

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. 2
2009 SEP -2 PM 12:36
REGIONAL HEARING
CLERK

In the Matter of:

MUNICIPALITY OF RÍO GRANDE
P. O. Box 847
Río Grande, Puerto Rico 00745

RESPONDENT

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

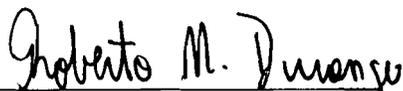
PREHEARING EXCHANGE

DOCKET NUMBER
CWA-02-2009-3458

COMPLAINANT'S INITIALPREHEARING EXCHANGE

Pursuant to the Prehearing Order, dated July 16, 2009, directing the Parties to simultaneously make their initial prehearing exchange by Friday, September 4, 2009, Complainant hereby files its Initial Prehearing Exchange for the above-captioned matter.

Respectfully submitted, in San Juan, Puerto Rico this 1st day of September 2009.



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1. **In compliance with this Court's Prehearing Order pursuant to Section 22.19(a) 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:**
 - a. *Each Party shall submit the names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, with a brief narrative summary of their expected testimony, or a statement that no witness will be called;*

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 6, 2007 Request for Information (RFI) Letter 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 and Fact 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 requirements, as published in 71 Fed. Reg. 64,952 (see, **Complainant's Exhibit 8a**), 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 6, 2007; and the Administrative Compliance Order (ACO), Docket No. CWA-02-2008-3131, EPA issued to Respondent on February 5, 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 6, 2007 Request for Information (RFI) Letter 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 (Fact 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 intended to be introduced into evidence, including a curriculum vita or resume for each identified expert witness; documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 1)*
- i. **Complainant's Exhibit 1**—Administrative Complaint, Docket No. CWA-02-2009-3458, dated March 30, 2009, with Certified Mail Receipt, **Complainant's Exhibit 1b**; and the Letter addressed to the Honorable Eduardo Rivera Correa , Mayor, Municipality of Río Grande, dated March 31, 2009, **Complainant's Exhibit 1a**, and the Certified Mail Receipt, **Complainant's Exhibit 1c**
- ii. **Complainant's Exhibit 2**—Respondent's Acknowledgment of Receipt Letter, dated April 29, 2009, requesting a 30 day extension for filing an Answer to the Complaint; Order Granting

- an Extension of Time to File an Answer to the Complaint, dated May 11, 2009, ***Complainant's Exhibit 2a***; Answer to the Administrative Complaint and Request for Hearing, dated June 9, 2009, ***Complainant's Exhibit 2b***, with Certificate of Service, ***Complainant's Exhibit 2c***;
- 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 23, 2009, prepared by Mr. José A. Rivera and Ms. Yolianne Maclay, Docket CWA-02-2009-3458; 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***; 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 5, 2008 Letter addressed to the Honorable Eduardo Rivera Correa, Mayor, Municipality of Río Grande, notifying the Municipality of Río Grande of the violations of the CWA; Administrative Compliance Order (ACO), Docket Number: CWA-02-2008-3131, dated February 5, 2008, ***Complainant's Exhibit 5a***; and the Certified Mail Receipt, ***Complainant's Exhibit 5b***.
- vi. ***Complainant's Exhibit 6***—EPA's July 6, 2007 Request for Information (RFI) Letter addressed to the Honorable Eduardo Rivera Correa, Mayor, Municipality of Río Grande, requesting, among other documents, proof of NOI coverage and the Certified Mail Receipt, ***Complainant's Exhibit 6a***.
- vii. ***Complainant's Exhibit 7***—EPA's February 12, 2003 Information Letter regarding the NPDES Phase II General Permit for Storm Water Discharges addressed to the Honorable Emilio Rosa Pacheco, Mayor, Municipality of Río Grande, 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.

