

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

PROCESSED  
2010  
FEBRUARY 10 10 10 AM '10

In the Matter of:

DESAROLLOS ALTAMIRA I. INC., AND  
CIDRA EXCAVATION, S.E..

DOCKET NO. CWA-02-2009-3462

Respondents.

**RESPONDENT CIDRA EXCAVATION S.E.  
PREHEARING EXCHANGE**

COMES NOW, Cidra Excavation, S.D. ("Cidra" or "Respondent"), through the undersigned attorneys, and in response to the Prehearing Order of March 25, 2010, issued in this matter hereby presents its PREHEARING EXCHANGE stating as follows:

I. Pursuant to Section 22.19(a) of the Rules of Practice, Respondent files with the Regional Hearing Clerk and serves upon Complainant and on the Presiding Judge:

(A) The names of all expert and other witnesses intended to be called at the 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.

1. Mr. Israel Quintana (Fact Witness) - Partner of Cidra Excavation S.E. He will testify concerning who were the contracting parties and the nature of the obligations assumed by Respondent in relation to work performed at the Hacienda Altamira Residential Development ("Altamira" or "Project"). He will also testify about work stoppages at the site provoked by Mr. Gustavo Pastrana Santiago, a nearby property owner, who claimed title over project site lands where erosion control

devices were to be installed. Finally, Mr. Quintana will testify on his understanding that all needed permits, authorizations and approvals for commencement of work at the Project had been obtained prior to commencement of construction activities at the Project. Lastly, Mr. Quintana will testify that, as a result of the dire economic condition of the construction industry in Puerto Rico, the Project is no longer under construction, with only 43 residential units finished, out of the 152 planned, and no more than 6 units sold.

2. Mr. Gustavo Adolfo Rodríguez (Fact Witness) - Will testify concerning his submission of a Notice of Intent for Storm Water Discharges Associated with Construction Activity Under an NPDES Permit ("NOI") to the EPA prior to commencement of construction activities at the Project. He will also testify concerning his preparation and submission to the Puerto Rico Department of Natural Resources and the U.S. Army Corps of Engineers, Antilles Office ("Corps"), of a Joint Permit Application related to work then proposed on an ephemeral body of water on the northeast side of the Project, which was thought to be within project boundaries, and the location of that body of water. Finally, Mr. Rodríguez will testify concerning the type of flora and fauna within the Project site and north of the same.

3. Mr. Francisco Charles (Fact Witness), an engineer employed by Hacienda Altamira, Inc., will testify concerning his meeting on January 19, 2006, with Corps personnel and the subsequent determination by the Corps that an unnamed body of water, northeast of the Project, was an ephemeral stream, not considered by the Corps as a "water of the United States".

Mr. Charles will also testify concerning the effect upon storm water management at the Project of work stoppages at the site provoked by a Mr. Dwight Pastrana Santiago, who alleged title over certain over project site lands where stormwater management devices were to be installed.

Finally, Mr. Charles will testify concerning conditions on or about the Project site and areas inspected and photographed by EPA inspector Mr. Hector Ortiz, including the Canóvanas River, on or about the days that Mr. Ortiz visited the Project.

4. Mr. José Iglesias, an engineer with Cidra Excavation, and Respondent's Project Manager for the Project. Mr. Iglesias will testify concerning rainfall levels at the Project site during the time covered by the EPA Complaint.

5. Mr. Juan Amador (Expert Witness), an environmental engineer with the firm of Morris and Associates, will testify concerning, the hydrological connections and pathways from and between stormwater runoff from the Project site and the nearest Traditional Navigable Body of water.

(B) Copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume of each identified expert witness.

- RX Cidra 1: Amended Special Partnership Deed No. 1, of January 27, 2000, signed before Notary Public and Attorney, Pedro Hernández Reyes, concerning Cidra Excavation, S.E.
- RX Cidra 2: January 22, 2007 NOI, 2 copies, one with Certified Mail Receipt
- RX Cidra 3: August 30, 2005, Federal and Commonwealth Joint Permit Application Form for Water Resource Alterations in Waters, Including Wetlands of Puerto Rico.
- RX Cidra 4: February 3, 2006, Department of the Army Corps letter, signed by Lawrence C. Evans to Ramón MacCohon.
- RX Cidra 5: Complainant's Exhibit 7c and 7d, Precipitation Data for the Hacienda Altamira Area Year 2007.<sup>1</sup>

---

<sup>1</sup> Respondent is not enclosing copies of those exhibits notified by Complainant as part of its Prehearing Exchange but will do so if required and proposes that these, in the future, be marked as Joint Exhibits.

- RX Cidra 6: USGS Gurabo Quadrangle Puerto Rico, N1815-W6552.5/7.5 (1969).
- RX Cidra 7: USGS Carolina Quadrangle Puerto Rico, 18065-D8-TF-020 (1969)
- RX Cidra 8: Resolución, Estado Libre Asociado de Puerto Rico, Tribunal de Primera Instancia, Sala Municipal de Canóvanas en Río Grande, Las Quintas 957, Inc. v. Dwight Pastrana Santiago, Querella Núm.:07Q49, Sobre Ley 140.
- RX Cidra 9: Complainant's Exhibit 4, September 23, 2009, Memorandum, "Recommendation to Propose a Clean Water Act Administrative Penalty against Desarrollos Altamira, Inc. ("DAI") and Cidra Excavation, S.E. ("CESE") signed by Héctor D. Ortiz, EPA Environmental Engineer.
- RX Cidra 10: Complainant's Exhibit 13-13f, site photos.
- RX Cidra 11: Construction Contract Agreement, 22 mayo 2006.
- RX Cidra 12: Complainant's Exhibit 12, Oct. 17, 2007 NOI.
- RX Cidra 13: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States.
- RX Cidra 14: Complainant's Exhibits 8a, b & c, respectively, October 16, 2007, letter from Respondent to EPA, October 24 letter from Cidra to EPA and Nov. 6, 2007 letter from EPA to Cidra, closing the Administrative Compliance Order issued on September 29, 2007 by EPA.

RX Cidra 15: Mr. Juan Amador's Resumé<sup>2</sup>.

(C) A statement as to its view as to the appropriate place of hearing and an estimate of the time needed to present its direct case. Also a statement as to whether translation services are necessary in regard to the testimony of any anticipated witness(es), and, if so, state the language to be translated.

Respondent considers that the appropriate place of hearing is San Juan, Puerto Rico. Translation services, from Spanish to English, will be required for Messrs. Quintana and Iglesias.

Respondent estimates that presentation of its direct case with take between 3-4 days.

II. Respondent Cidra, furthermore submits the following as part of its Prehearing Exchange:

(A) A detailed narrative statement explaining the factual and legal basis, and any and all documents it intends to rely upon in support, for its denial of the truth of the factual allegations set fort in Paragraph 14 of the Complaint.

The entity involved in activities at the site described in the Complaint, Cidra Excavation, S.E., is not organized as a corporation according to the Laws of the Commonwealth of Puerto Rico or those of any other jurisdiction, but is organized as a "Special Partnership" created under applicable laws in force and in compliance with the requirements of Supplement "P" of Chapter 3 of Act No. 91 of June 29, 1954, as amended, known as the "Income Tax Act of 1954", or of §§ 8630-8658 of Title 13, known as the "Puerto Rico Internal Revenue Code of 1994". Attached is a copy of the document whereby Cidra Excavation S.E. was constituted. Respondent will also rely on the Construction Contract for work at the Project, see RX Cidra 11.

(B) A detailed narrative statement explaining the factual and legal basis, and any and all documents it intends to rely upon in support, for its claim made on page 8 of its Answer

---

<sup>2</sup> Mr. Amador's resumé is not available at the moment of notification of Respondent's Prehearing Exchange, but will be mailed by separate cover.

that the proposed penalty of \$146,425.49 "has no basis in law or fact".

Complainant presents two Claims on which it bases Respondent's alleged violations to the Clean Water Act. These are:

Claim 1 - Failure to apply for coverage under the NPDES permit, which asserts that:

Respondents did not submit an individual NPDES permit application as required by 40 C.F.R § 122.21, nor did they file a complete and accurate NOI form prior to commencement of construction activities as required by Part 2 of the Construction General Permit. The construction project started on January 25, 2007, as stated in Respondents NOI application detail, and DAI obtained coverage on October 24, 2007, a total of 279 days late.

Claim 2 - Illegal Discharges of pollutant (storm water) into waters of the United States without NPDES permit coverage, which asserts that:

Respondents discharged pollutants from the Project into waters of the United States ... from January 25, 2007 (date when discharges began) to September 27, 2007 (date when the Order was issued), a total of 245 days of violation.

As described in RX Cidra 9 (Complainant Exh. 4, at p. 9), Fact Witness, Hector D. Ortiz, recommended the proposed penalty of \$146,425.49 based on both Claims 1 and 2. In computing the proposed penalty amount, Mr. Ortiz determined a penalty gravity component of \$93,424.00 based on the "length of the violations, the negative environmental effects to the receiving waters and human health, the importance of compliance and seriousness of the violation. See, Complainant's Exhibit 4, at p. 7.

Waterkeeper Alliance, Inc. v. E.P.A., 399 F.3d 486, 504 (2d Cir. 2005) and Service Oil, Inc., v. U.S.E.P.A., 590 F.3d 545 (8<sup>th</sup> Cir. 2009) both concluded that the Clean Water Act does not grant EPA with authority to assess administrative monetary penalties for failure to submit a timely permit application. Claim 1, thus, is not a valid basis for penalty assessment.

Waterkeeper, further concluded that "the Clean Water Act gives EPA jurisdiction to regulate and control only actual discharges - not potential discharges, and certainly not point sources themselves." Id., at 505 (emphasis in original). The penalty calculation also assumes that it rained on a continuous basis at the Altamira project site during a total of 245 days during which time, as a result, stormwater discharges occurred. This assumption is incorrect. Based on Complainant's own data, no more than, approximately, 26 rain events in excess of .5 inches occurred during the time described in Claim 2. Accordingly, without taking into consideration other factors such as duration and intensity, in addition to amount of rainfall, no more than 26 potential discharges of stormwater, without so admitting, could have occurred.

(C) A detailed narrative statement explaining the factual and legal basis, and any and all documents it intends to rely upon in support, for its claim made on page 8 of its Answer that "the proposed penalty assessment is excessive, unwarranted, burdensome, and fails to take into account the factors identified in Section 309(g)(3) of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., §1319(g)(3)"

Same as response to (B) supra.

(D) A detailed narrative statement explaining the factual and legal basis, and any and all documents it intends to rely upon in support, for its "Affirmative Defenses" set forth in its Answer on pages 9 through 12 (paragraphs 1-18 thereon).

Affirmative Defenses

1. *The Complaint fails to state a claim upon which relief can be granted against Respondent.*

See, supra, paragraph (B).

2. *The Environmental Protection Agency lacks jurisdiction under the Clean Water Act. 33 U.S.C §§ 1251 et seq.*

Stormwater from the Project does not discharge directly into waters of the United States, either a surface body of water

or wetlands. See, RX Cidra 4 and 10 (Complainants' Exhibits 13-13f).

3. At all times herein relevant, Respondent was not the "owner" of a "facility" or "activity" at the Hacienda Altamira residential development ("Facility" or "Site") within the meaning of the Clean Water Act, 33 U.S.C. §§1251 et seq. and regulations issued thereunder.

Cidra was the contractor responsible for site improvements, but not the owner. See, RX Cidra 10.

4. At no time was Cidra the "operator" of a "facility" or "activity" within the meaning of the Clean Water Act, 33 U.S.C. §§1251 et seq. and regulations issued thereunder.

This affirmative defense is withdrawn.

5. At no time did Cidra have, possess or retain responsibility for operation of the construction project as a whole.

Testimony of Mr. Israel Quintana who will indicate that operation control over the Project was retained by the Project Owner through its engineers.

6. At no time did Cidra have, possess or retain responsibility for obtaining coverage under the National Pollutant Discharge Elimination System ("NPDES") permit applicable to facilities or activities generating stormwater subject to Section 402 (p) of the Clean Water Act, 33 U.S.C. §1342 (p), and applicable regulations issued thereunder pursuant to 40 C.F.R. Part 122.

Responsibility for submitting a NOI and seeking coverage under the Clean Water Act was retained by the Project owner who contracted the services of Mr. Gustavo Rodriguez. See, RX Cidra 2 and 12 (Complainant Exh. 12)

7. At all times herein relevant Respondent understood that coverage for activities at the Facility, under the NPDES permit applicable to facilities or activities generating stormwater subject to Section 402 (p) of the Clean Water Act, 33



U.S.C. §1342 (p), and applicable regulations issued thereunder pursuant to 40 C.F.R. Part 122, had been requested and obtained.

Respondent was under the understanding that a NOI had been submitted prior to commencement of construction activities (RX Cidra 2)

8. Respondent activities at the Site did not result in the discharge of stormwater or pollutants to "waters of the United States".

Any stormwater discharges that may have occurred from the site entered terrain on the northern side of the Project that is not a jurisdictional wetland under the Clean Water Act. See, RX Cidra 4, 10 & 13.

9. At all times herein relevant, stormwaters from the Site which may have, without either so admitting or denying, gone beyond the Facility boundary, flowed onto terrain or land located between the Site and the "unnamed creek" described in the Complaint as a tributary of the "Río Canóvanas".

Same as supra 7.

10. Any and all stormwaters that at all times herein relevant may have, without either so admitting or denying, gone beyond Facility property limits, flowed from the Site to terrain or land that is not a wetland, jurisdictional or otherwise.

Same as supra 7.

11. The waterbody described in the Complaint as an "intermittent creek" is actually an ephemeral creek.

See, RX Cidra 3 & 4.

12. The "intermittent creek" described in the Administrative Complaint is not a relatively permanent, standing or continuously flowing body of water, forming geographic features that are described in ordinary parlance as streams, oceans, rivers or lakes.

Same as supra 10.

13. Any terrain that, at all times herein relevant, may have, without either so admitting or denying, received stormwaters from the Site, was not adjacent to waters considered "waters of the United States" pursuant to Environmental Protection Agency regulations at 40 C.F.R. 230.3.

Same as supra 10.

14. Any terrain that, at all times herein relevant, may have, without either so admitting or denying, received stormwaters from the Site, did not have a continuous surface connection to waterbodies that are "waters of the United States".

Same as supra 10 and, in addition, RX Cidra 6 & 7.

15. There is no "significant nexus" between terrain that at all times herein relevant may have, without either so admitting or denying, received stormwaters from the Facility and the closest "traditional navigable waters".

Respondent understands that, based on the U.S. Supreme Court decision in Rapanos v. United States, 126 S. Ct. 2208 (2006), and applicable EPA/Corp Guidance (RX Cidra 13), stormwater discharges which may have occurred from the Project site, which is denied, did not and do not have a "significant nexus" with the nearest Traditional Navigable Waters, the Río Grande de Loiza. See, RX Cidra 6 & 7.

16. To the extent that Respondents acts or omissions may, without either so admitting or denying, be in non compliance with Section 401 of the Clean Water Act, 33 U.S.C. § 1342, those failures are de minimis in nature, have created no danger to health and public safety or human welfare, a danger to the environment, or adversely impacted the hydrological or ecological functions and attributes of "waters of the United States".

Stormwaters discharged from the Project site, are from a construction site, not from industrial activity and, thus, did not contain substances classified as toxic or hazardous under applicable laws and regulations. The duration and amount of these discharges, occurring at the utmost, during no more than

26 days, did not reach potable water sources or adversely impact wildlife habitat or endanger public health.

17. Any and all actions or omissions concerning compliance with "Clean Water Act" Sections 301 and 402, 33 U.S.C. §§1311, 1342, have not resulted in any economic benefit to "Respondent".

Cidra was not legally required to obtain coverage by filing a NOI and, upon being notified by EPA, promptly stopped all construction activity at the site and promptly implemented all actions required by Mr. Hector Ortíz.

18. Respondent has, at all times, acted in good faith.  
Same as supra 17.

(E) If Respondent Cidra takes the position that it is unable to pay the proposed penalty, a copy of any and all documents upon which it intends to rely in support of such position.

Cidra will not raise an inability to pay argument, although, as elsewhere expressed, it considers the proposed penalty as excessive, unreasonable and unwarranted.

(F) If Respondent Cidra takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents upon which it intends to rely in support of such position.

Respondent has no additional arguments, besides those previously expressed, regarding the need to reduce or eliminate the proposed penalty.

