

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. 2
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REGIONAL HEARING
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In the Matter of:

MUNICIPALITY OF TOA ALTA

P. O. Box 82
Toa Alta, Puerto Rico 00954-0082

RESPONDENT

Proceeding pursuant to Section 309(g)(2)(B) of
the Clean Water Act, 33 U.S.C. § 1319(g)

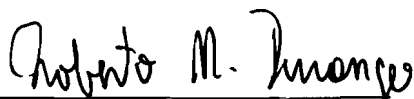
PREHEARING EXCHANGE

**DOCKET NUMBER
CWA-02-2009-3459**

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Pursuant to the Order Setting Prehearing Procedures, dated July 6, 2009, directing the Parties to simultaneously make their initial prehearing exchange by Thursday, September 3, 2009, Complainant hereby files its Initial Prehearing Exchange for the above-captioned matter.

Respectfully submitted, in San Juan, Puerto Rico this 27th day of August 2009.



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In compliance with this Court's Prehearing Order under Section 22.19 of the Rules, directing each party to file with the Regional hearing Clerk and to serve on the opposing party and on the Presiding Judge, Complainant hereby files the following prehearing information:

1. Witnesses; Documents and Exhibits

- a. *Each Party shall submit a list of all expert and other witnesses it intends to call with a brief narrative summary of their expected testimony;*

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

- i. **José A. Rivera (Expert Witness)**
Environmental Engineer
Regional Storm Water Program Specialist
Multimedia Permits and Compliance Branch
U.S. Environmental Protection Agency
Caribbean Environmental Protection Division, Region 2

Mr. José A. Rivera has been working with the U.S. Environmental Protection Agency since September 9, 1990, where he started as an Environmental Engineer in the Water Permit and Compliance Branch, Water Management Division, Region 2. Mr. Rivera currently is the NPDES Regional Storm Water Program Specialist at the Caribbean Environmental Protection Division, EPA, Region 2, in San Juan, Puerto Rico. Mr. Rivera holds a B.S. in Civil Engineering from the University of Puerto Rico where he graduated in 1990.

Mr. Rivera will testify about the National Pollutant Discharge Elimination System (NPDES) storm water permit application regulations, the Municipal Separate Storm Sewer System (MS4) requirements, the NPDES General Permit for Discharges from Small MS4's (the MS4 Permit) and how they apply to Respondent.

Mr. Rivera will also testify about his review of EPA's records, indicating Respondent's failure to apply for an NPDES permit for its storm water discharges from its MS4 into waters of the United States and Respondent's failure to produce evidence of submitting a NOI in response to the July 10, 2007 Request for Information Letter (RFI) EPA sent. Mr. Rivera will testify about Respondent's failure to comply with the NPDES storm water permit application regulations; factual and legal aspects of the case, among other things, the violations of the Clean Water Act (the Act or CWA) and the pertinent regulations; and the calculation of the assessed penalty included in the Complaint, which he prepared, the reasoning behind the calculation of said assessed penalty and the appropriateness of the penalty.

- ii. **Serigo Bosques (Expert Witness)**
Environmental Engineer
Regional Storm Water Coordinator
Multimedia Permits and Compliance Branch
U.S. Environmental Protection Agency
Caribbean Environmental Protection Division, Region 2

Mr. Sergio Bosques has been working with EPA, Region 2, CEPD, since July 14, 1991, where he started as an Environmental Engineer in the Water Permit and Compliance Branch, Water Management Division, Region 2. Mr. Bosques currently is the NPDES Regional Storm Water Program Coordinator at the Caribbean Environmental Protection Division, EPA, Region 2, in San Juan, Puerto Rico. Mr. Bosques holds a B.S. in Chemical Engineering from the University of Puerto Rico where he graduated in 1991 and a Masters Degree in Environmental Engineering from Stevens Institute of Technology, where he graduated from in 1996.

Mr. Bosques will testify about the National Pollutant Discharge Elimination System (NPDES) storm water permit application regulations, the Municipal Separate Storm Sewer System (MS4) requirements, the NPDES General Permit for Discharges from Small MS4's (the MS4 Permit) and how they apply to Respondent. Mr. Bosques will testify about his involvement with the NPDES program in the Commonwealth of Puerto Rico since 1999. Specifically, he will testify about the Public Meeting Information conference he held to provide information about the Storm Water Phase II program and its requirement as published in 71 Fed. Reg. 64,952 (see, **Complainant's Exhibit 9a**), which included a full day workshop on Small MS4 requirements and conditions held on September 28, 2006. He will also testify about the numerous courses, seminars, outreach programs, and meetings he held with Municipalities, consultants and other persons of interest throughout Puerto Rico, where he emphasized the applicability of the NPDES permit application requirements for Small MS4s.

