

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

MUNICIPALITY OF LAS PIEDRAS
P. O. Box 68
Las Piedras, Puerto Rico 00771

RESPONDENT

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

**PROCEEDING TO ASSESS A
CLASS II CIVIL PENALTY**

**DOCKET NUMBER
CWA-02-2009-3456**

2009 DEC 10 PM 1:07
REGIONAL HEARING
CLERK

U.S. ENVIRONMENTAL
PROTECTION AGENCY REGION 2

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Pursuant to the Prehearing Order, dated September 30, 2009, Complainant was directed to file its Initial Prehearing Exchange for the above-captioned matter by Friday, December 11, 2009. Complainant hereby files its Initial Prehearing Exchange.

Respectfully submitted, in San Juan, Puerto Rico this 8th day of December 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 General 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 (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 Factual 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 General 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 of the informational letter EPA issued on February 12, 2003; the request for information (RFI) letter issued on July 10, 2007; and the Administrative Compliance Order (ACO), Docket No. CWA-02-2008-3118, 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 (RFI) Letter EPA issued. 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. **Ms. Yolianne Maclay (Factual 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 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., "Complainant's Exhibit 1").*
- i. **Complainant's Exhibit 1**—Administrative Complaint, Docket No. CWA-02-2009-3456, dated March 30, 2009, with Certified Mail Receipt, **Complainant's Exhibit 1a**; and the Letter addressed to the Honorable Miguel A. López Rivera, Mayor, Municipality of Las Piedras, dated March 31, 2009, **Complainant's Exhibit 1b**, and the Certified Mail Receipt, **Complainant's Exhibit 1c**.
- ii. **Complainant's Exhibit 2**—Respondent's Answer to the Complaint, dated August 10, 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 23, 2009, prepared by Mr. José A. Rivera and Ms. Yolianne Maclay, Docket CWA-02-2009-3456; 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 16, 2008 Letter, addressed to the Honorable Itzamar Peña Ramírez, Mayor, Municipality of Las Piedras, notifying Respondent of the CWA violations; Administrative Compliance Order (ACO), Docket Number: CWA-02-2008-3118, dated February 16, 2008, ***Complainant's Exhibit 5a***; and the Certified Mail Receipt, ***Complainant's Exhibit 5b***;
- vi. ***Complainant's Exhibit 6***—EPA's March 6, 2009 Letter, addressed to the Honorable Miguel A. López Rivera, Mayor, Municipality of Las Piedras, notifying Respondent of the issuance of the ACO and of the non-compliance status of the Municipality; and the Certified Mail Receipt, ***Complainant's Exhibit 6a***.
- vii. ***Complainant's Exhibit 7***—EPA's July 10, 2007 Request for Information (RFI) Letter addressed to the Honorable Itzamar Peña Ramírez, Mayor, Municipality of Las Piedras, requesting, among other documents, proof of NOI coverage and the Certified Mail Receipt, ***Complainant's Exhibit 7a***; Respondent's Acknowledgment of Receipt of EPA's RFI Letter, ***Complainant's Exhibit 7b***, and notification of transition process to a new Administration, ***Complainant's Exhibit 7c***.
- 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 Angel R. Peña Rosa, Mayor, Municipality of Las

Piedras, 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; Respondent's Acknowledgment of Receipt of EPA's February 12, 2003 Letter, **Complainant's Exhibit 8a**.

- 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; 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 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 southeast urbanized area; a detailed map of Puerto Rico's southeast urbanized area, **Complainant's Exhibit 11a**; a map depicting the Municipality of Las Piedras's urbanized area, **Complainant's Exhibit 11b**; a map of the Río Valenciano within Las Piedras's urbanized area **Complainant's Exhibit 11c**; and an Aerial Photograph of the Río Valenciano, depicting the Municipality of Las Piedras's urbanized area **Complainant's Exhibit 11d**, 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.

- 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 a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/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)(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**.

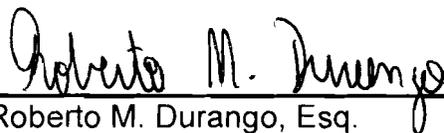
3. Respondent shall submit a statement . . .

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

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

Respectfully submitted, in San Juan, Puerto Rico this 8th day of December 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused to be sent the foregoing **Prehearing Exchange**, dated December 8, 2009, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original by **Federal Express** to:

Judge Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Building
1099 14th Street, N.W., Suite 350
Washington, D.C. 20460
Ph: 202.564.6291 / Fax (202) 565-0044.

Original and copy by **Federal Express** to:

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

Copy by **Regular Mail** to:

Edgar González, Esq.
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