

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2012 OCT -2 P 12:05
REGIONAL HEARING
CLERK

IN THE MATTER OF: Eduardo Rivera Rivera HC 05 Box 55204 Hatillo, Puerto Rico 00659 Respondent Eduardo Rivera Rivera Dairy Farm NPDES Number PRU021005	Docket No. CWA-02-2012-3353 Proceeding Pursuant Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) to Assess Class I Civil Penalty
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**ADMINISTRATIVE COMPLAINT, FINDINGS OF VIOLATION, NOTICE OF
PROPOSED ASSESSMENT OF A CIVIL 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 a Civil 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)(A) of the Clean Water Act ("Act"), 33 U.S.C. § 1319(g) (2)(A). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director of the Caribbean Environmental Protection Division, Region 2, EPA ("Complainant").
2. Pursuant to Section 309(g)(2)(A) 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 C.F.R. Part 22, a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Eduardo Rivera Rivera, for discharging pollutants into an unnamed creek which discharges into Rio Morovis which flows into Rio Cibuco, a tributary of the Atlantic Ocean, all of which are waters of the United States, in violation of Section 301(a) of the Act.
3. Section 301(a) of the Act, provides in part that "[e]xcept 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 402 of the Act, defines the National Pollutant Discharge Elimination System ("NPDES") as the national program for, among other things, issuing and enforcing permits. Section 402 of the Act, authorizes the Administrator to issue a 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.
5. To implement Section 402 of the Act, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under 40 C.F.R. § 122.1(b), a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.
6. Section 502(12) of the Act, defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."
7. Section 502(6) of the Act, defines "pollutant" to include, *inter alia*, biological materials and agricultural waste discharged to water.
8. Section 502(14) of the Act, defines "point source" to include "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 ... from which pollutants are or may be discharged."
9. "Concentrated animal feeding operations" ("CAFOs"), as defined in paragraph (b) of 40 C.F.R. § 122.23, or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section.
10. "Animal feeding operation" ("AFO") is defined at 40 C.F.R. § 122.23(b)(1) as a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
 - a) Animals (other than aquatic animals) have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
 - b) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
11. "Concentrated animal feeding operation" is defined at 40 C.F.R. § 122.23(b)(2) as a Large CAFO or as a Medium CAFO, or as designated in accordance with 40 C.F.R. § 122.23(c).
12. A Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in 40 C.F.R. § 122.23(b)(6)(i).

13. The term "land application area" means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied. 40 C.F.R. § 122.23(b)(3).
14. The term "manure" is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal. 40 C.F.R. § 122.23(b)(5).
15. "Process wastewater" means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding. 40 C.F.R. § 122.23(b)(7).
16. "Waters of the United States" includes among others intrastate rivers and streams, and tributaries thereto. 40 C.F.R. § 122.2.
17. The EPA is the agency within the Commonwealth of Puerto Rico with the authority to administer the federal NPDES program. The EPA maintains enforcement authority for violations of the Act.

II. Jurisdictional Findings

18. Eduardo Rivera Rivera, ("Respondent"), doing business as "Eduardo Rivera Rivera Dairy Farm" is an owner/operator of an animal feeding operation located at State Road 155, Km 52.0, Torrecillas Ward, Morovis, Puerto Rico, (the "Facility"). Respondent is a "person" within the meaning of Section 502(5) of the Act.
19. Respondent is an owner of the Facility as that term is defined at 40 C.F.R. § 122.2
20. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).
21. To the best of EPA's knowledge the Facility was confining approximately 275 mature dairy cows. The number of mature dairy cows confined and fed at the Facility is greater than 200 and less than 700 hundred, therefore the Facility is a medium CAFO, as that term is defined in 40 C.F.R. § 122.23(b)(6)(i)(A).
22. Based on information and belief, runoff from Respondent's manure storage lagoon overflowed to an adjacent field/pasture, where it continues to flow southwest via

a channel/ditch to an un-named creek or drainage channel which discharges into Rio Morovis which flows into Rio Cibuco, a tributary of the Atlantic Ocean, all of which are waters of the United States.

23. At all relevant times Respondent's Facility was a "point source" within the meaning of Section 502(14) of the Act.

24. At all relevant times "process wastewater" was generated in the operation of Respondent's Facility as that term is defined in 40 C.F.R. § 122.23(b)(7).

25. At all relevant times Respondent's Facility was a CAFO subject to the requirements and conditions of the NPDES permit.

26. The Rio Morovis, the Rio Cibuco and the Atlantic Ocean are all waters of the United States, as defined by 40 C.F.R. Part 122.2.

III. Findings of Violation

27. Complainant re-alleges Paragraphs 20-26 above.

28. On September 14, 2011 an EPA representative conducted a Compliance Evaluation Inspection (the "Inspection") at the Facility to determine if Respondent's operation of the Facility was in compliance with the Act and the applicable NPDES regulations. At the time of the Inspection EPA found that:

- a. the Facility confines and feeds or maintains dairy cows for a total of 6 hours a day in any twelve-month period;
- b. neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas;
- c. the Facility was confining/maintaining approximately 275 mature dairy cows;
- d. EPA inspector observed evidence that overflows from the Respondent's manure storage lagoon flows into an adjacent field/pasture, where it continues to flow southwest via a channel/ditch to an un-named creek or drainage channel which discharges into Rio Morovis, a tributary of Rio Cibuco, which discharges into the Atlantic Ocean;
- e. the Facility's manure storage lagoon did not have a free board and it was overflowing at the time of the inspection. There is an approximately 1 foot

wide channel leading from the southwestern side of the lagoon that is approximately 200 feet long which conveys the manure overflow discharges from the lagoon through the pasture which eventually led to an adjacent unnamed creek which discharges into the Rio Morovis, a tributary of Rio Cibuco, which discharges into the Atlantic Ocean; and

- f. the Facility does not have adequate livestock waste controls to prevent the discharge of animal waste from the Facility into Rio Morovis. Discharges of animal feedlot runoff from the Facility's manure storage contain ammonia, fecal coliform and other pollutants.