- viii. ***Complainant's Exhibit 8***—EPA's Final NPDES General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems, issued on November 6, 2006; Federal Register 71 Fed. Reg. 64,952, providing Notice of Final NPDES General Permits for discharges from small municipal separate storm sewer systems (Small MS4s), ***Complainant's Exhibit 8a***; 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 8b***.
- ix. ***Complainant's Exhibit 9***—A copy of 40 C.F.R. § 122.26 in support of ¶ 8 of the Complaint.
- x. ***Complainant's Exhibit 10***—A map of Puerto Rico's northeast urbanized area; a map depicting the Municipality of Río Grande's urbanized area ***Complainant's Exhibit 10a***; a map of the Espíritu Santo River MS4 within Río Grande's urbanized area ***Complainant's Exhibit 10b***; 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 10c***, all in support of ¶¶ 9 and 10 of the Complaint.
- xi. ***Complainant's Exhibit 11***—Mr. José A. Rivera's Resume.
- xii. ***Complainant's Exhibit 12***—Mr. Sergio Bosques' Resume.
- xiii. ***Complainant's Exhibit 13*** 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.

- c. *Each Party shall submit a statement of its view as to the appropriate place of hearing and an estimate of the time needed to present its direct case (see, Sections 22.21(d) and 22.19(d) of the Rules); also state if translation services are necessary in regard to the testimony of any anticipated witness(es), and, if so, state the language to be translated.*

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 more 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 that may be available for purposes of holding the hearing. Complainant estimates it will need two days to present its direct case. Translation services will not be necessary in regard to the testimony of witnesses Complainant anticipates to call.

2. Complainant shall submit the following as part of its Initial Prehearing Exchange

- a. *A copy of any documents, photographs and/or maps in support of the allegations in Paragraphs 8, 10 and 11 of the Complaint;*

See, Complainant's Exhibit 9; Complainant's Exhibit 10; Complainant's Exhibit 10a; Complainant's Exhibit 10b; and Complainant's Exhibit 10c

- b. *A copy of the portions of the NPDES General Permit for Discharges from Small MS4s that are relevant to this proceeding;*

See, Complainant's Exhibit 8b.

- c. *A copy of the letter dated February 12, 2003, referenced in Paragraph 23 of the Complaint;*

See, Complainant's Exhibit 7.

- d. *A copy of the Administrative Compliance Order referenced in Paragraph 29 of the Complaint;*

See, Complainant's Exhibit 5a.

- e. *A narrative statement explaining in detail the calculation of the proposed penalty, addressing each of the factors identified in Section 309(g) (3) of the Clean Water Act, and a copy of any documents in support;*

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)(4). 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 (see, **Complainant's Exhibit 4b** and **Complainant's Exhibit 4c**), which provide guidance about the development of medium-specific penalties. 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 7**), EPA's July 6, 2007 RFI letter (see, **Complainant's Exhibit 6**), and the February 5, 2008 ACO (see, **Complainant's Exhibit 5a**).

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 **\$49,393** 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**.

- f. *A copy of any penalty policies or guidelines relied upon by Complainant in calculating the proposed penalty; and*

See, **Complainant's Exhibit 4a**, **Complainant's Exhibit 4b**, **Complainant's Exhibit 4c**, and **Complainant's Exhibit 4d**.

- g. *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. Complainant believes that the provisions of Section 3512 of the PRA do not apply to the alleged violations in this proceeding.

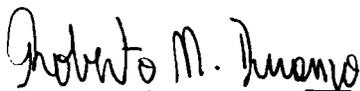
3. **The Respondent shall also submit the following as part of its Prehearing Exchange . . .**

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

4. **Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submittals as to provisions 3(A) through 3(D) above.**

At present, this section of the Prehearing Order does not apply to the Complainant. Complainant, however, takes notice of this section of the Prehearing Order and the October 9, 2009 deadline set by this Court.

Respectfully submitted, in San Juan, Puerto Rico this 1st day of September 2009.



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

MUNICIPALITY OF RÍO GRANDE
PO Box 847
Río Grande, Puerto Rico 00745

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-02-2009-3458

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Prehearing Exchange**, dated September 1, 2009, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy 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** to:

Attorney for Respondents:

Alejandro G. Carrasco-Castillo, Esquire
Counsel, Municipality of Río Grande
Parana 1684
URB. El Cerezal
San Juan, Puerto Rico 00926-3144

Original by **Federal Express** to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
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: 202.564.6291 / Fax (202) 565-0044.