Mr. Bosques will testify about his preparation and issuance of the informational letter, issued by EPA on February 12, 2003; the request for information (RFI) letter submitted on July 10, 2007; and the Administrative Compliance Order (ACO), Docket No. CWA-02-2008-3125, EPA issued to Respondent on February 16, 2008

Mr. Bosques will also testify about his review of EPA's records, indicating Respondent's failure to apply for an NPDES permit for its storm water discharges from its MS4 into waters of the United States and Respondent's failure to produce evidence of submitting a NOI in response to the July 10, 2007 Request for Information letters (RFI) EPA sent. Mr. Bosques will testify about Respondent's failure to comply with the NPDES storm water permit application regulations; and factual and legal aspects of the case, among other things, the violations of the Clean Water Act (the Act or CWA) and the pertinent regulations.

- iii. **Mrs. Yolianne Maclay (Witness)**
Environmental Engineer
Multimedia Permits and Compliance Branch
U.S. Environmental Protection Agency
Caribbean Environmental Protection Division

Ms. Yolianne Maclay has been working with EPA, Region 2, CEPD, since February 15, 2008, as an Environmental Engineer in the Multimedia Permits and Compliance Branch. Ms. Maclay holds a Bachelor in Science Degree in Environmental Engineering from the Polytechnic University of Puerto Rico where she graduated in 2004. Prior to joining EPA, Ms. Maclay worked as an Environmental Engineer at URS Caribe and at ETAG Corporation.

Ms. Maclay will testify about the factual and legal aspects of the case, among other things, and the calculation of the assessed penalty included in the Complaint, which she assisted Mr. Rivera in preparing, the reasoning behind the calculation of said assessed penalty and the appropriateness of the penalty.

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. *Each Party shall submit copies of all documents and exhibits it intends to introduce into evidence at the hearing. The exhibits should include a resume for each proposed expert witness.*

- i. ***Complainant's Exhibit 1—Administrative Complaint***, Docket No. CWA-02-2009-3459, dated March 30, 2009, with the letter addressed to the Honorable Luis R. Collazo Rivera, Mayor, Municipality of Toa Alta, dated March 31, 2009, ***Complainant's Exhibit 1a.***, and ***Certified Mail Receipt***, ***Complainant's Exhibit 1b.***
- ii. ***Complainant's Exhibit 2—Respondent's Answer to the Administrative Complaint and Request for Hearing***, dated May 29, 2009.
- iii. ***Complainant's Exhibit 3— Letter addressed to Mrs. Wanda García***, Acting Director of the Water Quality Area, PR

Environmental Quality Board (EQB), dated March 31, 2009, with Certified Mail Receipt, ***Complainant's Exhibit 3a***.

- iv. ***Complainant's Exhibit 4***—Penalty Memorandum dated March 19, 2009, prepared by Mr. José A. Rivera and Ms. Yolianne Maclay, Docket CWA-02-2009-3459; Ben Software Printout prepared in support of the penalty calculation, ***Complainant's Exhibit 4a***; EPA's General Enforcement Policies known as GM-21 and GM-22, a guidance document for medium specific penalties in support of the penalty calculation, ***Complainant's Exhibit 4b*** and ***Complainant's Exhibit 4c***; the March 18, 2009 Calculation of Notice of Intent Cost per Household Memorandum, prepared for calculating the Economic Benefit Component (Avoided Cost or Benefits) Section of the Penalty Memorandum ***Complainant's Exhibit 4d***.
- v. ***Complainant's Exhibit 5***—EPA's February 16, 2008 Letter addressed to the Honorable Luis R. Collazo Rivera, Mayor, Municipality of Toa Alta, notifying the Municipality of Toa Alta of the violations of the CWA, with Administrative Compliance Order (ACO), Docket Number: CWA-02-2008-3125, ***Complainant's Exhibit 5a***; and the Certified Mail Receipt, ***Complainant's Exhibit 5b***.
- vi. ***Complainant's Exhibit 6***—Respondent's Acknowledgment of Receipt of the ACO, Docket Number: CWA-02-2008-3125, dated March 24, 2008.
- vii. ***Complainant's Exhibit 7***—EPA's July 10, 2007 Request for Information (RFI) letter addressed to the Honorable Luis R. Collazo Rivera, Mayor, Municipality of Toa Alta, requesting, among other documents, proof of NOI coverage and the Certified Mail Receipt, ***Complainant's Exhibit 7a***.
- viii. ***Complainant's Exhibit 8***—EPA's February 12, 2003 Information Letter regarding the NPDES Phase II General Permit for Storm Water Discharges addressed to the Honorable Rafael López Gonzalez, Mayor, Municipality of Toa Alta, notifying the Municipality, among others, about the NPDES program and the Region 2's NPDES Permit Applications From Small MS4's applicability to the Municipality.
- ix. ***Complainant's Exhibit 9***—EPA's Final NPDES General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems, issued on November 6, 2006, and published in the Federal Register 71 Fed. Reg. 64,952,

Complainant's Exhibit 9a; and a copy of the portions of the NPDES General Permit for Discharges from Small MS4s that are relevant to this proceeding, **Complainant's Exhibit 9b**.