**CERTIFICATE OF SERVICE:** Respondent Cidra Excavation, S.E.'s Prehearing Exchange has been notified by certified mail, return receipt requested: Original and Copy, to Regional Hearing Clerk, U.S. EPA, Region II, 290 Broadway - 17th Floor, New York, New York 10007; and, copy was notified to: Hon. Susan L. Biro, Chief Administrative Law Judge, U.S. EPA, Mail Code 1900L, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 200460; Ms. Silvia Carreño-Coll, Esq., Assistant Regional Counsel, U.S. EPA, Region 2, 1492 Ponce de León Ave., Suite 417, San Juan, PR 00907-4127; Roberto M. Durango, Esq., Assistant Regional Counsel, U.S. EPA, Region 2, 1492 Ponce de León Ave., Suite 417, San Juan, PR

**DOCKET NO. CWA-02-2009-3462**

00907-4127; Jose A. Hernández Mayoral, Esq., Bufete Hernández Mayoral CSP, 206 Tetuan Street, Suite 702, San Juan, PR 00901.

In San Juan, Puerto Rico this 14<sup>th</sup> day of May, 2010.

Respectfully submitted.

**MARTINEZ-LORENZO LAW OFFICES**

Attorneys for Respondent Cidra  
Excavation, S.E.

Union Plaza Building - Suite 1200

416 Ponce de León Avenue

Hato Rey, P.R. 00918-3424

Tel. (787) 756-5005/Fax: (787) 641-5007

E-mail: pmartlor@pmlawpr.com

By:

  
\_\_\_\_\_  
Patricio Martínez-Lorenzo

MAZARIO

por ISRAEL QUINTANA FOR SI Y EN REPRESENTACION DE CIDBA EXCAVATION, INC. Y DON JOSE RODRIGUEZ

SAR JADW, n. 27 de FEBRERO de 19-1999

OTORGADA EN

ESCRITURA ENMENDADA DE SOCIEDAD ESPECIAL

SOBRE

NUMERO UNO (1)

ESCRITURA

COPIA DE LA



MINIL PRIUS FIDE

Abogado Público

Pedro Hernandez Reyes

PX-Edm I

—Comienza mi protocolo de instrumentos públicos correspondiente al año dos mil (2000) hoy día veintisiete (27) de enero del dos mil (2000).-----

-----NUMERO UNO (1)-----

-----**ESCRITURA ENMENDADA DE SOCIEDAD ESPECIAL**-----

---En la ciudad de San Juan, Puerto Rico, a los veintisiete (27) días del mes de enero del dos mil (2000)-----

-----**ANTE MI**-----

-----**PEDRO HERNÁNDEZ REYES**-----

---Abogado y Notario Público en y para el Estado Libre Asociado de Puerto Rico, con residencia en San Juan, Puerto Rico y estudio abierto en el Edificio Bolivia Treinta y Tres (33), Tercer Piso, Oficina trescientos uno (301), Hato Rey, Puerto Rico.-----

---**DE UNA PARTE: DON ISRAEL QUINTANA**, número de seguro social 580-88-7786, mayor de edad, casado con Doña Hilda Luz Pérez, y vecino de Dorado, Puerto Rico, y **DON JORGE RODRÍGUEZ NAZARIO**, número de seguro social 125-24-2257, mayor de edad, casado con Juanita Iglesias y vecino de Gurabo, Puerto Rico, en adelante denominados conjuntamente como "Socios Especiales"-----

---**Y DE LA OTRA PARTE: CIDRA EXCAVATION, INC.**, una corporación organizada y existente con arreglo a las leyes del Estado Libre Asociado de Puerto Rico cuyo número de seguro social patronal es 66-03-71678, en adelante denominada como "Socio Especial Administrador", y representada en este acto por su Presidente, Don Israel Quintana de las circunstancias personales y seguro social antes indicado, y quien asegura estar debidamente facultado para comparecer a este otorgamiento, facultades que acreditará donde y cuantas veces fuere menester, lo que justifica



6. El método de contabilidad que la sociedad utilizará será el de contrato terminado según provisto en el Artículo 42-4(a)(2) del Reglamento a la Ley de Contribuciones sobre Ingresos de 1954, según enmendada.

7. La fecha de comienzo de operaciones de esta sociedad así como el comienzo de su período de contabilidad será el 1ro. de junio de 1989.

8. CIDRA EXCAVATION, S.E. cualifica como sociedad especial, según lo dispuesto en la Sección 330, incisos (a), (b), (c), (d) de la Ley antes indicada.


Y PARA QUE ASI CONSTE, firmamos la presente Declaración Jurada en San Juan, Puerto Rico, hoy 9 de agosto de 1989.

CIDRA EXCAVATION, INC.

Por:

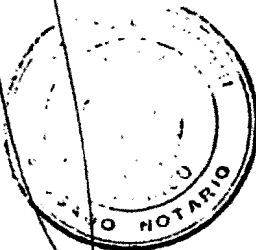
  
Israel Quintana

  
Israel Quintana

  
Jorge Rodríguez Nazario

Affidavit Número: 2655

Jurado y suscrito ante mí por Don Israel Quintana, por sí y como Presidente de CIDRA EXCAVATION, INC., número de seguro social 580-88-7786, mayor de edad, casado y vecino de Dorado, Puerto Rico, y Don Jorge Rodríguez Nazario, número de seguro social 125-24-2257, mayor de edad, casado y vecino de Gurabo, Puerto Rico, a quienes Doy Fe de conocer personalmente, en San Juan, Puerto Rico, hoy día 9 de agosto de 1989.



  
NOTARIO PUBLICO

Blank Page



This Form Replaces Form 3510-9 (8-98)

Form Approved OMB Nos. 2040-0188 and 2040-0211

Refer to the Following Pages for Instructions

United States Environmental Protection Agency  
Washington, DC 20460

NPDES  
Form



Notice of Intent (NOI) for Storm Water Discharges Associated with  
Construction Activity Under an NPDES General Permit

Submission of this Notice of Intent (NOI) constitutes notice that the party identified in Section II of this form requests authorization to discharge pursuant to the NPDES Construction General Permit (CGP) permit number identified in Section I of this form. Submission of this NOI also constitutes notice that the party identified in Section II of this form meets the eligibility requirements of the CGP for the project identified in Section III of this form. Permit coverage is required prior to commencement of construction activity until you are eligible to terminate coverage as detailed in the CGP. To obtain authorization, you must submit a complete and accurate NOI form. Refer to the instructions at the end of this form.

I. Permit Number

PER100000

II. Operator Information

Name: DESARROLLOS ALTAMIRA I INC

IRS Employer Identification Number (EIN): 61-1424317

Mailing Address:

Street: PO Box 1960

City: SAN JUAN State: PR Zip Code: 00902-1960

Phone: 787-777-0628 Fax (optional): 787-777-0628

E-mail (optional):

III. Project/Site Information

Project/Site Name: HACIENDA ALTAMIRA (PARCEL "A")

Project Street/Location: STATE ROAD PR 957, km 0.2

City: CANOVANAS State: PR Zip Code: 00729

County or similar government subdivision: HATO PUERTO WARD

Latitude/Longitud (Use one of three possible formats, and specify method)

Latitude 1. 18°20'15" N (degrees, minutes, seconds) Longitude 1. 65°52'55" W (degrees, minutes, seconds)  
2. " " N (degrees, minutes, decimal) 2. " " W (degrees, minutes, decimal)  
3. " " N (decimal) 3. " " W (decimal)

Method:  U.S.G.S. topographic map  EPA web site  GPS  Other:  
- If you used a U.S.G.S. topographic map, what was the scale:

Project Located in Indian country?  Yes  No  
If so, name of Reservation or if not part of a Reservation, put "Not Applicable": Not Applicable

Estimated Project Start Date: 01 / 25 / 2007 Estimated Project Completion Date: 08 / 25 / 2009  
Month Date Year Month Date Year

Estimated Area to be Disturbed (to the nearest quarter acre): 42.05

IV. SWPPP Information

Has the SWPPP been prepared in advance of filing this NOI?  Yes  No

Location of SWPPP for viewing:  Address in Section II  Address in Section III  Other

If Other:

SWPPP Street: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip Code: \_\_\_\_\_

SWPPP Contact Information (if different than that in Section II):

Name: GUSTAVO RODRIGUEZ, Ecologist

Phone: 787 - 241 - 9000 Fax (optional): 787 - 732 - 3502

E-mail (optional): \_\_\_\_\_

V. Discharge Information

Identify the name(s) of waterbodies to which you discharge. There are no bodies of water that will receive discharge

Is this discharge consistent with the assumptions and requirements of applicable EPA approved or established TMDL(s)?

Yes  No

VI. Endangered Species Information

Under which criterion of the permit have you satisfied your ESA eligibility obligations?

A  B  C  D  E  F

If you select criterion F, provide permit tracking number of operator under which you are certifying eligibility:

\_\_\_\_\_

VII. Certification Information

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Print Name: Gustavo Adolfo Rodriguez

Print Title: President - Environmental Permitting

Signature: *Gusto Adolfo Rodriguez*

Date: 22 JANUARY 2007

7006 0810 0003 9400 0062

U.S. Postal Service  
CERTIFIED MAIL RECEIPT

NON-PROFIT MAIL USE

Postage	\$ 16.39
Certified Fee	\$2.40
Return Receipt Fee (Endorsement Required)	\$1.85
Registered Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$ 19.64



0001  
 Street, Apt. No., or PO Box No.  
 City, State, ZIP+4

Form Approved OMB Nos. 2040-0188 and 2040-0211

United States Environmental Protection Agency  
 Washington, DC 20460  
 of Intent (NOI) for Storm Water Discharges Associated with Construction Activity Under an NPDES General Permit

ice that the party identified in Section II of this form requests authorization to Permit (CGP) permit number identified in Section I of this form. Submission d in Section II of this form meets the eligibility requirements of the CGP for the age is required prior to commencement of construction activity until you are ) obtain authorization, you must submit a complete and accurate NOI form.

II. Operator Information

Name: **D E S A R R O L L O S A L T A M I R A I I N C**

IRS Employer Identification Number (EIN): **61 - 1424317**

Mailing Address:

Street: **PO BOX 1950**

City: **SAN JUAN** State: **PR** Zip Code: **00902 - 1960**

Phone: **787 - 777 - 0527** Fax (optional): **787 - 777 - 0628**

E-mail (optional):

III. Project/Site Information

Project/Site Name: **HACIENDA ALTAMIRA (PARCEL "A")**

Project Street/Location: **STATE ROAD PR 957, km 0.2**

City: **CANOYANAS** State: **PR** Zip Code: **00729**

County or similar government subdivision: **HATO PUERCO WARD**

Latitude/Longitude (Use one of three possible formats, and specify method)

Latitude 1. <b>18°20'15" N</b> (degrees, minutes, seconds)	Longitude 1. <b>65°52'55" W</b> (degrees, minutes, seconds)
2. _____ N (degrees, minutes, decimal)	2. _____ W (degrees, minutes, decimal)
3. _____ ° N (decimal)	3. _____ ° W (decimal)

Method:  U.S.G.S. topographic map  EPA web site  GPS  Other:  
 • If you used a U.S.G.S. topographic map, what was the scale:

Project Located in Indian country?  Yes  No  
 If so, name of Reservation or if not part of a Reservation, put "Not Applicable": **Not Applicable**

Estimated Project Start Date: **01 / 25 / 2007** Estimated Project Completion Date: **08 / 25 / 2009**

Month Date Year Month Date Year

Estimated Area to be Disturbed (to the nearest quarter acre): **42.05**

Has the SWPPP been prepared in advance of filing this NOI?  Yes  No

Location of SWPPP for viewing:  Address in Section II  Address in Section III  Other

If Other:

SWPPP Street: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip Code: \_\_\_\_\_

SWPPP Contact Information (if different than that in Section II):

Name: GUSTAVO RODRIGUEZ, ECOLOGIST

Phone: 787 - 241 - 9000 Fax (optional): 787 - 732 - 3502

E-mail (optional): \_\_\_\_\_

#### V. Discharge Information:

Identify the name(s) of waterbodies to which you discharge. There are no bodies of water that will receive discharge

Is this discharge consistent with the assumptions and requirements of applicable EPA approved or established TMDL(s)?

Yes  No

#### VI. Eligibility:

Under which criterion of the permit have you satisfied your ESA eligibility obligations?

A  B  C  D  E  F

If you select criterion F, provide permit tracking number of operator under which you are certifying eligibility:

\_\_\_\_\_

#### VII. Certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Print Name: Gustavo Adolfo Rodriguez

Print Title: President - Environmental Permitting

Signature: Gustavo Adolfo Rodriguez

Date: 22 JANUARY 2007

*General Permit***2.2 How to Submit Your NOI**

You must either use EPA's electronic NOI system (accessible at [www.epa.gov/npdes/eNOI](http://www.epa.gov/npdes/eNOI)) or use a paper form (included in Appendix E) and then submit that paper form to:

**For Regular U.S. Mail Delivery:**

EPA Stormwater Notice Processing  
Center  
Mail Code 4203M  
U.S. EPA  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**For Overnight/Express Mail Delivery:**

EPA Stormwater Notice Processing  
Center  
Room 7420  
U.S. EPA  
1201 Constitution Avenue, NW  
Washington, DC 20004

**2.3 Authorization to Discharge Date**

You are authorized to discharge stormwater from construction activities under the terms and conditions of this permit seven (7) calendar days after acknowledgment of receipt of your complete NOI is posted on EPA's NPDES website.

<http://www.epa.gov/npdes/stormwater/cgp>. The exception to this 7-day timeframe is if EPA delays your authorization based on eligibility considerations of Part 1.3 (e.g., ESA concerns). Under this circumstance, you are not authorized for coverage under this permit until you receive notice from EPA of your eligibility.

**2.4 Submission Deadlines**

- A. *New Projects:* To obtain coverage under this permit, you must submit a complete and accurate NOI and be authorized consistent with Part 2.3 prior to your commencement of construction activities.
- B. *Permitted Ongoing Projects:* Permitted ongoing projects are not eligible for coverage under this permit. If you previously received authorization to discharge for your project under the 2003 CGP, your authorization will be automatically continued under that permit until the expiration of this permit and the issuance of a new CGP, or the termination of coverage by you under the 2003 CGP, whichever is earlier. Note: If you are an operator of a permitted ongoing project and you transfer ownership of the project, or a portion thereof, to a different operator, that operator will be required to submit a complete and accurate NOI for a new project in accordance with Part 2.2.
- C. *Unpermitted Ongoing Projects:* If you previously did not receive authorization to discharge for your project under the 2003 CGP and you wish to obtain coverage under this permit, you must submit an NOI within 90 days of the issuance date of this permit.

Blank page

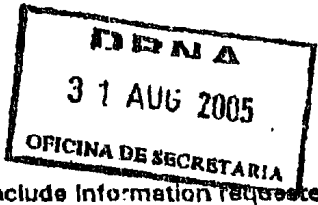
FEDERAL AND COMMONWEALTH JOINT PERMIT APPLICATION FORM FOR WATER RESOURCE ALTERATIONS IN WATERS, INCLUDING WETLANDS, OF PUERTO RICO

FOR AGENCY USE ONLY

USACE Application # _____	Date Application Received _____
PRPB CZM Application # _____	Date Application Received _____
EOB WQC Application # _____	Date Application Received _____
DNER SLUC Application # _____	Date Application Received _____
DNER WF Application # _____	Date Application Received _____
DNER WC&WI Application # _____	Date Application Received _____
DNER ECEFP Application # _____	Date Application Received _____

Government Agency Acting as Sponsor in accordance with Section 4C of Law:

1. Type of Permit or Certification Requested (check all that apply):
- U.S. Army Corps of Engineers Permit to place Fill in Waters of the U.S. (Section 404), Work in Navigable Waters of the U.S. (Section 10) and/or Transport Dredged Material for Ocean Disposal (Section 103)
  - CZM Certification
  - Water Quality Certification
  - Submerged Land Use Concession
  - Water Franchises
  - Well Construction and Water Intakes
  - Earth Crust Extraction Formal Permit - Include information requested in Section 4C of Law



706

2. Type of activity for which you are applying (check all that apply):
- New construction or work including dredging or filling in, on or over waters of the U.S., including wetlands, navigable waters and/or other surface waters.
  - Alteration or operation of an existing work, construction or system which was not previously permitted.
  - Modification of previously permitted project. Provide previous permit numbers.
  - Removal, Extraction, Excavation and dredging of earth crust components.
  - Extraction of water

3. Applicant's Name and Address

Name MacCohon, Ram6n-Hacienda Altamira, Inc.  
 Last Name, First Name (if individual). Corporate Name. Name of Government Agency

Address P.O. Box 1960

Municipality San Juan, Puerto Rico, Zip 00902-1960

Telephone (787) 777-0627 Fax (787) 777-0628

Name of the Property Owner (if different from applicant): \_\_\_\_\_  
 (if applicant not the owner, explain contractual relationships. Include Owner's address):

JOINT PERMIT APPLICATION - Puerto Rico

4. Agent's Name and Address

Name Gustavo Adolfo Rodríguez, ENVIRONMENTAL PERMITTING

Address P.O. Box 362893

Municipality San Juan, Puerto Rico

Zip 00936-2893

Telephone \_\_\_\_\_

Fax \_\_\_\_\_

5. Name of Waterway at Work

Site Unnamed ephemeral creek tributary to Río Canóvanas.

