

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
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REGIONAL HEARING
CLERK

In the Matter of:

MUNICIPALITY OF CATAÑO

RESPONDENT

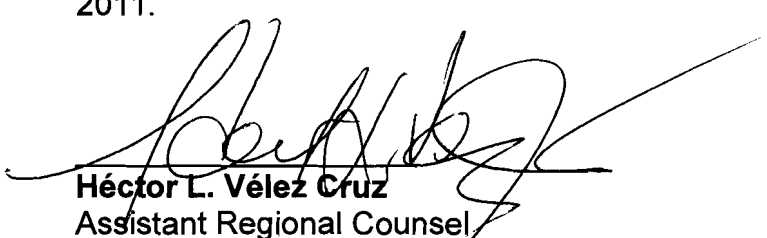
Complainant's Prehearing Exchange

**DOCKET NUMBER
CWA-02-2010-3456**

COMPLAINANT'S OPENING PREHEARING EXCHANGE

Pursuant to the request made by Hon. Susan L. Biro, Chief Administrative Law Judge, on the Order Setting Prehearing Procedures, dated January 10, 2011, the Complainant in the above captioned matter hereby files its Opening Prehearing Exchange for the above captioned matter.

Respectfully submitted, in San Juan, Puerto Rico this 17th day of February 2011.



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1. Pursuant to Section 22.19(a) of the Rules, each party shall file with the Regional hearing Clerk and shall serve on the opposing party and on the Presiding Judge:
 - a. The names of any expert and other witnesses intended to be called at hearing, identifying each as a fact witness or expert witness, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called;

Complainant expects to call the following persons as witnesses at the hearing:

- i. **Yolianne Maclay**
Multimedia Permit and Compliance Branch
U.S. Environmental Protection Agency
Caribbean Environmental Protection Division
Storm Water Program Specialist

Mrs. Yolianne Maclay has been working with EPA, Region 2, CEPD since February 17, 2008, as an Environmental Engineer handling NPDES inspections in the Multimedia Permit and Compliance Branch. Mrs. Maclay holds a B.S. in Environmental Engineering from the Polytechnic University of Puerto Rico where she graduated in 2004. Mrs. Maclay has worked in ETAG Corporation and URS Corporation as an environmental consultant.

Mrs. Maclay will testify about the NPDES storm water permit application regulations, the NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (MS4) requirements and how it applies to Respondent's facility. She will also testify about the: factual and legal aspects of this case, the violations of the Clean Water Act (the "Act" or "CWA") and the pertinent regulations; the calculation of the assessed penalty included in the complaint (which she performed), and the reasoning behind the calculation of said assessed penalty and the appropriateness of the penalty.

Mrs. Maclay will also testify about the: Administrative Compliance Order (ACO), Docket No. CWA-02-2008-3115, dated February 11, 2008, to Respondent, ordering Respondent to comply with the storm water discharge permit regulations.

- ii. **Sergio Bosques**
Environmental Engineer
Regional Storm Water Coordinator
Environmental Management Branch
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
San Juan, Puerto Rico

Mr. Sergio Bosques has been working with the EPA since July 14, 1991, where he started as an Environmental Engineer in the Water Permits and Compliance Branch, Water Management Division, New York, Region 2. Mr. Bosques is currently an Environmental Engineer in the EPA Caribbean Environmental Protection Division Environmental Management Branch, where he started on May 10, 1998. Mr. Bosques holds a degree in B.S. in Chemical Engineering from the University of Puerto Rico where he graduated in 1991.

Mr. Bosques may testify as to the numerous NPDES Storm water seminars he has conducted in Puerto Rico over the years, and will discuss the NPDES General Permit for Discharges from Small MS4s for systems located in the Commonwealth of Puerto Rico (the "Small MS4 Permit"), dated November 6, 2006, and how it applies to Respondent's facility.