29. Based on the size of the Facility, the distance from the Facility's manure storage to the unnamed creek, and the slope and condition of the land across that distance, wastewater, containing pollutants gathered from open feeding areas will discharge into the unnamed creek as a result of significant precipitation events.

30. To EPA's knowledge, manure discharges occurred at least on one instance on September 14, 2011, the date when EPA inspected the Facility. During this period of time, the Facility discharged pollutants directly into the unnamed creek and into Rio Morovis, a tributary of Rio Cibuco, which discharges into the Atlantic Ocean.

31. Respondent failed to provide effective operation and maintenance to the manure storage lagoon that resulted in discharges into an un-named creek or drainage channel which discharges into Rio Morovis, the Rio Cibuco, and the Atlantic Ocean.

32. On September 14, 2011, an EPA official conducted a review of the EPA files (Review) in order to verify Respondent's compliance with the Act and the applicable NPDES regulations.

33. The Review revealed that Respondent failed to submit an individual NPDES permit application, as required by 40 C.F.R. § 122.21, or a notice of intent for coverage under an NPDES general permit, as required by 40 C.F.R. § 122.28, for its discharges of pollutants from the Facility into waters of the United States.

34. EPA issued Administrative Order CWA-02-2012-3108 ("Compliance Order"), dated September 7, 2012, against Respondent to address the violations mentioned above. The Compliance Order incorporated findings of violations, and ordered Respondent among other things, to cease and desist the discharge of pollutants into waters of the United States from the Facility and to submit a compliance plan that addresses the deficiencies in the operation of the manure storage lagoon.

35. Based on the Findings detailed above, Complainant hereby finds that the Respondent violated Section 301(a) of the Act, by discharging pollutants (manure) from its Facility into waters of the United States without the appropriate permit to do so.

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, EPA, Region 2, hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a penalty of **\$11,525.00**. The proposed penalty has been determined in accordance with the applicable factors under Section 309(g)(3) of the Act. EPA is required to take into consideration 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. EPA has also taken in consideration the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Act of 1996, which requires EPA to adjust penalties for inflation on a periodic basis.

Based on the Findings set forth above, Respondent has been found in violation of Section 301(a) of the Act, by discharging pollutants (manure) into waters of the United States without a NPDES permit. Respondent failed to take appropriate measures to prevent the discharges of pollutants from the facility manure storage lagoon. Manure contains very high amounts of pollutants such as Biological Oxygen Demand ("BOD"), Total Suspended Solids ("TSS"), Coliforms, Phosphorous, Nitrogen, etc., that could be dangerous to human health if a person becomes in contact with this discharge. The violation is serious. The discharge occurred at least on one instance on September 14, 2011, the date of EPA inspection. Respondent does not have a prior history of violations under the Act.

EPA may issue a 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 Litigation

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

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

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 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. §§ 51-59, and the procedures set forth in Subpart D of 40 C.F.R. 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 comments 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 its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 2.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 22.27(c). 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 C.F.R. § 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 that it believes is 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 Respondents' 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 C.F.R. § 22.18.

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

Lourdes del Carmen Rodriguez, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
48 State Road 165, Km. 1.2
Guaynabo, Puerto Rico 00968
Tel. (787) 977-5819

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent requesting a formal hearing does not prevent it 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 22.18(b)(2). In accepting the Consent Agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the Final Order that is to

accompany the Consent Agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its 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 within thirty (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 C.F.R. § 22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified on the previous page. 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:

**U. S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000**

Pursuant to 40 C.F.R. § 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 C.F.R. § 22.18(a)(3). In accordance with 40 C.F.R. § 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. Further, pursuant to 40 C.F.R. § 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.

VIII. Filing of Documents

1. 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**

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

**Lourdes del Carmen Rodriguez, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
48 State Road 165, Km. 1.2
Guaynabo, Puerto Rico 00968
Tel. (787) 977-5819**

IX. 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 28th DAY OF September, 2012.



Jose C. Font
Acting Director
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
48 State Road 165, Km. 1.2
Guaynabo, Puerto Rico 00968

To: Mr. Eduardo Rivera Rivera
HC 05 Box 55204
Hatillo, Puerto Rico 00659

In the Matter of Eduardo Rivera Rivera, Docket No. CWA-02-2012-3353

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

<p>IN THE MATTER OF:</p> <p>Eduardo Rivera Rivera HC 05 Box 55204 Hatillo, Puerto Rico 00659</p> <p>Respondent</p> <p>Eduardo Rivera Rivera Dairy Farm NPDES Number PRU021005</p>	<p>Docket No. CWA-02-2012-3353 Proceeding to Assess Class I Civil Penalty under Section 309(g) of the Clean Water Act</p>
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CERTIFICATE OF SERVICE

I certify that, on the date noted below, I caused to be mailed, by certified mail, return receipt requested, a copy of the foregoing "ADMINISTRATIVE COMPLAINT" and a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits", 40 C.F.R. Part 22 , to the following person at the address listed below:

Mr. Eduardo Rivera Rivera
HC 05 Box 55204
Hatillo, Puerto Rico 00659

I sent the original and a copy of the foregoing Complaint for filing, by overnight mail to:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, R 2
290 Broadway, 16th Floor
New York, NY 10007-1866.

Date: October 1, 2012


San Juan, Puerto Rico
Aileen Sanchez