6. Name of project, including phase if applicable:

Hacienda Altamira

Is this application a part of a multi-phase project?  yes  no

Project location (Indicate Wards, Municipality, etc. Use additional sheets, if needed):

Ward and Municipality (ies) Hato Puerco Ward, Municipality of  
Canóvanas

"Finca" N/A

Road 957, Km. 0, Hm. 2

Street address, road, or other location

Coordinates In Center of Project: Latitude: \_\_\_\_\_

Longitude: \_\_\_\_\_

Lambert Coordinates: X : 19555E

Y : 2029738N

Directions to locate Site:

Take State Road PR-185 South from Canóvanas to Juncos. Turn left (East) on intersection with PR-957. The project begins on kilometer 0.2, and extends to the North of PR-957 for almost one kilometer.



JOINT PERMIT APPLICATION - Puerto Rico

7. If there have been any pre-application meetings, including at the project site, with regulatory staff, please list the date(s), location(s), and names of key staff and project representatives.

There have been no pre-application meetings, in the office or at the project site, with U.S. Corps of Engineers (USACE) regulatory staff.

8. Please identify by number any Commonwealth and/or Federal permit pending, issued or denied for projects at the location, and any related enforcement actions. (Provide Copies)

Agency	Date	No./Type of Application	Action Taken
ICPR	11mar02	-----	No Objection
DNER	12aug02	C4-2000-420	No Objection

9. Please provide the names, addresses and zip codes of property owners whose property directly adjoins the project (excluding applicant). Please attach a plan view showing the owner's names and adjoining property lines. Attach additional sheets if necessary.

- a. \_\_\_\_\_ c. \_\_\_\_\_
- \_\_\_\_\_ c. \_\_\_\_\_
- \_\_\_\_\_ c. \_\_\_\_\_
- b. \_\_\_\_\_ d. \_\_\_\_\_
- \_\_\_\_\_ d. \_\_\_\_\_
- \_\_\_\_\_ d. \_\_\_\_\_
- e. SEE ATTACHMENT "A" f. \_\_\_\_\_
- \_\_\_\_\_ f. \_\_\_\_\_
- \_\_\_\_\_ f. \_\_\_\_\_
- g. \_\_\_\_\_ h. \_\_\_\_\_
- \_\_\_\_\_ h. \_\_\_\_\_
- \_\_\_\_\_ h. \_\_\_\_\_

10. Proposed Use (Check one or more as applicable)  Private  Public  Commercial  Industrial  Agricultural

Explain:

Construction of 995 middle-class residential units

JOINT PERMIT APPLICATION -- Puerto Rico

12. Total Extent of Work in USACE Jurisdictional Open Waters or Wetlands: (Use additional sheets and provide complete breakdown of each category if more space is needed)

- Fill: 0.005 acres 0.005 cuerdas 1308 cubic yards 1000 cubic meters
- Excavation: \_\_\_\_\_ acres \_\_\_\_\_ cuerdas \_\_\_\_\_ cubic yards \_\_\_\_\_ cubic meters
- Dredging: \_\_\_\_\_ acres \_\_\_\_\_ cuerdas \_\_\_\_\_ cubic yards \_\_\_\_\_ cubic meters
- Docks, Piers, and Over Water Structures: N/A  
Dimensions N/A

- Total Number of Slips N/A Total Number of Mooring Pillings N/A
- Total area of structure over water and wetlands/seagrasses N/A

- Seawall length N/A ft (mts) Seawall material N/A
- Riprap length: N/A ft (mts) Type of riprap material N/A

13. Proposed Submerged Land Use: N/A

Submerged Land \_\_\_\_\_ sf \_\_\_\_\_ sm Maritime Zone \_\_\_\_\_ sf \_\_\_\_\_ sm  
 Length of use requested (months, years, ect.): \_\_\_\_\_

14. Proposed Mining: Sand Gravel Stone Fill Other

Excavation: \_\_\_\_\_ cuerdas/acres Rate: \_\_\_\_\_ m<sup>3</sup> \_\_\_\_\_ day \_\_\_\_\_ week \_\_\_\_\_ month  
 Total amount:: \_\_\_\_\_ m<sup>3</sup> Duration: \_\_\_\_\_ years Slope: \_\_\_\_\_ V: \_\_\_\_\_ H Depth: \_\_\_\_\_ mts  
 Equipment: \_\_\_\_\_

15. Water Extraction: N/A

Amount of proposed extraction: \_\_\_\_\_ MGD \_\_\_\_\_ GPD  
 \_\_\_\_\_ hrs/day \_\_\_\_\_ days/week \_\_\_\_\_ weeks/year  
 Safe Yield (Q 99): \_\_\_\_\_ MGD  
 Method of extraction: Surface Water: \_\_\_\_\_ pipe diameter (in) \_\_\_\_\_ pump capacity(gpm)  
 Source: \_\_\_\_\_ River \_\_\_\_\_ Sea \_\_\_\_\_ Stream  
 Name of the Source: \_\_\_\_\_ Number of people served: \_\_\_\_\_  
 Other Water extractions located upstream and downstream from proposed intake:

JOINT PERMIT APPLICATION - Puerto Rico

15. (Continued)

Water Discharges/Outfalls located upstream and downstream from proposed intake: \_\_\_\_\_

N/A

Proposed use of Water:  Domestic  Government  Fisheries  Commercial  Institutional  
 Industrial  Agricultural  Recreational  Other

Brief Description of the proposed use of the water. Specify as applicable the type of crop, acreage number of animals, products, merchandize, number of dwellings, number of employees, etc:

N/A

For water intakes include the following information: N/A

Intake Dimensions: Height \_\_\_\_\_ (ft) Width \_\_\_\_\_ (ft)

Pipe Diameter \_\_\_\_\_ (Inches)

Type of Structure:  Dam  Gallery  Other \_\_\_\_\_

Note (Hydraulic - Hydrology Study (H&H): For intake structures, dam or gallery, etc, which alters the natural water level, the applicant should submit an H&H study describing the actual water level and the projected change in water levels after the work is completed.

N/A

16. Indicate the zoning of the project site: The proposed project site is

zoned as "Urban Soils", According to the "Plan de Ordenamiento Territorial de Canóvanas".

Indicate the current land use of the project site: The proposed project site

is currently vacant.

Indicate the current floodzone classification of the project site: The proposed project site is outside of any flood zone classification, as per sheet 21B to the PR PB Flood Maps.

Specify if the proposed project is in compliance with the Puerto Rico Planning Board Regulation Number 13: To date, the Department of Natural and Environmental Resources (DNER) has not requested a Hydrographic-Hydrologic (H-H) study (see enclosed comments letter dated 12 April 2002 from the DNER). This probably due to fact that the project is not adjacent to Rio Canóvanas, and no other major creeks or rivers will be affected by the proposed work.

JOINT PERMIT APPLICATION -- Puerto Rico

17. Indicate the proponent Agency with respect to compliance with Article 4(c) of Law #9 of June 18, 1970: The proponent Agency with respect to compliance with Article 4(c) is the PRPB.  
(Please provide evidence of compliance with Article 4(c) to expedite the process)

18. Indicate if any of the following natural or artificial systems are locate within the proposed project site or in the sites adjacent to the project (Use Additional Sheets as necessary):

<u>System project</u>	<u>Location (Indicate distance from proposed project)</u>
Rivers and streams with continuous flow	N/A
Rivers and/or streams with intermittent flow	Ephemeral creek found inside the project, on the northeast portion.
Maritime Zone/ Submerged Lands	N/A
Lakes or Lagoons	N/A
State and Federal Natural Reserves	N/A
Coral Reefs	N/A
Mangroves and Salt Flats	N/A
Seagrasses	N/A
Other Wetlands (Swamps, bogs, marshes)	N/A
Mudflats, riffles, pools	N/A
Wildlife Refuges	N/A
Areas of Special Interest	N/A
Springs	N/A
Estuaries	N/A
Artificial ponds	N/A
Irrigation Systems	N/A
Dams	N/A
Bridges	N/A
Cultural Resources	N/A
Coastal Dunes/Barriers	N/A
Other:	

Describe those systems identified that are located within the proposed project site or adjacent to the project site (Use additional sheets as Necessary): The unnamed ephemeral creek is located on the northeast portion of the project. It is approximately 100 feet long by 2 feet wide. It originates approximately on the 85 contour line in a very steep area and travels North until it reaches the property line, where it flows under a vicinity road ("camino vecinal") via a small culvert and then continues its flow, eventually reaching Rio Canóvanas. The banks of the creek are forested with species such as "pomarrosa" (Syzygium jambos) and mango (Mangifera indica). PR JPA FORM 1000-1 (August 1999) Page 7 of 9

JOINT PERMIT APPLICATION -- Puerto Rico

By signing this application form, I am applying, or I am applying on behalf of the applicant, for the permit and any proprietary authorizations identified above, according to the supporting data and other incidental information filed with this application. I am familiar with the information contained in this application and represent that such information is true, complete and accurate. I understand this is an application and not a permit, and that work prior to approval is a violation. I understand that this application and any permit issued or proprietary authorization issued pursuant thereto, does not relieve me of any obligation for obtaining any other required Federal or Commonwealth permit prior to commencement of construction. I agree, or I agree on behalf of my corporation, to operate and maintain the permitted system unless the permitting agency authorizes transfer of the permit to a responsible operation entity. I understand that knowingly making any false statement or representation in this application is a violation of 18 U.S.C. Section 1001.

Gustavo A. Rodriguez, Environmental Permitting  
Typed/Printed Name of Applicant (if no Agent is used) or Agent (if one is so authorized below)

Gustavo A. Rodriguez Signature of Applicant/Agent      31 August 05 Date

President  
(Corporate Title if applicable)

AN AGENT MAY SIGN ABOVE ONLY IF THE APPLICANT COMPLETES THE FOLLOWING:

I hereby designate and authorize the agent listed above to act on my behalf, or on behalf of my corporation, as the agent in the processing of this application for the permit and/or proprietary authorization indicated above; and to furnish, on request, supplemental information in support of the application. In addition, I authorize the above-listed agent to bind me, or my corporation, to perform any requirement which may be necessary to procure the permit or authorization indicated above. I understand that knowingly making any false statement or representation in this application is a violation of 18 U.S.C. Section 1001.

✓ Francisco L. Charles      Francisco Charles      08/30/05  
Typed/Printed Name of Applicant      Signature of Applicant      Date

✓ representative - Hacienda A. Hummer, Inc.  
(Corporate Title if applicable)

JOINT PERMIT APPLICATION - Puerto Rico

**CERTIFICATION OF CONSISTENCY WITH THE PUERTO RICO COASTAL ZONE MANAGEMENT PROGRAM**

I certify that the proposed activity complies with the enforceable policies of the Puerto Rico approved coastal management program and will be conducted in a manner consistent with such program.

Hacienda Altamira, Inc.  
Typed/Printed Name of Applicant

[Handwritten Signature]  
Signature of Applicant/Agent

30 August 05  
Date

President-Environmental Permitting  
(Corporate Title if applicable)

Please note: The applicant's original signature (not a copy) is required above.

**PERSON AUTHORIZING ACCESS TO THE PROPERTY MUST COMPLETE THE FOLLOWING:**

I either own the property described in this application or I have legal authority to allow access to the property, and I consent, after receiving prior notification, to any site visit on the property by agents or personnel from the PRPB, EQB, DNER, and the USACE necessary for the review and inspection of the proposed project specified in this application. I authorize these agents or personnel to enter the property as many times as may be necessary to make such review and inspection. Further, I agree to provide entry to the project site for such agents or personnel to monitor permitted work if a permit is granted.

✓ Francisco L. Charles  
Typed/Printed Name

✓ [Handwritten Signature]  
Signature

08/30/05  
Date

✓ Representative - Hacienda Altamira, Inc.  
Corporate Title (if applicable)

Blank Page

RX-Cidra 4



**DEPARTMENT OF THE ARMY**  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS, ANTILLES OFFICE  
400 FERNANDEZ JUNCOS AVENUE  
SAN JUAN, PUERTO RICO 00901-3299

REPLY TO  
ATTENTION OF

FEB 23 2006

Antilles Regulatory Section  
SAJ-2002-783 (JD-VG)  
NPR

Mr. Ramón MacCrohon  
Hacienda Altamira, Inc.  
P.O. Box 9021990  
San Juan, Puerto Rico 00901-1990

Dear Mr. MacCrohon:

Reference is made to the Department of the Army (DA) permit application, filed through Joint Permit Application (JPA) Number 706, and submitted on your behalf by Environmental Permitting, Inc., for the proposed Hacienda Altamira residential development. The project would occupy a 101-acre vacant lot located at Hwy. PR-957, Km. 0.2, Hato Puerco Ward, Municipality of Canóvanas, Puerto Rico.

Based on our preliminary review of the above-referenced application, the U.S. Army Corps of Engineers (Corps) made a determination that this project could meet the requirements to qualify under Nationwide Permit Number 39, (NWP-39) for Residential, Commercial and Institutional Developments. Subject determination was made through our letter dated December 5, 2005, in which we requested you to provide additional information required to complete the evaluation of your proposal. Subsequently, on January 19, 2006, Mrs. Vivian Gerena from my staff met with a representative of Hacienda Altamira, Inc., Mr. Francisco Charles, to further discuss the contents of the referenced letter. During subject meeting, Mr. Charles questioned the jurisdictional nature of the "stream" that traverses the property, which is subject to this application. Therein, we requested Mr. Charles to provide us with additional information, including photographic documentation of the area, for us to determine whether this "stream" falls under our jurisdiction pursuant to Section 404 of the Clean Water Act. Additional information was received in our office on January 27, 2006.

The new information available to this office served to corroborate that referenced stream does not meet the regulatory parameters to be considered as waters of the U.S., namely, the presence of a bed and bank configuration, an ordinary high water mark impressed on the banks, or a connection between this area and navigable waters of the U.S. either physically or through an interstate commerce connection other than through use by migratory birds. In the absence of referenced parameters, it's our determination that subject stream shall not be classified as a water of the U.S., thus non-jurisdictional. The area where the proposed activity would be located is entirely uplands.



-2-

Pursuant to our regulations, the afore-mentioned DA permit application currently under evaluation is hereby withdrawn, as your project as proposed will not require a DA permit in accordance with Section 404 of the Clean Water Act as it will not involve the discharge of dredged or fill material into waters of the United States. However, please be advised that this letter does not obviate the requirement to obtain any other Federal, State or local permits which may be necessary for your project.

This determination has been conducted to identify the limits of the Corps Clean Water Act jurisdiction for the particular site identified in this request. This determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service prior to starting work.

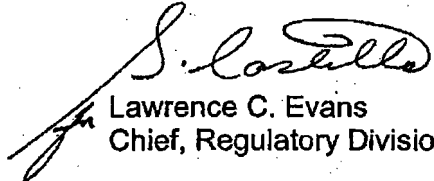
This determination is valid for a period of 5 years from the date of this letter unless new information warrants a revision of the determination before the expiration date. Any reliance upon this determination beyond the expiration date may lead to possible violation of current Federal laws and/or regulations.

Additionally, your project site may contain species protected by the Endangered Species Act (ESA) of 1972, as amended. You should contact your local U.S. Fish and Wildlife Service (FWS) office to determine if federally listed species or their habitat are present on your project site. If it is determined that federally listed species may be affected by the proposed project, authorization for "incidental take" may be required.