Complainant reserves the right, and nothing herein is intended or is to be construed to prejudice or waive any such right, to call or not to call any of the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent and/or areas of the testimony of any of the above-named potential witnesses, where appropriate. In addition, Complainant reserves the right to list and to call additional potential hearing witnesses, including expert witnesses, to answer and/or rebut evidence (testimonial or documentary) listed by Respondent in its prehearing exchange or on matters arising as a consequence of such evidence.

- b. Copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vitae or resume for each identified expert witness. The documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals:
- i. ***Complainant's Exhibit 1*** - Administrative Complaint, Docket No. CWA-02-2010-3456, dated September 24, 2010, with letters addressed to Hon. José Rosario, Mayor of the Municipality of Cataño, dated September 27, 2010, ***Complainant's Exhibit 1a***.
 - ii. ***Complainant's Exhibit 2*** - Letter addressed to Roberto Ayala, Director of the Water Quality Bureau, PR Environmental Quality Board (EQB), dated September 27, 2010.
 - iii. ***Complainant's Exhibit 3*** – Respondent's Answer to the Administrative Complaint and Request for Hearing, dated October 27, 2010.
 - iv. ***Complainant's Exhibit 4*** – Penalty Memorandum dated September 23, 2010, prepared by Mrs. Yolianne Maclay.
 - v. ***Complainant's Exhibit 5*** - EPA February 11, 2008 letter addressed to Hon. Wilson Soto Molina, Mayor of the Municipality of Cataño, notifying violations of the CWA, with Certified Mail Receipt, and with the Administrative Compliance Order, Docket Number CWA-02-2008-3115, ***Complainant's Exhibit 5a***.
 - vi. ***Complainant's Exhibit 6*** - EPA September 5, 2008 letter addressed to Hon. Wilson Soto Molina, Mayor of the Municipality of Cataño, acknowledging receipt of the Municipality's Notice of Intent (NOI) form under the National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) within an Urbanized Area, and assigning NPDES number PRR040033 for its NOI form, along with certificates of service and return receipts.

- vii. ***Complainant's Exhibit 7.*** - EPA March 6, 2009 letter addressed to Hon. José Rosario, newly elected Mayor of the Municipality of Cataño, informing the Municipality's non-compliance status with the NPDES General Permit for Discharges from Small MS4s for systems located in the Commonwealth of Puerto Rico (the "Small MS4 Permit") and the Administrative Compliance Order, Docket Number CWA-02-2008-3115, along with certificates of service and return receipts.
- viii. ***Complainant's Exhibit 8*** - - EPA January 8, 2010 letter addressed to Hon. José Rosario, Mayor of the Municipality of Cataño, informing the Municipality that it continues to be in non-compliance status with the Administrative Compliance Order, Docket Number CWA-02-2008-3115, and the Small MS4 Permit, along with certificates of service and return receipts.
- ix. ***Complainant's Exhibit 9*** - NPDES General Permit for Discharges from Small MS4s for systems located in the Commonwealth of Puerto Rico (the "Small MS4 Permit"), dated November 6, 2006.
- x. ***Complainant's Exhibit 10*** – EPA July 6, 2007 Request for Information Letter sent Hon. Wilson Soto Molina, Mayor of the Municipality of Cataño.

Complainant reserves the right, and nothing herein is intended or should be construed to prejudice such right, to supplement or add, subject to notice to the Court and Respondent, documentary evidence to Complainant's prehearing exchange submission in order to respond to and/or rebut, or otherwise to address an issue arising as a consequence of, evidence Respondent submits in its prehearing exchange or otherwise to update this prehearing exchange.

- c. statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.**

Pursuant to 40 CFR §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent conducts business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional office is located, or in Washington, D.C. Complainant requests that the hearing be held in San Juan, where the relevant Environmental Protection Agency Regional office is located. This location is convenient for both parties and witnesses than the Municipality where the events that gave rise to this action occurred. The Complainant can assist by providing the Regional Hearing Clerk with information on facilities which may be available for purposes of holding the hearing. Complainant estimates it will need one day to present its direct case.

