed and that the proposed order assessing civil penalties be denied.

Respectfully submitted this 2nd day of September, 2011.

CERTIFICATE OF SERVICE

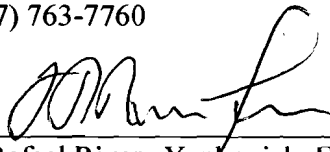
I hereby certify that on this same day, a true and correct copy of this motion was sent upon the Assistant Regional Counsel for EPA by courier addressed to:

Héctor Vélez Cruz, 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

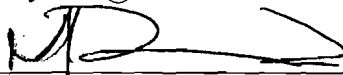
The original and a copy of this motion were sent on this same date via express mail to the EPA Region 2 Regional Hearing Clerk's Office at 290 Broadway Avenue, 17th Floor, New York, New York 10007-1966, Attention: Ms. Karen Maples at maples.karen@epa.gov.

Additional copies of this motion were also sent by certified mail to: Tri-Stella Development Group, Inc., p/c Atty. José A. Cepeda Rodríguez, Suite 906, Hato Rey Center, 268 Ponce de León Ave., Hato Rey, Puerto Rico 00918; and Mr. Roberto Ayala, Water Quality Area, PR Environmental Quality Board, PO Box 11488, San Juan, Puerto Rico 00910.

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