This letter does not obviate the requirement to obtain any other Federal, State, or local permits that may be necessary for your project.

Should you have any questions, please contact Mrs. Vivian Gerena at the letterhead address or by telephone at 787-729-6905/6944, extension 3058.

Sincerely,



Lawrence C. Evans  
Chief, Regulatory Division

Blank page

**COMPLAINANT – Exhibit 7c - 7d,  
precipitation data for the Hacienda Altamira area 2007**

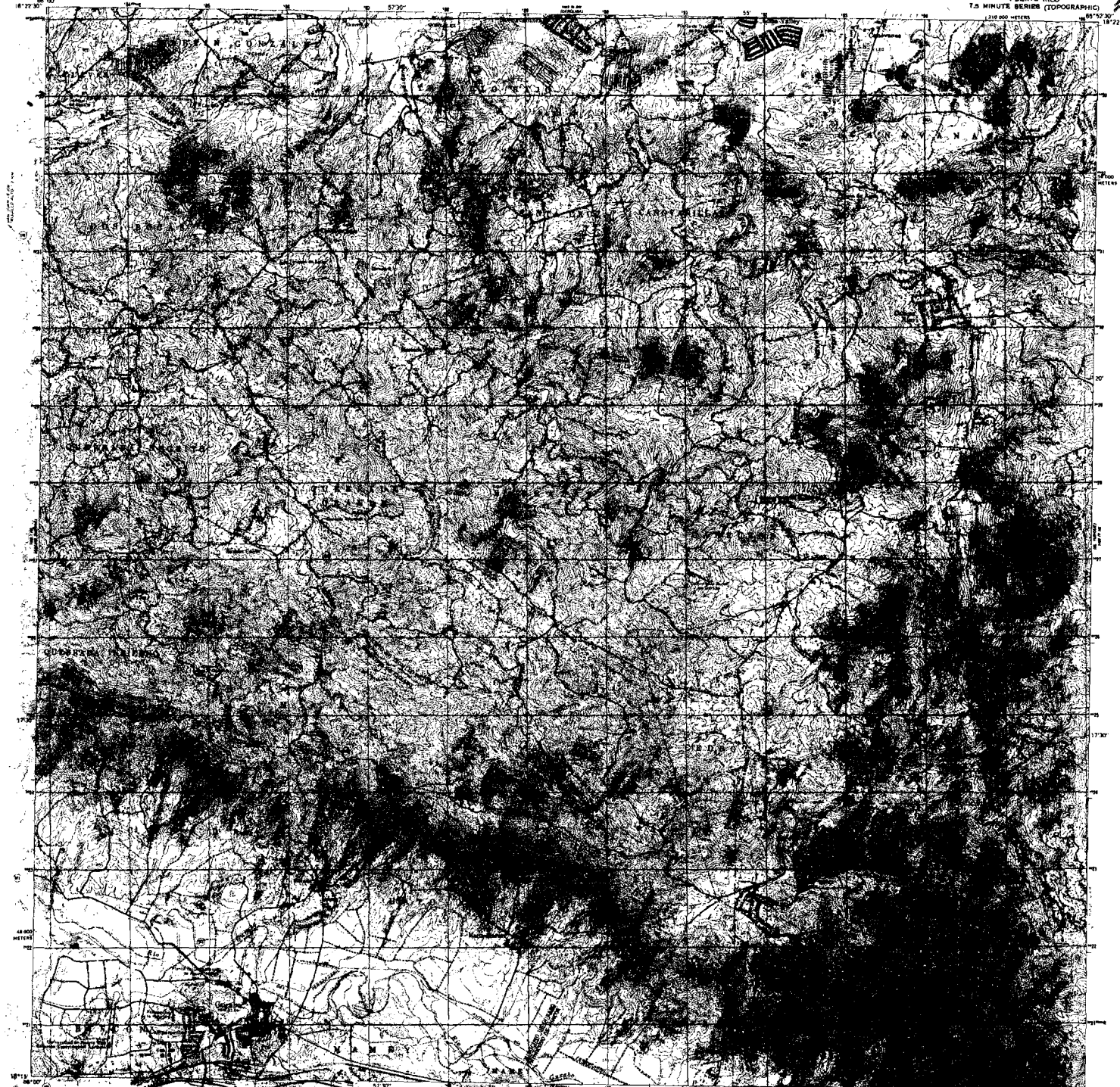
RX - Cibola 5

Blank Page

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
GEOLOGICAL SURVEY

COMMONWEALTH OF PUERTO RICO  
DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS

OURABO QUADRANGLE  
PUERTO RICO  
7.5 MINUTE SERIES (TOPOGRAPHIC)



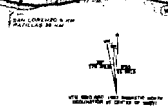
Revised, edited, and published by the Geological Survey  
Compiled by USGS and BOB/ROSA

Topography by photogrammetric methods from aerial  
photographs taken 1945. Data checked 1948. Derived from aerial  
photographs taken 1967 and 1968. Photo checked 1988

Political boundaries, Puerto Rico Datum, 1940 adjustment  
2000-meter grid cells based on Puerto Rico coordinate system  
1000-meter Universal Transverse Mercator grid, zone 20

Barriers are municipality boundaries by the Puerto Rico Planning Board  
Historic reference distances shown in red

There may be private land rights within the boundaries  
of the National or State reservations shown on this map.



SCALE 1:20000

CONTOUR INTERVAL 10 METERS  
DASHED LINES REPRESENT 5 METERS CONTINUOUS  
DASHED LINES MEAN SEA LEVEL

ROAD CLASSIFICATION

Primary highway, all weather	Light duty road, all weather
Hard surface	Unimproved surface
Secondary highway, all weather	Unimproved road, but of good hard surface
	Weather
	Minor Road

THIS MAP COMPILED BY THE NATIONAL MAP SECURITY BOARD  
FOR SALE BY U.S. GEOLOGICAL SURVEY, RESTON, VIRGINIA 22092  
AND DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS, SAN JUAN, P. R. 00910  
A 7.5-MINUTE TOPOGRAPHIC MAP AND TITLES IS AVAILABLE ON REQUEST

OURABO, P. R.  
N1813-956524/7.5  
1988  
M1:10000 7.5-MINUTE TOPOGRAPHIC  
THIS DOCUMENT IS UNCLASSIFIED

Rt-Cidra 6



RX-1000 7

CAROLINA R.R.  
1900

FOR SALE BY THE U.S. DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS  
AND OPERATING UNDER CONTRACT WITH THE U.S. DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS  
AND OPERATING UNDER CONTRACT WITH THE U.S. DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
GEOLOGICAL SURVEY



CAROLINA QUADRANGLE  
1:25,000 SERIES (CONTOUR)

COMMONWEALTH OF PUERTO RICO  
DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
GEOLOGICAL SURVEY

Blank Page



ESTADO LIBRE ASOCIADO DE PUERTO RICO  
TRIBUNAL DE PRIMERA INSTANCIA  
SALA MUNICIPAL DE CANÓVANAS EN RÍO GRANDE

Las Quintas 957, Inc.  
Querellante

v.

Dwight Pastrana Santiago  
Querellado

Querella Num.: 07Q49

SOBRE: Ley 140

RESOLUCIÓN

El 21 de febrero de 2007, Las Quintas 957, Inc. (el "Querellante") presentó querrela bajo la Ley 40. En síntesis argumentó que era el titular legítimo de una propiedad, con una cabida superficial de 43.2952 cuerdas, la cual colinda por el Norte con un camino municipal que a su vez colinda con terrenos de Alfonso Pastrana y la Sucesión García, respectivamente, por el Este con la Parcela Número 2, por el Sur con la Carretera PR-957 y por el Oeste con la Carretera PR-957. Dicha propiedad fue adquirida por la querellante con la intención de desarrollar y construir un proyecto residencial de viviendas unifamiliares.

Una vez comenzado el movimiento de tierra relacionado al proyecto residencial, Dwight Pastrana Santiago (el "Querellado"), quien es el titular de la propiedad que colinda por el Sur con un camino municipal que a su vez es la colindancia Norte de la propiedad del Querellante, reubicó la verja que demarcaba la colindancia Sur de su propiedad para demarcar un area con una cabida de aproximadamente una cuerda dentro de la propiedad del Querellante.

El 4 de abril de 2007, se celebró vista en su fondo para resolver la controversia sobre la colindancia. Ambas partes tuvieron la oportunidad de comparecer y presentar sus argumentos.

El Querellante presentó como parte de su prueba la descripción registral de la propiedad del Querellado según surge de la escritura número 112, otorgada el 8 de noviembre de 1982 ante el Notario Público Jose A. Figueroa Morales, siendo esta escritura el instrumento mediante el cual el Querellado adquirió título sobre su propiedad. Dicha escritura demostró que la colindancia sur de la propiedad del Querellado es el camino municipal entre la propiedad del Querellante y del Querellado y la Carretera Número 957. El Querellado no presentó objeción ni prueba que rebatiera lo anterior.

Sirviendo el camino municipal como línea divisoria entre ambas propiedades, no cabe más que concluir que el Querellado erró al extralimitar su terreno más allá de su colindancia. Por lo que se establece que la colindancia sur de la propiedad del Querellado es el camino municipal y la Carretera 957.

En vista de lo anterior se le prohíbe la entrada al Querellado a la propiedad del Querellante con la intención de afectar el uso y disfrute de la propiedad por Querellante y a que interfiera con las obras de construcción que se están llevando a cabo en la propiedad del Querellante y cualquier acto que afecte el orden social entre los colindantes.

POR TODO LO CUAL, el Tribunal declara CON LUGAR la Querella y emite la presente RESOLUCIÓN estableciendo que la colindancia sur de la propiedad del Querellado es el camino municipal y la Carretera 957 y se el prohíbe al Querellado a que tome o lleve acabo acción alguna que interrumpa con el uso, disfrute y explotación de la finca del Querellante.

**REGISTRESE Y NOTIFIQUESE.**

Dada en Río Grande, Puerto Rico, a 14 MAY 2007 de 2007.

Hon. Orlando Puldón Gómez  
Juez Municipal

CARMEN SONIA RIVERA CORTES  
SECRETARIA REGIONAL

Por: Yanira Pizarro  
Sec. Auxiliar

MAY 15 2007



Blank Page

**COMPLAINANT - Exhibit 4**

Blank Page

**COMPLAINANT - Exhibit 13 - 13f**

Rx-claim 10

Blank Page

## Construction Contract Agreement

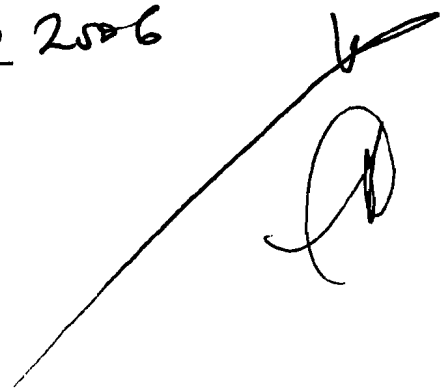
**Las Quintas "Hacienda Altamira": 152 units**

**Construction for Site, Temporary Pump Station, Sanitary Force Line  
and Water Distribution Off-site.**

**The Owner- Desarrollos Altamira I, Inc.**

**The Contractor-Cidra Excavation, S.E.**

Date: 22 de Mayo 2006

A handwritten signature, possibly "A", is written above a long, sweeping diagonal line that extends from the bottom left towards the top right of the page.



**ARTICLE 1**  
**THE CONTRACT DOCUMENTS**

The Contract Documents consist of this Agreement, Conditions of the Contract (General Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 7.

**ARTICLE 2**  
**THE WORK OF THIS CONTRACT**

The Contractor shall fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

- A) Site Improvements
- B) Water Distribution Off-Site
- C) Sanitary Force Line & Temporary Pump Station
- D) Widening of Road PR 957

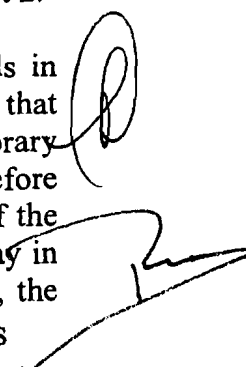
for the project Las Quintas "Hacienda Altamira" in Canóvanas, as per plans and specifications prepared by Lopez & Associates. The project consists of the site development of 152 of "single-family" units. Case no.05DAZ-CET00-10363, Temporary pump station, PR #957 Widening, and main entrance Ref : 2000-80-0279-JPU.

**ARTICLE 3**  
**DURATION OF PROJECT**

The work to be performed under this Contract shall be commenced ten (10) days after the execution of this contract provided the following conditions are met: 1) the Owner shall have completed the closing of the interim financing and received a commitment for permanent financing of the project with a financial institution which shall issue a letter to the effect that: the total amount of the construction contract is included in said financing and will be used solely for the purpose of paying the amount stipulated in the construction contract or until notice of commencement is given by the owner.

Time is of the essence in the performance of the work referred to in this contract and the the project shall be completed in thirty (30) months from the notice to proceed according to the project schedule as, incorporated as Exhibit 1. It is of the essence of this Agreement that Contractor commences deliveries of lots pads no later than the end of the fourth (4<sup>th</sup>) month following execution of this Agreement, as per Exhibit 1 and Exhibit 2.

Thereafter and at all times, the Contractor shall maintain deliveries of 12 lot pads in accordance with Exhibit 2. Additionally, it is of the essence of this agreement that contractor deliver to owner water distribution offsite, sanitary force line and temporary pump station (including AAA connections) and widening of Road PR-957, on or before the eight (8<sup>th</sup>) month following the execution of this Agreement. Within ten days of the execution hereof, the contractor shall commence the work. As a penalty for any delay in the Project Schedule by the time agreed to and under the terms of this agreement, the Contractor shall pay to the Owner: ~~\_\_\_\_\_~~ FIFTY (\$50.00) as per day's



delay in the delivery of houses in excess of the scheduled delivery set forth in Exhibit 2.

#### ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be: EIGHT MILLION DOLLARS (\$8,000,000), for the development of the site and improvements for the construction of 152 housing units. Other than as set forth in the immediately preceding sentence, the contract sum may only be varied pursuant to permitted changes, additions and deductions, as provided in the Contract Documents.

4.2 The Contract Sum is based upon the following Lump Sum Prices which are described in the Contract Documents and are hereby accepted by the Owner and Contractor:

LUMP SUM PRICE OF \$ 7,507,462 for the site;

LUMP SUM PRICE OF \$ 100,000 for water distribution offsite

LUMP SUM PRICE OF \$ 206,440 for sanitary force line & temporary pump station,

LUMP SUM PRICE OF \$186,098 for the widening of Road PR 957, as described in break down in Exhibit 3.

LUMP SUM PRICE as per plans and specifications of Lopez and Associates.

4.3 This Contract is a LUMP SUM PRICE Contract. The LUMP SUM UNIT PRICE cannot be modified for any reason, including without limitation, mobilization or price modifications due to increases in materials or labor or any related items, except for the Article 7.2.9.

#### ARTICLE 5 PROGRESS PAYMENTS

5.1 The Owner shall appoint a Supervisory Engineer who shall be charged the administration of the Contract as described in the Contract Documents and will be the Owner's representative. All matters pertaining to Contract administration, including without limitation the issuance of Change Orders, specified under Article 4 of AIA Document A201-1997 and otherwise will be under the control of the Supervisory Engineer. Progress payments shall be made based upon Applications for Payment submitted to the Supervisory Engineer by the Contractor and Certificates for Payment issued by the Supervisory Engineer. The Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

5.1.1 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows: See Attached Breakdown Exhibit 3.

5.1.2 Provided that an Application for Payment is received by the Supervisory Engineer not later than the last day of month, the Owner shall make payment to the Contractor not later than the 20th day of the succeeding month. If an Application for Payment is received by the Supervisory Engineer after the applications dated fixed above, payment shall be made by the Owner not later than 20 days after the Supervisory Engineer receives the Application for Payment.

5.1.3 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work.

The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Supervisory Engineer may require. This schedule, unless objected by the Supervisory Engineer, shall be used as a basis for reviewing the Contractor's Applications for Payment.

5.1.4 Applications for payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Applications for Payment.

5.1.5 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

1. Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the Progress Payment Breakdown Schedule for each Work listed in Section 4.2 hereof, and incorporated as Exhibit 3, less retainage of TEN percent (10 %). Pending final determination of cost to the Owner of changes in the Work permitted under this Agreement, amounts not in dispute shall be included as provided in Subparagraph 7.3.8 of AIA Document A201-1997; General Conditions even though the Contract Sum has not yet been adjusted by the Change Order.