- 2. In addition, the Complainant shall submit the following as part of its Initial Prehearing Exchange:**

- a. Copy of the Small MS4 Permit, or pertinent sections thereof, referenced in Paragraph 9 of the Complaint;**

Please see *Complainant's Exhibit 9*.

- b. Copy of the Compliance Order referenced in Paragraph 23 of the Complaint;**

Please see *Complainant's Exhibit 5a*.

- c. Copy of any EPA policy or guidance document upon which Complainant has relied upon, or intends to rely on, in determining the proposed penalty;**

The calculation of the proposed penalty was performed using each of the statutory factors listed in Section 309 (g) of the CWA, 33 U.S.C. § 1319(g). Factors such as the nature, circumstances, extent and gravity of the violation, prior history of such violations, degree of culpability, Respondent's Economic Benefit and its ability to pay were considered by EPA when calculating the proposed penalty.

d. Narrative statement, and a copy of any document in support, explaining in detail the calculation of the proposed penalty, including the discussion of each penalty assessment factor in Section 309(g)(3) of the Clean Water Act; and

The proposed civil penalty for this case has been determined 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 into account the nature, circumstances, extent and gravity of the violations, and Respondent's prior history of violations, 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 into account the particular facts and circumstances of this case. The particular facts and circumstances of this case are based on a series of compliance evaluations performed on EPA records and communications between EPA and Respondent..

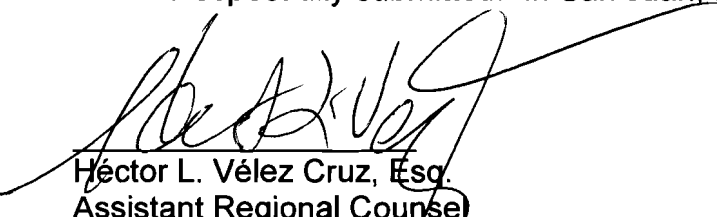
The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that the Respondent is assessed a civil penalty in the amount of \$64,195.00 for the violations alleged in the Complaint. A penalty memorandum and narrative explanation supporting the penalty figure for the violations cited in the Complaint is included in **Complainant's Exhibit 4**.

e. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget Control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

Complainant believes that the Paperwork Reduction Act (PRA) does not apply to the alleged violations in this proceeding. The requirements of Sections 301 and 308(a) of the Act, 33 U.S.C. §§ 1311 and 1318(a), are statutorily imposed and independently enforceable regardless of the PRA. Section 3512, the public protection provision of the PRA, does not preclude the Agency from seeking enforcement directed at statutory mandates. See 5 C.F.R. § 1320.6(e)(1997).

Courts construing the PRA have held that it does not apply to requirements imposed by statute. See Gossner Foods, Inc. v. EPA, 918 F. Supp. 359 (D. Utah 1996). The violations in this matter, failure to timely apply for a storm water permit, pursuant to Section 308(a) of the Act, and discharging pollutants through a point source to the waters of the United States without a NPDES permit pursuant to Section 301 of the Act are statutorily mandated. The NOI Form OMB Number is 2040-0086 and the Water compliance Inspection report has an OMB No. 2040-0057.

Respectfully submitted. In San Juan, Puerto Rico, February 17, 2011.



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RESPONDENT

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**DOCKET NUMBER
CWA-02-2010-3456**

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Prehearing Exchange**, dated February 17, 2011, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy by facsimile, **Overnight Mail** to:

Karen Maples
Regional Hearing Clerk
Region II
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, NY 10007-1866
Fax (212) 637-3202.

Copy by facsimile, **Overnight Mail** to:

Attorney for Respondent:
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Landrón & Vera, LLP.
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lrodriguez@landronvera.com.

Copy by facsimile, **Overnight Mail** to:

Chief Administrative Law Judge
Honorable Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
Fax (202) 565-0044.

Date

2/17/2011

Signature