- x. **Complainant's Exhibit 10**—A copy of 40 C.F.R. § 122.26 in support of ¶ 8 of the Complaint.
- xi. **Complainant's Exhibit 11**—A map of Puerto Rico's northeast urbanized area; a map depicting the Municipality of Río Grande's urbanized area **Complainant's Exhibit 11a**; a map of the Espíritu Santo River MS4 within Río Grande's urbanized area **Complainant's Exhibit 11b**; and an Aerial Photograph of the Espíritu Santo River and the Atlantic Ocean depicting the Municipality of Río Grande's urbanized area **Complainant's Exhibit 11c**, all in support of ¶¶ 9 and 10 of the Complaint.
- xii. **Complainant's Exhibit 12**—Mr. José A. Rivera's Resume
- xiii. **Complainant's Exhibit 13**—Mr. Sergio Bosques' Resume.
- xiv. **Complainant's Exhibit 14**—Ms. Yolianne Maclay's Resume.

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.

2. **The Complainant shall submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any EPA penalty or enforcement policies or guidelines were applied in calculating the penalty.**

The proposed civil penalty for this case has been determined after taking into account the applicable factors identified at Section 309(g) of the Act, 33 U.S.C. § 1319(g). 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. The Agency has also taken into account EPA's General Enforcement policies known as GM-21 and GM-22, which provide guidance about the development of a medium-specific penalty. The particular facts and circumstances of this case were also considered, based on a series of communications EPA sent Respondent, including among others, EPA's February 12, 2003 Information Letter regarding the NPDES Phase II General Permit for Storm Water Discharges (see, Complainant's Exhibit 8),

EPA's July 10, 2007 RFI Letter (see, *Complainant's Exhibit 7*), and the February 16, 2008 ACO (see, *Complainant's Exhibit 5*).

Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that Respondent be assessed a civil penalty in the amount of **\$49,646** 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*.

- 3. The Respondent is directed to clarify whether its defense admits liability but challenges the appropriateness of the penalty sought by EPA.**

This section of the Prehearing Order does not apply to the Complainant.

- 4. If the Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on Respondent's ability to continue in business, Respondent shall furnish supporting documentation such as a financial statement or tax returns.**

This section of the Prehearing Order does not apply to the Complainant.

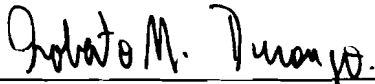
- 5. The Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. § 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget Control number involved herein and whether the provisions of Section 3512 of the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

Complainant believes that the Paperwork Reduction Act (PRA) does not apply to the alleged violations in this proceeding. Sections 301(a) and 308(a) of the Act, 33 U.S.C. §§ 1311(a) and 1318(a), requirements are 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(a) of the Act are statutorily mandated. Complainant believes there is no applicable NOI Form OMB Number for the Final NPDES General Permit for Storm Water Discharges from Small MS4's.

6. Each Party shall submit its views on the place for the hearing pursuant to §§ 22.21(d) and 22.19(d) of the Rules. Each party should also indicate when they would be available for the hearing, and give an estimate of the 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 is available for a hearing at this Court's discretion. Complainant estimates it will need two days to present its direct case.

Respectfully submitted, in San Juan, Puerto Rico this 27th day of August 2009.



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P. O. Box 82
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RESPONDENT

Proceeding pursuant to Section 309(g)(2)(B) of
the Clean Water Act, 33 U.S.C. § 1319(g)

PREHEARING EXCHANGE

**DOCKET NUMBER
CWA-02-2009-3459**

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Prehearing Exchange**, dated August 27, 2009, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original by **Federal Express** to:

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

Copy by **Certified Mail Return Receipt** to:

Attorney for Respondents:

Hans Valiente, Esq.
Counsel, Municipality of Toa Alta
Lcdo. Ricardo Robles Caraballo & Asociados
PO Box 2130
Bayamón, Puerto Rico 00960

Original **Federal Express** to:

Judge William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court Building
1099 14th Street, N.W. Suite 350
Washington, D.C. 20460
Ph: 202.564.6255 / Fax (202) 565-0044