2. Subtract the aggregate of previous payments made by the Owner; and

3. Subtract amounts, if any for which the Supervisory Engineer has withheld or nullified a Certificate for Payment as provided in Paragraph 9.5 of AIA Document A201-1997.

5.1.6 The retained amounts for each Work listed in Section 4.2 hereof shall be paid by the Owner to the Contractor after each Work has been delivered to the final Owner. The amount to be paid as retainage to the Contractor shall be established on a per house basis upon delivery of each unit.

## 5.2 FINAL PAYMENT

5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor, after deducting charges and penalties, if any, when:

1. the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Subparagraph 12.2.1 of AIA Document A201-1997, and to satisfy other requirements, if any, which extend beyond final payment; and

2. a final Certificate for Payment has been issued by the Contractor to the Supervisory Engineer;

3. the Contractor shall certify to Owner's satisfaction having paid all materials, labor, fees and related charges properly payable by Contractor with respect to the Project and shall hold Owner harmless from any such cost or expense.

## ARTICLE 6 TERMINATION OR SUSPENSION

6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201-1997. 6.2 The Work may be suspended by the Owner

as provided in Section 2.31 and Article 14 of AIA Document A201-1997. The Owner shall have the right to carry out the work as provided in Section 2.4.1 of and otherwise pursuant to AIA Document A201-1997.

**ARTICLE 7**  
**MISCELLANEOUS PROVISIONS**

7.1 Terms used in this Agreement which are defined in AIA Document A201-1997, as amended and attached hereto shall have the meanings designated in such document, except that the term Architect as used in such document shall mean the Inspecting Engineer for all matters pertaining to contract administration or other administrative, supervisory or managerial functions, including without limitation matters pertaining to potential conflicts or the processing or approval of permitted change orders.

7.2 The Contract Documents, which constitute the entire agreement between the Owner and the Contractor, are listed in Article I and, except for Modifications issued after execution of this Agreement, are enumerated as follows: (List below the Agreement, the Conditions of the Contract (General, Supplementary, and other Conditions), the Drawings, the Specifications, and any Addenda and accepted alternates, showing page or sheet number in all cases and dates were applicable.)

7.2.1 This Agreement.

7.2.2 General Conditions of the Contract for Construction, AIA Document A201-1997, as amended and attached hereto to reflect the provisions of this Agreement.

7.2.3 Drawings prepared by Lopez Associates, Exhibit 5. Specifications prepared by López Associates, Exhibits 6.

7.2.4 Preliminary Sub-soil study prepared by Suelos Inc. dated January 18, 2005, Final Subsoil study prepared by Geo Consult dated February 1<sup>st</sup>. of 2006 and Hidrologic/Hidraulic study prepared by C/A Engineering.

7.2.5 Project Schedule, Exhibit 1. House Delivery Schedule, Exhibit 2

7.2.6 Progress Payment Breakdown for the project, Exhibit 3

7.2.7 Cash Flow, Exhibit 4

7.2.8 Federal and local government permits, endorsements and requirements for the construction of the project, as listed in Exhibit 7.

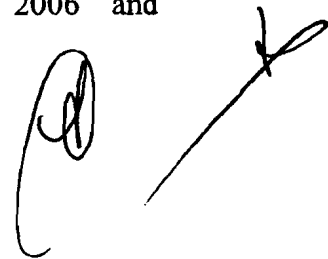
7.2.9 Supplementary Site Agreement. Exhibit 8 & Cidra Excavation Letter April 26, 2006.

7.2.9 Payment & Performance Bond, Exhibit 9. Builder Risk, Exhibit 10

7.3 The municipal taxes for the Construction Permit (Arbitrios de Construcción) are not included in the contract and will be paid directly by the Owner.

7.4 Governmental fees for connection to or improvements of utilities are not included in the contract and will be paid directly by the Owner, except for water and electricity for construction purposes.

7.5 Definition of Completion. Each stage of the work shall be deemed to have been completed upon receipt by the Contractor from the Supervisory Engineer or the Owner,



of a Letter of Endorsement by the Owner or its representatives, accepting the work performed, after due endorsement by all pertinent local and federal government agencies which regulate construction work in Puerto Rico.

7.6.1 The Contractor shall furnish the Owner a Performance and Labor and Material Bond in an Amount equal to one hundred percent (100%) each of the total contract price from a Federal List Insurance Co. contracted and accepted by the owner, Exhibit 9. The Contractor will furnish the Owner with a Public Liability Insurance with the following limits: \$1,000,000 for death or injury to persons and \$1,000,000 property damage. The Contractor is obliged to deliver to the Owner a certified copy of the Payment made to the State Insurance Fund (Fondo del Seguro del Estado) and a copy of the policies. Builder's Risk Insurance, Exhibit 10 will be supplied by the Contractor before construction commenced. The Payment and Performance Bond shall contain a "Dual Obligee" rider making such bond extensive to the Owner and the Bank providing financing. All policies shall contain additional insured or co insurance provisions for the benefit of the Owner and the financial institution.. Contractor shall provide a Hold Harmless policy covering the Owner and financing institution and a 100% wage payment bond of the general contract (CO-OBLIGEE). All Public Liability Insurance will have an Umbrella coverage with limits of \$5,000,000.

7.6.2 The Contractor shall defend and hold harmless the Owner for any and all claims arising under DACO jurisdiction.

7.7 The term for the execution of contract will be the number of months set forth in Article 3 from the beginning of the present contract. Holidays, Saturday, Sundays will be included in the above mentioned term. There will be no reason, excuse or justification to modify or change the term of the termination with the except for matters arising under Clause 7.8.

7.8 The construction term may be extended due to rain days or other extreme weather conditions; Any request for extension for rain days by Contractor shall be subjected to the approval of the Soil Consultant and the Supervisory Engineer, and subject to the final approval of the Owner. After such approvals an extension of time in the contract will be granted. Otherwise the Contractor shall have no right to seek extensions of time for rain.

7.9 The Contractor shall not be responsible in the delay of partial or total delivery of the project when the following circumstances occur and the Owner will not impose any penalty for said circumstances.

a. In case of the occurrence of wind storms, hurricanes, flooding, earthquakes or other extraordinary natural events that render the project unsuitable for work or the occurrence of other national emergencies which shall impede work on the Project; which unsuitability or condition shall have been established by contractor to owner's satisfaction.

b. General strikes or work stoppages involving industry wide labor unrest or strikes or stoppages involving industries that produce or provide construction supplies to the Project which impede or obstruct the receipt of such supplies at the Project. In case of a strike due to any union dealing with the Contractor's employees which strike is caused by Contractor's failure or fault to comply with legal and accepted union demands and/or requirements, then the Contractor shall not have extension in time and penalty and liquidated damages shall be in effect as described in Article 2-3 of this contract.



c. The Owner shall give a proper extension of time to the Contractor in case that any of the possible circumstances as expressed in Article 7.13 occurs and shall not impose any penalty for said circumstances.

7.10 The contractor has studied and reviewed the plans and technical specifications of the Work listed in Section 4.2 hereof and the physical conditions of the site, as they relate to that portion of the Project which is to be performed by the Contractor and has found them to be clear and free of inconsistencies. The contractor finds the plans and specifications to be clear and sufficient and includes all of the necessary work in order to execute and finalize the project in its experience. The price of any such modification will be determined by applying to the market value per unit requested a 10% for expenses and overhead and 10% for profit to the contractor and the approval by the owner.

7.11 The Contractor shall ascertain that the construction of the project shall follow and meet all approvals issued by all municipal, local and federal government agencies, as shown in plans and its technical specifications.

7.12 Any and all surveying work needed to construct the project shall be paid by the Contractor at his expense.

7.13 The Contractor shall provide the Owner, at Contractor's expense, with concrete, steel, and any other test to ascertain the appropriateness of the work performed. Contractor shall provide 6-8 test cylinders per each 40 yards of concrete poured for retaining walls. Cylinders will be opened as follows: two (2) at 7 days, three (3) at 28 days; one (1) at 56 days. Test results of cylinders samples shall be reviewed and approved by the Owners structural engineer.

7.14 Warranties and Indemnities of Owner by Contractor:

The Contractor shall be liable and responsible to the Owner of the Project, and its stockholders, officers, representatives and agents, and the ultimate purchaser of the project and their respective successors in interest for any and all liability arising from or relating to the Contractor's work as assumed by the Owner under the laws of the Commonwealth of Puerto Rico or otherwise, or which exist on the part of the Owner of the Project relating to the Contractor's work, and agrees to save and hold harmless the Owner and its stockholders officers, representatives and agents, and their respective successors in interest, from any and all liability by reason thereof, including, but without limitation to, any improper work or materials, the repair and replacement of this work or materials which may be damaged, defective or which may have to be repaired or replaced, or which are not in accordance with the samples submitted, and the repair and replacement of the work or material, which may be damaged by the Contractor in the course of his work of the repair and replacement referred to in this paragraph, all for the terms provided by the laws of the Commonwealth of Puerto Rico for such liability. The Contractor shall be notified in writing at regular intervals of all work or materials to be repaired and/or replaced under this paragraph. He shall proceed to carry out this work promptly, and in no event later than two weeks after he has received notification from the Owner. If the Contractor fails to carry out the repair and replacement of defective work or materials within the time specified in this paragraph, the Owner may proceed to carry out same, or arrange for its completion by others, and reserves the right to charge the Contractor the cost thereof. Contractor declares and hereby agrees to assume toward Owner, and its stockholders, officers, representative and agents the obligations and responsibilities which the Owner has assumed toward home purchaser under the Contract between the Owner and home purchaser so as they apply to the part of the work or materials covered by this Agreement between Owner and Contractor.



7.15 Timeliness is of the essence in the performance of the work referred to in this contract and every dispute or claim regarding this matter shall be decided by mediation or arbitration, which will be determined in the manner set forth in Section 7.20 and Section 7.21 hereof.

7.16 Compliance with Regulations:

In signing this contract, the Contractor certifies that he is familiar with all rules, regulations of the Planning Board of Puerto Rico, the Natural Resources Department, Labor Department, Environmental Quality Board and all other Federal, Commonwealth and municipal authorities which may have jurisdiction over the Project and agrees that all work shall be done in compliance with said rules, regulations and requirements, including any changes that may be promulgated by said authorities, and shall be subject to the inspection of the Planning Board of Puerto Rico and other governmental and/or public authorities having jurisdiction over the Project. The Contractor shall not be responsible for the design criteria used by the drawing prepared by López Associates. In addition, all work and materials shall comply with the requirements property, if any. Other than as specifically set forth herein, the Contractor shall procure, pay for, at its own expense and deliver to the Owner any and all necessary licenses and certificates in connection with his work on the Project.

7.17 Coordination of Work:

The Contractor shall coordinate the construction and work sequence of the project with the Owner before commencement of this work in order to facilitate the sale and delivery of the individual housing units in accordance with the project schedule and house delivery schedule in Exhibit 1 and Exhibit 2 and in compliance with the requirements of the financial institution.

The Contractor shall also coordinate through the Owner and the Supervisory Engineer its work with that of other Contractors at the Project in such a manner that the complete Project schedule is maintained and that Contractor does not interfere with the work of other contractors.

The Contractor shall also coordinate with the other contractor necessary vehicular access to the project. The site Contractor shall not be responsible for maintaining, repair and all damage cause for third party to such access. The Owner shall pay for that cost.

7.18 The Contractor shall be responsible for all the necessary reports required from the Contractor by any local or federal governmental agency involved in the project as part of the contract.

7.19 Special Conditions:

It is understood that the contractor has studied the plans of the project and finds them clear, specific and recognized them independently of signing the prints; and it is understood that this work will comply with local and federal agencies, as approved in plans and its technical specifications.

1. Desarrollos Altamira I, Inc., shall advance payments to third parties related to claims filed for unpaid invoices after written notice to the subcontractor and no action takes place. This payment will be reduced for current certifications and/or retainage from subcontractor.
2. The contractor shall supply to the owner prior to commencement of



work for its approval a list of suppliers and schedule with specification of materials to be used in the project. All the colors in the plans specifications must be decided by the Architects, or the Owner or its authorized representative, as Desarrollos Altamira I, Inc., representative.

3. The contractor shall submit to the owner with the mix design of concrete to be used and a mill certification of the resistance of reinforcing steel.
4. The contractor shall be responsible, at his own cost, to provide security services at the Project.
5. The contractor shall be responsible for all of the damages caused by its personnel or contractors equipment or/and subcontractors to the project and specifically to the existing streets and to work performed in relation to the Project by other contractors and, shall pay for all the expenses related to the reposition and repair of damages so caused.
6. The Contractor will guarantee after completion of the project the material and workmanship as required by local and federal agencies and otherwise in accordance with local law.
7. The contractor shall furnish all temporary services and/or facilities necessary to perform its work and all the necessary infrastructure, including but not limited to construction water throughout the project duration without any additional cost.

7.20. Mediation any claim or dispute pursuant to the terms of this Agreement shall be if necessary mediated under provision of AIA Document A201-1997, except that the mediation shall be carried out by the Architect. If the parties are unable to resolve their differences through mediation before the Architect, either party may subject the matter to arbitration. Notwithstanding the submission of any matter to mediation, the Contractor shall continue the Work uninterruptedly, subject only to the Owner's rights under the Contract.

7.21. Arbitration any claim or dispute pursuant to the terms of this Agreement which is not resolved through mediation shall be subject to arbitration undertaken under provision of AIA Document A201-1997, except that the parties agree that they will be bound to select the arbitrator or their respective arbitrators in the case of complex matters within 20 days of notice of arbitration. In the event that within such term an arbitrator has not been selected or that in the case of complex matters any party has not selected his arbitrator within such term, such arbitrator shall be selected by the American Arbitration Association from a list of arbitrator resident within the Commonwealth of Puerto Rico. Notwithstanding the submission of any matter to arbitration, the Contractor shall continue the Work uninterruptedly, subject only to the Owner's rights under the Contract.

7.22 Causes for Delay. The Contractor shall be responsible to Owner for any delays in the delivery of the Work and shall pay the penalties set forth in Article 3 hereof, except to the extent that the Owner shall determine that such delay was caused by or the direct result of the delay or untimely delivery by any other contractor of work necessary for the Contractor to perform his Work. Any determination by the Owner in this respect may be challenged by the Contractor and subjected to mediation or arbitration pursuant to the terms of this Agreement, as applicable.



7.23 Notice of House Model Changes. In the event that the Owner shall determine to vary the previously indicated house model for any particular lot in the development, the Owner shall give notice thereof to the Contractor prior to the surveyor's plotting of the house pad.

**ARTICLE 8  
OTHER PROVISIONS**

8.1 Where reference is made in this Agreement to a provision of AIA Document A201-1997 or another Contract Document, the reference refers to provision of AIA Document A201-1997, as amended and attached hereto and to such provisions as amended or supplemented by other provisions of the Contract Documents.

8.2 The Owner's representative is:

Ramón Mac-Crohon and/or its  
Authorized Representative  
P.O. Box 9021990  
San Juan, Puerto Rico 00902-1990

8.3 The Contractor's representative is:

Israel Quintana Luciano  
Managing Partner  
Cidra Excavation, S.E.  
P.O. Box 11218  
Caparra Heights Staion  
San Juan, Puerto Rico, 00922-1218

8.4 Neither the Owner's nor the Contractor's representative shall be changed without ten days prior written notice to the other party.

**ARTICLE 9**

This agreement shall constitute the main and primary document between Owner and Contractor, and will prevail among all other documents in case of contradiction or misinterpretation. Should any other interpretations, or additional clause which may be missing, in order to interpret or clarify this agreement, will refer to AIA Document A201-1997, as its supplementary document.

This Agreement entered into as of the 22 day of May 2006.

  
\_\_\_\_\_  
OWNER  
DESARROLLOS ALTAMIRA I, INC.

  
\_\_\_\_\_  
CONTRACTOR  
CIDRA EXCAVATION, S.E.

**General Conditions of the Contract for Construction**

For the following PROJECT:

(Name and location of address):

**THE OWNER:**

(Name and address):

**THE ARCHITECT:**

(Name and address):

**TABLE OF ARTICLES**

**GENERAL PROVISIONS**

**OWNER**

**CONTRACTOR**

**ADMINISTRATION OF THE CONTRACT**

**SUBCONTRACTORS**

**CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

**CHANGES IN THE WORK**

**TIME**

**PAYMENTS AND COMPLETION**

**PROTECTION OF PERSONS AND PROPERTY**

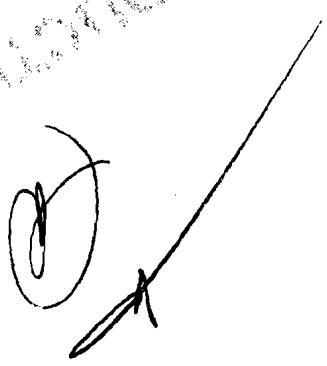
**INSURANCE AND BONDS**

**UNCOVERING AND CORRECTION OF WORK**

**MISCELLANEOUS PROVISIONS**

**TERMINATION OR SUSPENSION OF THE CONTRACT**

**REPRODUCTION**



This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification. This document has been approved and endorsed by The Associated General Contractors of America.

AIA Document A201™ - 1997. Copyright © 1991, 1915, 1919, 1925, 1937, 1951, 1958, 1991, 1993, 1996, 1997, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100. All rights reserved. WAIVER: The AIA Document is printed by U.S. Copyright Law and International Trade. Reproduction or distribution of this AIA Document, or any portion of it, may result in severe civil and criminal penalties, and will be prosecuted to the maximum extent possible under the law. Purchasers are not permitted to reproduce this document. To report copyright violations of AIA Content, please contact The American Institute of Architects, legal counsel, copyright@aia.org.

INDEX

(Numbers and Topics in Bold are Section Headings)

**Acceptance of Nonconforming Work**

9.6.6, 9.9.3, 12.3

**Acceptance of Work**

9.6.6, 9.8.2, 9.9.3, 9.10.1, 9.10.3, 12.3

**Access to Work**

3.16, 6.2.1, 12.1

**Accident Prevention**

4.2.3, 10

**Acts and Omissions**

3.2, 3.3.2, 3.12.8, 3.18, 4.2.3, 4.3.8, 4.4.1, 8.3.1, 9.5.1, 10.2.5, 13.4.2, 13.7, 14.1

**Addenda**

1.1.1, 3.11

**Additional Costs, Claims for**

4.3.6, 4.3.5, 4.3.6, 6.1.1, 10.3

**Additional Inspections and Testing**

9.8.3, 12.2.1, 13.5

**Additional Time, Claims for**

4.3.4, 4.3.7, 8.3.2

**ADMINISTRATION OF THE CONTRACT**

3.1.3, 4, 9.4, 9.5

**Advertisement or Invitation to Bid**

1.1

**Aesthetic Effect**

4.2.13, 4.5.1

**Allowances**

3.11

**All-risk Insurance**

11.4.1.1

**Applications for Payment**

4.2.5, 7.3.8, 9.2, 9.3, 9.4, 9.5.1, 9.6.3, 9.7.1, 9.8.5, 9.10, 11.1.9, 14.2.1, 14.4.3

**Approvals**

2.4, 3.1.3, 3.5, 3.10.2, 3.12, 4.2.7, 9.3.2, 13.4.2, 13.5

**Arbitration**

4.3.3, 4.4, 4.5.1, 4.5.2, 4.6, 8.3.1, 9.7.1, 11.4.9, 11.4.10

**Architect**

4.1

**Architect, Definition of**

4.1.1

**Architect, Extent of Authority**

2.4, 3.12.7, 4.2.3, 4.3.6, 4.4, 5.2, 6.3, 7.1.2, 7.3.6, 7.4, 9.2, 9.3.1, 9.4, 9.5, 9.8.3, 9.10.1, 9.10.3, 12.1, 12.2.1, 13.5.1, 13.5.2, 14.2.2, 14.2.4

**Architect, Limitations of Authority and Responsibility**

2.1.1, 3.3.3, 3.12.4, 3.12.8, 3.12.10, 4.1.2, 4.2.1, 4.2.2, 4.2.3, 4.2.6, 4.2.7, 4.2.10, 4.2.12, 4.2.13, 4.4, 5.2.1, 7.4, 9.4.2, 9.6.4, 9.6.6

**Architect's Additional Services and Expenses**

2.4, 11.4.1.1, 12.2.1, 13.5.2, 13.5.3, 14.2.4

**Architect's Administration of the Contract**

3.1.3, 4.2, 4.3.4, 4.4, 9.4, 9.5

**Architect's Approvals**

2.4, 3.1.3, 3.5.1, 3.10.2, 4.2.7

**Architect's Authority to Reject Work**

3.5.1, 4.2.6, 12.1.2, 14.2.1

**Architect's Copyright**

1.6

**Architect's Decisions**

4.2.6, 4.2.7, 4.2.11, 4.2.12, 4.2.13, 4.3.4, 4.4.1, 4.4.5, 4.4.6, 4.5, 6.3, 7.3.6, 7.3.8, 8.1.3, 8.3.1, 9.2, 9.4, 9.5.1, 9.8.4, 9.9.1, 13.5.2, 14.2.2, 14.2.4

**Architect's Inspections**

4.2.2, 4.2.9, 4.3.4, 9.4.2, 9.8.3, 9.9.2, 9.10.1, 13.5

**Architect's Instructions**

3.2.3, 3.3.1, 4.2.6, 4.2.7, 4.2.8, 7.4.1, 12.1, 13.5.2

**Architect's Interpretations**

4.2.11, 4.2.12, 4.3.6

**Architect's Project Representative**

4.2.10

**Architect's Relationship with Contractor**

1.1.2, 1.6, 3.1.3, 3.2.1, 3.2.2, 3.2.3, 3.3.1, 3.4.2, 3.5.1, 3.7.3, 3.10, 3.11, 3.12, 3.16, 3.18, 4.1.2, 4.1.3, 4.3.4, 4.4.1, 4.4.7, 5.2, 6.2.2, 7, 8.3.1, 9.2, 9.3, 9.4, 9.5, 9.7, 9.8, 9.9, 10.2.6, 10.3, 11.3, 11.4.7, 12, 13.4.2, 13.5

**Architect's Relationship with Subcontractors**

1.1.2, 4.2.3, 4.2.4, 4.2.5, 9.6.3, 9.6.4, 11.4.7

**Architect's Representations**

9.4.2, 9.5.1, 9.10.1

**Architect's Site Visits**

4.2.2, 4.2.5, 4.2.9, 4.3.4, 9.4.2, 9.5.1, 9.9.2, 9.10.1, 13.5

**Asbestos**

10.3.1

**Attorneys' Fees**

3.18.1, 9.10.2, 10.3.3

**Award of Separate Contracts**

6.1.1, 6.1.2

**Award of Subcontracts and Other Contracts for Portions of the Work**

5.2

**Basic Definitions**

1.1

**Bidding Requirements**

1.1.1, 1.1.7, 5.2.1, 11.5.1

**Boiler and Machinery Insurance**

11.4.2

**Bonds, Lian**

9.10.2

Bonds, Performance, and Payment  
7.3.6.4, 9.6.7, 9.10.3, 11.4.9, 11.5  
Building Permit  
3.7.1

### Capitalization 1.3

Certificate of Substantial Completion  
9.8.3, 9.8.4, 9.8.5

Certificates for Payment  
4.2.5, 4.2.9, 9.3.3, 9.4, 9.5, 9.6.1, 9.6.6, 9.7.1, 9.10.1,  
9.10.3, 13.7, 14.1.1.3, 14.2.4

Certificates of Inspection, Testing or Approval  
13.5.4

Certificates of Insurance  
9.10.2, 11.1.3

Change Orders  
1.1.1, 2.4.1, 3.4.2, 3.8.2.3, 3.11.1, 3.12.8, 4.2.8, 4.3.4,  
4.3.5, 5.2.3, 7.1, 7.2, 7.3, 8.3.1, 9.3.1.1, 9.10.3,  
11.4.1.2, 11.4.4, 11.4.9, 12.1.2

Change Orders, Definition of  
7.2.1

### CHANGES IN THE WORK

3.11, 4.2.8, 7, 8.3.1, 9.3.1.1, 11.4.9

Claim, Definition of  
4.3.1

Claims and Disputes  
3.2.3, 4.3, 4.4, 4.5, 4.6, 6.1.1, 6.3, 7.3.8, 9.3, 9.10.4,  
10.3.3

Claims and Timely Assertion of Claims  
4.6.5

Claims for Additional Cost  
3.2.3, 4.3.4, 4.3.5, 4.3.6, 6.1.1, 7.3.8, 10.3.2

Claims for Additional Time  
3.2.3, 4.3.4, 4.3.7, 6.1.1, 8.3.2, 10.3.2

Claims for Concealed or Unknown Conditions  
4.3.4

Claims for Damages  
3.2.3, 3.18, 4.3.10, 6.1.1, 8.3.3, 9.5.1, 9.6.7, 10.3.3,  
11.1.1, 11.4.5, 11.4.7, 14.1.3, 14.2.4

Claims Subject to Arbitration  
4.4.1, 4.5.1, 4.6.1

Cleaning Up  
3.15, 6.3

Commencement of Statutory Limitation Period  
13.7

Commencement of the Work, Conditions Relating to  
2.2.1, 3.2.1, 3.4.1, 3.7.1, 3.10.1, 3.12.6, 4.3.5, 5.2.1,  
5.2.3, 6.2.2, 8.1.2, 8.2.2, 8.3.1, 11.1, 11.4.1, 11.4.6,  
11.5.1

Commencement of the Work, Definition of  
8.1.2

Communications Facilitating Contract  
Administration  
3.9.1, 4.2.4

Completion, Conditions Relating to  
1.6.1, 3.4.1, 3.11, 3.15, 4.2.2, 4.2.9, 8.2, 9.4.2, 9.8,  
9.9.1, 9.10, 12.2, 13.7, 14.1.2

### COMPLETION, PAYMENTS AND

Completion, Substantial  
4.2.9, 8.1.1, 8.1.3, 8.2.3, 9.4.2, 9.8, 9.9.1, 9.10.3,  
9.10.4.2, 12.2, 13.7

Compliance with Law  
1.6.1, 3.2.2, 3.6, 3.7, 3.12.10, 3.13, 4.1.1, 4.4.8, 4.6.4,  
4.6.6, 9.6.4, 10.2.2, 11.1, 11.4, 13.1, 13.4, 13.5.1,  
13.6, 13.6, 14.1.1, 14.2.1.3

Concealed or Unknown Conditions  
4.3.4, 8.3.1, 10.3

Conditions of the Contract  
1.1.1, 1.1.7, 6.1.1, 6.1.4

Consent, Written  
1.6, 3.4.2, 3.12.8, 3.14.2, 4.1.2, 4.3.4, 4.6.4, 9.3.2,  
9.8.5, 9.9.1, 9.10.2, 9.10.3, 11.4.1, 13.2, 13.4.2

### CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

1.1  
Construction Change Directive, Definition of  
7.3.1

Construction Change Directives  
1.1.1, 3.12.8, 4.2.8, 4.3.9, 7.1, 7.3, 9.3.1.1

Construction Schedules, Contractor  
1.4.1.2, 3.10, 3.12.1, 3.12.2, 4.3.7, 2.6.1.3

Contingent Assignment of Subcontracts  
5.4, 14.2.2.2

Continuing Contract Performance  
4.3.3

Contract, Definition of  
1.1.2

CONTRACT, TERMINATION OR  
SUSPENSION OF THE  
5.4.1.1, 11.4.9, 14

Contract Administration  
3.1.3, 4, 9.4, 9.5

Contract Award and Execution, Conditions Relating  
to  
3.7.1, 3.10, 5.2, 6.1, 11.1.3, 11.4.6, 11.5.1

Contract Documents, The  
1.1, 1.2

Contract Documents, Copies Furnished and Use of  
1.6, 2.2.5, 5.3

Contract Documents, Definition of  
1.1.1

Contract Sum  
3.8, 4.3.4, 4.3.5, 4.4.5, 5.2.3, 7.2, 7.3, 7.4, 9.1, 9.4.2,  
9.5.1.4, 9.6.7, 9.7, 10.3.2, 11.4.1, 14.2.4, 14.3.2

Contract Sum, Definition of  
9.1

Contract Time

4.3.4, 4.3.7, 4.4.5, 5.2.3, 7.2.1.3, 7.3, 7.4, 8.1.1, 8.2, 8.3.1, 9.5.1, 9.7, 10.3.2, 12.1.1, 14.3.2

Contract Time, Definition of

8.1.1

**CONTRACTOR**

3

Contractor, Definition of

3.1, 6.1.2

Contractor's Construction Schedules

1.4.1.2, 3.10, 3.12.1, 3.12.2, 4.3.7.2, 6.1.3

Contractor's Employees

3.2.2, 3.4.3, 3.8.1, 3.9, 3.10.2, 4.2.3, 4.2.6, 10.2, 10.3, 11.1.1, 11.4.7, 14.1, 14.2, 14.1

Contractor's Liability Insurance

11.1

Contractor's Relationship with Separate Contractors and Owner's Forces

3.12.5, 3.14.2, 4.2.4.6, 11.3.7, 12.1.2, 12.2.4

Contractor's Relationship with Subcontractors

1.2.2.3.7.2, 3.18.7, 3.18.7.5, 9.6.2, 9.6.7, 9.10.2, 11.4.1.2, 11.4.7, 11.4.8, 11.4.9

Contractor's Relationship with the Architect

1.1.2, 1.6, 4.1.3, 3.2.1, 3.2.2, 3.2.3, 3.3.1, 3.4.2, 3.5.1, 3.7.3, 3.10, 3.11, 3.12, 3.15, 3.18, 4.1.2, 4.1.3, 4.2, 4.3.4, 4.4.1, 4.4.7, 5.2, 6.2.2, 7.8.3.1, 9.2, 9.3, 9.4, 9.5, 9.7, 9.8, 9.9, 10.2.6, 10.3, 11.3, 11.4, 11.5, 13.4.2, 13.5

Contractor's Representations

1.5.2, 3.5.1, 3.12.6, 6.2.2, 8.2.1, 9.3.3, 9.8.2

Contractor's Responsibility for Those Performing the Work

3.2, 3.18, 4.2.3, 4.3.8, 6.3.1, 6.1.3, 6.2, 6.3, 9.5.1, 10

Contractor's Review of Contract Documents

1.5.2, 3.2, 3.7.3

Contractor's Right to Stop the Work

9.7

Contractor's Right to Terminate the Contract

4.3.10, 14.1

Contractor's Submittals

3.10, 3.11, 3.12, 4.2.7, 5.2.1, 5.2.3, 7.3.6, 9.2, 9.3, 9.8.2, 9.8.3, 9.9.1, 9.10.2, 9.10.3, 11.1.3, 11.5.2

Contractor's Superintendent

3.9, 10.2.6

Contractor's Supervision and Construction Procedures

1.2.2, 3.3, 3.4, 3.12.10, 4.2.2, 4.2.7, 4.3.3, 6.1.3, 6.2.4, 7.1.3, 7.3.4, 7.3.6, 8.2, 10, 12, 14

Contractual Liability Insurance

11.1, 11.2, 11.3

Coordination and Correlation

1.2, 1.5.2, 3.3.1, 3.10, 3.12.6, 6.1.3, 6.2.1

Copies Furnished of Drawings and Specifications

1.6, 2.2.5, 3.11.3

Copyrights

1.6, 3.17

Correction of Work

2.3, 2.4, 3.7.4, 4.2.1, 9.4.2, 9.8.2, 9.8.3, 9.9.1, 12.1.2, 12.2, 13.7.1.3

Correlation and Intent of the Contract Documents

1.2

Cost, Definition of

7.3.6

Costs

2.4, 3.2.4, 3.7.4, 3.8.2, 3.15.2, 4.3, 5.4.2, 6.1.1, 6.2.3, 7.3.6, 7.3.6, 7.3.7, 7.3.8, 9.10.2, 10.3.2, 10.5, 11.3, 11.4, 12.1, 12.2.1, 12.2.4, 13.5, 14

Cutting and Patching

6.2.5, 3.14

Damage to Construction of Owner or Separate Contractors

3.14.2, 6.2.4, 9.2.1.5, 10.2.1.2, 10.2.5, 10.6, 11.1, 11.4, 12.2.4

Damages to the Work

3.14.2, 9.9.1, 10.2.1.2, 10.2.5, 10.6, 11.4, 12.2.4

Damages, Claims for

3.2.3, 3.18, 4.3.10, 6.1.1, 8.3.3, 9.5.1, 9.6.7, 10.3.1, 11.1.1, 11.4.5, 11.4.7, 14.1.3, 14.2.4

Damages for Delay

6.1.1, 8.3.3, 9.5.1.6, 9.7, 10.3.2

Date of Commencement of the Work, Definition of

8.1.2

Date of Substantial Completion, Definition of

8.1.3

Day, Definition of

8.1.4

Decisions of the Architect

4.2.6, 4.2.7, 4.2.11, 4.2.12, 4.2.13, 4.3.4, 4.4.1, 4.4.5, 4.4.6, 4.5, 6.3, 7.3.6, 7.3.8, 8.1.3, 8.3.1, 9.2, 9.4, 9.5.1, 9.8.4, 9.9.1, 13.5.2, 14.2.2, 14.2.4

Decisions to Withhold Certification

9.4.1, 9.5, 9.7, 14.1.1.3

Defective or Nonconforming Work, Acceptance

Rejection and Correction of

2.3, 2.4, 3.5.1, 4.2.6, 6.2.5, 9.5.1, 9.5.2, 9.6.6, 9.8.2, 9.9.3, 9.10.4, 12.2.1, 13.7.1.3

Defective Work, Definition of

3.5.1

Definitions

1.1, 2.1.1, 3.1, 3.5.1, 3.12.1, 3.12.2, 3.12.3, 4.1.1, 4.3.1, 5.1, 6.1.2, 7.2.1, 7.3.1, 7.3.6, 8.1, 9.1, 9.8.1

Delays and Extensions of Time

3.2.3, 4.3.1, 4.3.4, 4.3.7, 4.4.5, 5.2.3, 7.2.1, 7.3.1, 7.4.1, 8.3, 9.5.1, 9.7.1, 10.3.2, 10.6.1, 14.3.2

Disputes

4.1.4, 4.3, 4.4, 4.5, 4.6, 6.3, 7.3.8

**Documents and Samples at the Site**

- 3.11
- Drawings, Definition of
- 1.1.5
- Drawings and Specifications, Use and Ownership of
- 11.1.1, 1.3, 2.2.5, 3.11, 5.3

**Effective Date of Insurance**

- 8.2.2, 11.1.2

**Emergencies**

- 4.3.5, 10.6, 14.1.1.2

**Employees, Contractor's**

- 3.3.2, 3.4.3, 3.8.1, 3.9, 3.18.2, 4.2.3, 4.2.6, 10.2, 10.3,
- 11.1.1, 11.4.7, 14.1, 14.2.1.1

**Equipment, Labor, Materials and**

- 11.3, 1.1.6, 3.4, 3.5.1, 3.8.2, 3.8.3, 3.12, 3.13, 3.15.1,
- 4.2.6, 4.2.7, 5.2.1, 6.2.1, 7.3.6, 9.3.2, 9.3.3, 9.5.1.3,
- 9.10.2, 10.2.1, 10.2.4, 14.2.1.2

**Execution and Progress of the Work**

- 1.1.3, 1.2.1, 1.2.2, 2.2.3, 2.2.5, 3.1, 3.3, 3.4, 3.5, 3.7,
- 3.10, 3.12, 3.14, 4.2.2, 4.2.3, 4.3.3, 6.2.2, 7.1.3, 7.3.4,
- 8.2, 9.5, 9.9, 11.10.2, 10.3, 12.2, 14.2, 14.3

**Extensions of Time**

- 3.2.3, 4.3.1, 4.3.4, 4.3.7, 4.4.5, 5.2.3, 7.2.1, 7.3, 7.4,
- 9.5.1, 9.7.1, 10.3.2, 10.6.1, 14.3.2

**Failure of Payment**

- 4.3.6, 9.5.1.3, 9.7, 9.10.2, 14.1.1.3, 14.2.1.2, 13.6

**Faulty Work**

(See Defective or Nonconforming Work)

**Final Completion and Final Payment**

- 4.2.1, 4.2.9, 4.3.2, 9.8.2, 9.10, 11.1.2, 11.1.3, 11.4.1,
- 11.4.5, 12.3.1, 13.7, 14.2.4, 14.4.3

**Financial Arrangements, Owner's**

- 2.2.1, 13.2.2, 14.1.1.5

**Fire and Extended Coverage Insurance**

- 11.4

**GENERAL PROVISIONS**

1

**Governing Law**

- 13.1

**Guarantees (See Warranty)**

**Hazardous Materials**

- 10.2.4, 10.3, 10.5

**Identification of Contract Documents**

- 1.5.1

**Identification of Subcontractors and Suppliers**

- 5.2.1

**Indemnification**

- 3.17, 3.18, 9.10.2, 10.3.3, 10.5, 11.4.1.2, 11.4.7

**Information and Services Required of the Owner**

- 2.1.2, 2.2, 3.2.1, 3.12.4, 3.12.10, 4.2.7, 4.3.3, 6.1.3,
- 6.1.4, 6.2.5, 9.3.2, 9.6.1, 9.6.4, 9.9.2, 9.10.3, 10.3.3,
- 11.2, 11.4, 13.5.1, 13.5.2, 14.1.1.4, 14.1.4

**Injury or Damage to Person or Property**

- 4.3.8, 10.2, 10.6

**Inspections**

- 3.1.3, 3.3.3, 3.7.1, 4.2.2, 4.2.6, 4.2.9, 9.4.2, 9.8.2,
- 9.8.3, 9.9.2, 9.10.1, 12.2.1, 13.5

**Instructions to Bidders**

**Instructions to the Contractor**

- 3.2.3, 3.3.1, 3.8.1, 4.2.8, 5.2.1, 7, 12, 8.2.2, 13.5.2

**Insurance**

- 3.18.1, 6.1.1, 7.3.6, 8.2.1, 9.3.2, 9.8.4, 9.9.1, 9.10.2,
- 9.10.5, 11

**Insurance, Boiler and Machinery**

- 11.4.2

**Insurance, Contractor's Liability**

- 11.1

**Insurance, Effective Date of**

- 8.2.2, 11.1.2

**Insurance, Loss of Use**

- 11.4.3

**Insurance, Owner's Liability**

- 11.2

**Insurance, Project Management Protective**

**Liability**

- 11.3

**Insurance, Property**

- 10.2.5, 11.4

**Insurance, Stored Materials**

- 9.3.2, 11.4.1.4

**INSURANCE AND BONDS**

11

**Insurance Companies, Consent to Partial Occupancy**

- 9.9.1, 11.4.1.5

**Insurance Companies, Settlement with**

- 11.4.10

**Intent of the Contract Documents**

- 1.2.1, 4.2.7, 4.2.12, 4.2.13, 7.4

**Interest**

- 13.6

**Interpretation**

- 1.2.3, 1.4, 4.1.1, 4.3.1, 5.1, 6.1.2, 8.1.4

**Interpretations, Written**

- 4.2.11, 4.2.12, 4.3.6

**Joinder and Consolidation of Claims Required**

- 4.6.4

**Judgment or Final Award**

- 4.6.6

**Labor and Materials, Equipment**

1.1.3, 1.1.6, 3.4, 3.5.1, 3.8.2, 3.8.23, 3.12, 3.13, 3.15.1, 4.2.6, 4.2.7, 5.2.1, 6.2.1, 7.3.6, 9.3.2, 9.3.3, 9.5.1.3, 10.2.1, 10.2.4, 14.2.1.2

**Labor Disputes**

3.11

**Laws and Regulations**

1.6, 3.2.2, 3.6, 3.7, 3.12.10, 3.13, 4.1.1, 4.4.8, 4.6, 9.6.4, 9.9.1, 10.2.2, 11.1, 11.4, 13.1, 13.4, 13.5.1, 13.5.2, 13.6, 14

**Liens**

2.1.2, 4.4.8, 8.2.2, 9.3.3, 9.10

**Limitation on Consolidation or Joinder**

4.6.4

**Limitations, Statutes of**

4.6.3, 12.2.6, 13.7

**Limitations of Liability**

2.3, 3.2.1, 3.5.1, 3.7.3, 3.12.8, 3.12.10, 3.17, 3.18, 4.2.6, 4.2.7, 4.2.12, 6.2.2, 9.4.2, 9.6.4, 9.6.7, 9.10.4, 10.3.3, 10.2.5, 11.1.2, 11.2.1, 11.4.7, 12.2.5, 13.4.2

**Limitations of Time**

2.1.2, 2.7, 2.4, 3.2.1, 3.7.3, 3.10, 9.11, 3.12.5, 3.15.1, 4.2.7, 4.3, 4.4, 4.5, 4.6, 5.2.5.3, 5.4, 6.2.4, 7.3, 7.4, 8.2, 9.2, 9.3.1, 9.3.3, 9.4.1, 9.5, 9.6, 9.7, 9.8, 9.9, 9.10, 11.1.3, 11.4.1.5, 11.4.6, 11.4.10, 12.2.5, 13.7, 14

**Loss of Use Insurance**

11.4.3

**Material Suppliers**

1.6, 3.12.1, 4.2.4, 4.2.6, 5.2.1, 9.3, 9.4.2, 9.6, 9.10.5

**Materials, Hazardous**

10.2.4, 10.3, 10.5

**Materials, Labor, Equipment and**

1.1.3, 1.1.6, 1.6.1, 3.4, 3.5.1, 3.8.2, 3.8.23, 3.12, 3.13, 3.15.1, 4.2.6, 4.2.7, 5.2.1, 6.2.1, 7.3.6, 9.3.2, 9.3.3, 9.5.1.3, 9.10.2, 10.2.1, 10.2.4, 14.2.1.2

**Means, Methods, Techniques, Sequences and**

**Procedures of Construction**

3.3, 3.12.10, 4.2.2, 4.2.7, 9.4.2

**Mechanic's Lien**

4.4.8

**Mediation**

4.4.1, 4.4.5, 4.4.6, 4.4.8, 4.5, 4.6.1, 4.6.2, 8.3.1, 10.5

**Minor Changes in the Work**

1.1.1, 3.12.8, 4.2.8, 4.3.6, 7.1, 7.4

**MISCELLANEOUS PROVISIONS**

13.5.1

**Modifications, Definition of**

1.1.1

**Modifications to the Contract**

1.1.1, 1.1.2, 3.7.3, 3.11, 4.1.2, 4.2.1, 5.2.3, 7, 8.3.1, 9.7, 10.3.2, 11.4.1

**Mutual Responsibility**

6.2

**Nonconforming Work, Acceptance of**

9.6.6, 9.9.3, 12.3

**Nonconforming Work, Rejection and Correction of**

2.3, 2.4, 3.5.1, 4.2.6, 6.2.5, 9.5.1, 9.8.2, 9.9.3, 9.10.4, 12.2.1, 13.7.1.3

**Notice**

2.2.1, 2.8, 4.3, 5.2.3, 3.3.1, 3.7.2, 3.7.4, 3.12.9, 4.3, 4.4, 6.3, 5.2.1, 8.2.2, 9.7, 9.10, 10.2.2, 11.1.3, 11.4.6, 12.2.2, 12.2.4, 13.3, 13.5.1, 13.5.2, 14.1, 14.2

**Notice, Written**

2.3, 2.4, 3.3.1, 3.9, 3.12.9, 3.12.10, 4.3, 4.4.8, 4.6.5, 5.2.1, 8.2.2, 9.7, 9.10, 10.2.2, 10.3, 11.1.3, 11.4.6, 12.2.2, 12.2.4, 13.3, 14

**Notice of Testing and Inspections**

13.5.1, 13.5.2

**Notice to Proceed**

8.2.2

**Notices, Permits, Fees and**

2.1, 3.7, 3.13, 7.3.6.4, 10.2.2

**Observations, Contractor's**

1.5.2, 3.2, 3.7.3, 4.3.4

**Occupancy**

2.2.2, 9.6.6, 9.8, 11.4.1.5

**Orders, Written**

1.1.1, 2.3, 3.9, 4.3.6, 7.1, 8.2.2, 11.4.9, 12.1, 12.2, 13.5.2, 14.3.4

**OWNER**

2

**Owner, Definition of**

2.1

**Owner, Information and Services Required of the**

2.1.2, 2.2, 3.2.1, 3.12.4, 3.12.10, 4.2.7, 4.3.3, 6.1.3, 6.1.4, 6.2.5, 9.3.2, 9.6.1, 9.6.4, 9.9.2, 9.10.3, 10.3.3, 11.2, 11.4, 13.5.1, 13.5.2, 14.1.1.4, 14.1.4

**Owner's Authority**

1.6, 2.1.1, 2.3, 2.4, 3.4.2, 3.8.1, 3.12.10, 3.14.2, 4.1.2, 4.1.3, 4.2.4, 4.2.9, 4.3.6, 4.4.7, 5.2.1, 5.2.4, 5.4.1, 6.1, 6.3, 7.2.1, 7.3.1, 8.2.2, 8.3.1, 9.3.1, 9.3.2, 9.5.1, 9.9.1, 9.10.2, 10.3.2, 11.1.3, 11.3.1, 11.4.3, 11.4.10, 12.2.2, 12.3.1, 13.2.2, 14.3, 14.4

**Owner's Financial Capability**

2.2.1, 13.2.2, 14.1.1.5

**Owner's Liability Insurance**

11.2

**Owner's Loss of Use Insurance**

11.4.3

**Owner's Relationship with Subcontractors**

1.1.2, 5.2, 5.3, 5.4, 9.6.4, 9.10.2, 14.2.2

Owner's Right to Carry Out the Work

2.4, 12.2.4, 14.2.2.2

Owner's Right to Clean Up

6.3

Owner's Right to Perform Construction and to Award Separate Contracts

6.1

Owner's Right to Stop the Work

2.3

Owner's Right to Suspend the Work

14.3

Owner's Right to Terminate the Contract

14.2

Ownership and Use of Drawings, Specifications and Other Instruments of Service

11.1, 1.6, 2.2.5, 3.2, 11.1, 3.17.1, 4.2.12, 5.3

Partial Occupancy or Use

9.6.6, 9.9, 11.4.1.5

Patching, Cutting and

3.14, 6.2.5

Patents

3.17

Payment, Applications for

4.2.5, 7.3.8, 9.2, 9.3, 9.4, 9.5.1, 9.6.3, 9.7.1, 9.8.1,

9.10.1, 9.10.3, 9.10.5, 11.1.3, 14.2.4, 14.4.5

Payment, Certificates for

4.2.5, 4.2.9, 9.3.3, 9.4, 9.5, 9.6.1, 9.6.6, 9.7.1, 9.10.1,

9.10.3, 13.7, 14.1.1.3, 14.2.4

Payment, Failure of

4.3.6, 9.5.1.3, 9.7, 9.10.2, 14.1.1.3, 14.2.1.2, 13.6

Payment, Final

4.2.1, 4.2.9, 4.3.2, 9.8.2, 9.10, 11.1.2, 11.1.3, 11.4.1,

11.4.5, 12.3.1, 13.7, 14.2.4, 14.4.3

Payment Bond, Performance Bond and

7.3.6.4, 9.6.7, 9.10.3, 11.4.9, 11.5

Payments, Progress

4.3.3, 9.3, 9.6, 9.8.5, 9.10.3, 13.6, 14.2.3

**PAYMENTS AND COMPLETION**

9.2

Payments to Subcontractors

5.4.2, 9.5.1.3, 9.6.2, 9.6.3, 9.6.4, 9.6.7, 11.4.8,

14.2.1.2

PCB

10.3.1

Performance Bond and Payment Bond

7.3.6.4, 9.6.7, 9.10.3, 11.4.9, 11.5

Permits, Fees and Notices

2.2.2, 3.7, 3.13, 7.3.6.4, 10.2.2

**PERSONS AND PROPERTY, PROTECTION OF**

10

Polychlorinated Biphenyl

10.3.1

Product Data, Definition of

3.12.2

Product Data and Samples, Shop Drawings

3.11, 3.12, 4.2.7

Progress and Completion

4.2.2, 4.3.3, 8.2, 9.8, 9.9.1, 14.1.4

Progress Payments

4.3.3, 9.3, 9.6, 9.8.5, 9.10.3, 10.6, 14.2.3

Project, Definition of the

1.1.4

Project Management Protective Liability

10.1.1.3

Project Manual, Definition of the

1.1.7

Project Manuals

2.2.5

Project Representatives

4.2.10

Property Insurance

10.2.5, 11.3

**PROTECTION OF PERSONS AND PROPERTY**

10

Regulations and Laws

1.6, 3.2.2, 3.6, 3.7, 3.12.10, 3.13, 4.1.1, 4.1.6, 4.6,

9.6.4, 9.9.1, 10.2.2, 11.1, 11.4, 13.1, 13.4, 13.5.1,

13.5.2, 13.6, 14

Rejection of Work

3.5.1, 4.2.6, 12.2.1

Releases and Waivers of Liens

9.10.2

Representations

1.5.2, 3.5.1, 3.12.6, 6.2.2, 8.2.1, 9.3.3, 9.4.2, 9.5.1,

9.8.2, 9.10.1

Representatives

2.1.1, 3.1.1, 3.9, 4.1.1, 4.2.1, 4.2.10, 5.1.1, 5.1.2,

13.2.1

Resolution of Claims and Disputes

4.4, 4.5, 4.6

Responsibility for Those Performing the Work

3.3.2, 3.18, 4.2.3, 4.3.8, 5.3.1, 6.1.3, 6.2, 6.3, 9.5.1,

10

Retainage

9.3.1, 9.6.2, 9.8.5, 9.9.1, 9.10.2, 9.10.3

Review of Contract Documents and Field

Conditions by Contractor

1.5.2, 3.2, 3.7.3, 3.12.7, 6.1.3

Review of Contractor's Submittals by Owner and

Architect

3.10.1, 3.10.2, 3.11, 3.12, 4.2, 5.2, 6.1.3, 9.2, 9.8.2

Review of Shop Drawings, Product Data and

Samples by Contractor

3.12



**Rights and Remedies**

1.1.2, 2.3, 2.4, 3.5.1, 3.15.2, 4.2.6, 4.3.4, 4.5, 4.6, 5.3, 5.4, 6.1, 6.3, 7.3.1, 8.3, 9.5.1, 9.7, 10.2.5, 10.3, 12.2.2, 12.2.4, 13.4, 14

**Royalties, Patents and Copyrights**

3.17

**Rules and Notices for Arbitration**

4.6.2

**Safety of Persons and Property**

10.2, 10.6

**Safety Precautions and Programs**

3.3.1, 4.2.2, 4.2.7, 5.3, 11.10.1, 10.2, 10.6

**Samples, Definition of**

3.12.3

**Samples, Shop Drawings, Product Data and**

3.11, 3.12, 4.2.7

**Samples at the Site, Documents and**

3.11

**Schedule of Values**

9.2, 9.3.1

**Schedules**

14.1.2, 3.10, 3. Construction 2.1, 3.12.2, 4.3.7.2,

6.1.5

**Separate Contracts and Contractors**

1.1.3, 3.12.5, 3.14.2, 4.2.4, 4.2.7, 4.6.4, 6.1.3,

11.4.7, 12.1.2, 12.2.5

**Shop Drawings, Definition of**

3.12.1

**Shop Drawings, Product Data and Samples**

3.11, 3.12, 4.2.7

**Site Use of**

3.13, 6.1.1, 6.2.1

**Site Inspections**

1.2.2, 3.2.1, 3.3.3, 3.7.1, 4.2, 4.3.4, 9.4.2, 9.10.1, 13.5

**Site Visits, Architect's**

4.2.2, 4.2.9, 4.3.4, 9.4.2, 9.5.1, 9.9.2, 9.10.1, 13.5

**Special Inspections and Testing**

4.2.6, 12.2.1, 13.5

**Specifications, Definition of the**

1.1.6

**Specifications, The**

1.1.1, 1.1.6, 1.1.7, 1.3.2, 1.6, 3.11, 3.12.10, 3.17

**Statute of Limitations**

4.6.3, 12.2.6, 13.7

**Stopping the Work**

2.3, 4.3.6, 9.7, 10.3, 14.1

**Stored Materials**

6.2.1, 9.3.2, 10.2.1.2, 10.2.4, 11.4.1.4

**Subcontractor, Definition of**

5.1.1

**SUBCONTRACTORS**

5

**Subcontractors, Work by**

1.2.2, 3.3.2, 3.12.1, 4.2.3, 5.2.3, 5.3, 5.4, 9.3.1.2,

9.6.7

**Subcontractual Relations**

5.3, 5.4, 9.3.1.2, 9.6, 9.10, 10.2.1, 11.4.7, 11.4.8, 14.1, 14.2.1, 14.3.2

**Submittals**

1.6, 3.10, 3.11, 3.12, 4.2.7, 5.2.1, 5.2.3, 7.3.6, 9.2, 9.3, 9.8, 9.9.1, 9.10.2, 9.10.3, 11.4.7

**Subrogation, Waivers of**

6.1.1, 11.4.5, 11.4.7

**Substantial Completion**

4.2.9, 8.1.1, 8.1.3, 8.2.3, 9.4.2, 9.8, 9.9.1, 9.10.3, 9.10.4.2, 12.2.15.7

**Substantial Completion, Definition of**

9.8.1

**Substitution of Subcontractors**

5.2.3, 5.2.4

**Substitution of Architect**

4.1.3

**Substitutions of Materials**

3.4.2, 3.5.1, 7.3.7

**Sub-subcontractor, Definition of**

5.1.2

**Subsurface Conditions**

4.3.4

**Successors and Assigns**

13.2

**Superintendent**

3.9, 10.2.6

**Supervision and Construction Procedures**

1.2.2, 3.3, 3.4, 3.12.10, 4.2.2, 4.2.7, 4.3.3, 6.1.3, 6.2.4, 7.1.3, 7.3.6, 8.2, 8.3.1, 9.4.2, 10, 12, 14

**Surety**

4.4.7, 5.4.1.2, 9.10.2, 9.10.3, 14.2.2

**Surety, Contract of**

9.10.2, 9.10.3

**Surveys**

2.2.3

**Suspension by the Owner for Convenience**

14.4

**Suspension of the Work**

5.4.2, 14.3

**Suspension or Termination of the Contract**

4.3.6, 5.4.1.1, 11.4.9, 14

**Taxes**

3.6, 3.8.2.1, 7.3.6.4

**Termination by the Contractor**

4.3.10, 14.1

**Termination by the Owner for Cause**

4.3.10, 5.4.1.1, 14.2

**Termination of the Architect**

4.1.3

**Termination of the Contractor**

14.2.2

**TERMINATION OR SUSPENSION OF THE CONTRACT**

14

**Tests and Inspections**

3.1.3, 3.3.3, 4.2.2, 4.2.6, 4.2.9, 9.4.2, 9.8.3, 9.9.2, 9.10.1, 10.3.2, 11.4.1.1, 12.2.1, 13.5

**TIME**

8

**Time, Delays and Extensions of**

3.2.3, 4.3.1, 4.3.4, 4.3.7, 4.4.5, 5.2.3, 7.2.1, 7.3.1, 7.4.1, 8.3, 9.5.1, 9.7.1, 10.3.2, 10.6.1, 14.3.2

**Time Limits**

2.1.2, 2.2, 2.4, 3.2.1, 3.7.3, 3.10, 3.11, 3.12.5, 3.15.1, 4.2, 4.3, 4.4, 4.5, 4.6, 5.2, 5.3, 5.4, 6.2.4, 7.3, 7.4, 8.2, 9.2, 9.3.1, 9.3.3, 9.4.1, 9.5, 9.6, 9.7, 9.8, 9.9, 9.10, 11.1.8, 11.4.1.5, 11.4.6, 11.4.10, 12.2, 13.5, 13.7, 14.1

**Time Limits on Claims**

4.3.2, 4.3.4, 4.3.8, 4.4, 4.5, 4.6

**Title to Work**

9.3.2, 9.3.3

**UNCOVERING AND CORRECTION OF WORK**

12

**Uncovering of Work**

12.1

**Unforeseen Conditions**

4.3.4, 8.3.1, 10.3

**Unit Prices**

4.3.9, 7.3.2

**Use of Documents**

1.1.1, 1.6, 2.2.5, 3.12.6, 5.3

**Use of Site**

3.13, 6.1.1, 6.2.1

**Values, Schedule of**

9.2, 9.3.1

**Waiver of Claims by the Architect**

13.4.2

**Waiver of Claims by the Contractor**

4.3.10, 9.10.5, 11.4.7, 13.4.2

**Waiver of Claims by the Owner**

4.3.10, 4.9.3, 9.10.3, 9.10.4, 11.4.3, 11.4.5, 11.4.7, 12.2.1, 13.4.2, 14.2.4

**Waiver of Consequential Damages**

4.3.10, 14.2.4

**Waiver of Liens**

9.10.2, 9.10.4

**Waivers of Subrogation**

6.1.1, 11.4.5, 11.4.7

**Warranty**

3.5, 4.2.9, 4.3.5.3, 9.3.3, 9.8.4, 9.9.1, 9.10.4, 12.2.2, 13.7.3

**Weather Delays**

4.3.7.2

**Work, Definition of**

1.1.3

**Written Consent**

1.6, 3.4.2, 3.12.8, 3.14.2, 4.1.2, 4.3.1, 4.6.4, 9.3.2, 9.8.5, 9.9.1, 9.10.2, 9.10.3, 11.4.1, 13.2, 13.4.2

**Written Interpretation**

4.2.11, 4.2.12, 4.3.10

**Written Notices**

2.4, 3.3.1, 3.9, 3.12.9, 3.12.10, 4.3, 4.4.8, 4.6.3, 5.2.1, 8.2.2, 9.7, 9.10, 10.2.2, 10.3, 11.1.3, 11.4.6, 12.2.2, 12.2.4, 13.3, 14

**Written Orders**

1.1.1, 2.3, 3.9, 4.3.6, 7, 8.2.2, 11.4.9, 12.1, 12.2, 13.5.2, 14.3.1

Blank Page

**COMPLAINANT - Exhibit 12**

Px-Allen 12

Blank page



Clean Water Act Jurisdiction  
Following the U.S. Supreme Court's Decision  
in  
Rapanos v. United States & Carabell v. United States



This memorandum<sup>1</sup> provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States<sup>2</sup> (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.<sup>3</sup> The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

### Summary of Key Points

**The agencies will assert jurisdiction over the following waters:**

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

**The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:**

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

**The agencies generally will not assert jurisdiction over the following features:**

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

**The agencies will apply the significant nexus standard as follows:**

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

<sup>1</sup> This guidance incorporates revisions to the EPA/Army Memorandum originally issued on June 6, 2007, after careful consideration of public comments received and based on the agencies' experience in implementing the *Rapanos* decision.

<sup>2</sup> 126 S. Ct. 2208 (2006).

<sup>3</sup> 33 U.S.C. §1251 *et seq.*

## Background

Congress enacted the Clean Water Act (“CWA” or “the Act”) “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”<sup>4</sup> One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into “navigable waters” except in compliance with other specified sections of the Act.<sup>5</sup> In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source[.]”<sup>6</sup> and provides that “[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas[.]”<sup>7</sup>

In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a “water of the United States.” The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

## The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term “waters of the United States” is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.<sup>8</sup> However, the plurality concluded that the agencies’ regulatory authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters.<sup>9</sup>

Justice Kennedy did not join the plurality’s opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals.<sup>10</sup> Justice Kennedy agreed with the plurality that the statutory term “waters of the United States” extends beyond water bodies that are traditionally considered navigable.<sup>11</sup> Justice Kennedy, however, found the plurality’s interpretation of the scope of the CWA to be “inconsistent with the Act’s text, structure, and purpose[.]” and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies.<sup>12</sup> Justice Kennedy concluded that wetlands are “waters

<sup>4</sup> 33 U.S.C. § 1251(a).

<sup>5</sup> 33 U.S.C. § 1311(a), §1362(12)(A).

<sup>6</sup> 33 U.S.C. § 1362(12)(A)

<sup>7</sup> 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

<sup>8</sup> Id. at 2220.

<sup>9</sup> Id. at 2225-27.

<sup>10</sup> Id. at 2236-52. While Justice Kennedy concurred in the Court’s decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of “whether the specific wetlands at issue possess a significant nexus with navigable waters.” 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both “whether the ditches and drains near each wetland are ‘waters,’” and “whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection....” Id. at 2235.

<sup>11</sup> Id. at 2241.

<sup>12</sup> Id. at 2246.

of the United States” “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”<sup>13</sup>

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA’s and the Corps’ interpretation of “waters of the United States” was a reasonable interpretation of the Clean Water Act.<sup>14</sup>

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.<sup>15</sup> Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.<sup>16</sup> Since Rapanos, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that EPA regions and Corps districts need guidance to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices. This approach is appropriate for a guidance document. The agencies will continue to monitor implementation of the Rapanos decision in the field and recognize that further consideration of jurisdictional issues, including clarification and definition of key terminology, may be appropriate in the future, either through issuance of additional guidance or through rulemaking.

---

<sup>13</sup> Id. at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 126 S. Ct. at 2235-36.

<sup>14</sup> Id. at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens’ dissent. See 126 S. Ct. at 2266.

<sup>15</sup> See Marks v. United States, 430 U.S. 188, 193-94 (1977); Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal “test ... that lower courts should apply,” under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

<sup>16</sup> 126 S. Ct. at 2265 (Stevens, J., dissenting) (“Given that all four justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases – and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied – on remand each of the judgments should be reinstated if *either* of those tests is met.”) (emphasis in original). The agencies recognize that the Eleventh Circuit, in United States v. McWane, Inc., et al., 505 F.3d 1208 (11<sup>th</sup> Cir. 2007), has concluded that the Kennedy standard is the sole method of determining CWA jurisdiction in that Circuit. The Supreme Court denied the government’s petition for a writ of *certiorari* on December 1, 2008.



## Agency Guidance<sup>17</sup>

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.<sup>18</sup> Specifically, this guidance identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the Rapanos opinions.<sup>19</sup> EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

### ***1. Traditional Navigable Waters (i.e., “(a)(1) Waters”) and Their Adjacent Wetlands***

#### **Key Points**

- **The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3(s)(1).**
- **The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.**

EPA and the Corps will continue to assert jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or

<sup>17</sup> The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

<sup>18</sup> This guidance focuses only on those provisions of the agencies’ regulations at issue in Rapanos -- 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies’ regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of “waters of the United States.” Indeed, the plurality opinion in Rapanos noted that “... there is no reason to suppose that our construction today significantly affects the enforcement of §1342 ... The Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.’” (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the Rapanos decision.

<sup>19</sup> In 2001, the Supreme Court held that use of “isolated” non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This guidance does not address SWANCC, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. See 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

foreign commerce, including all waters which are subject to the ebb and flow of the tide.”<sup>20</sup> These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands “adjacent” to traditional navigable waters as defined in the agencies’ regulations. Under EPA and Corps regulations and as used in this guidance, “adjacent” means “bordering, contiguous, or neighboring.” Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are “waters of the United States.”<sup>21</sup>

The regulations define “adjacent” as follows: “The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”<sup>22</sup> Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based

---

<sup>20</sup> 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The “(a)(1)” waters include all of the “navigable waters of the United States,” defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka MN). For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

- They are subject to Section 9 or 10 of the Rivers and Harbors Act, or
- A federal court has determined that the water body is navigable-in-fact under federal law, or
- They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
- They have historically been used for commercial navigation, including commercial water-borne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation, including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with “flashy” flow characteristics. In such circumstances, daily gage data is more representative of flow characteristics.

<sup>21</sup> Id. at 2248 (Justice Kennedy, concurring) (“As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.”).

<sup>22</sup> 33 C.F.R. § 328.3(c).

inference that such wetlands have an ecological interconnection with jurisdictional waters.<sup>23</sup> Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

## ***2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries***

### **Key Points**

- **The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).**
- **The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)**

A non-navigable tributary<sup>24</sup> of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are “relatively permanent” – waters that typically (e.g., except due to drought) flow year-round or waters that have a

<sup>23</sup> See e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (“...the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”).

<sup>24</sup> A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes. It is reasonable for the agencies to treat the entire tributary in light of the Supreme Court’s observation that the phrase “navigable waters” generally refers to “rivers, streams, and other hydrographic features.” 126 S. Ct. at 2222 (Justice Scalia, quoting *Riverside Bayview*, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

continuous flow at least seasonally (e.g., typically three months).<sup>25</sup> Justice Scalia emphasizes that relatively permanent waters do not include tributaries “whose flow is ‘coming and going at intervals ... broken, fitful.’”<sup>26</sup> Therefore, “relatively permanent” waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.<sup>27</sup> The plurality opinion indicates that “continuous surface connection” is a “physical connection requirement.”<sup>28</sup> Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).<sup>29</sup>

---

<sup>25</sup> See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that “relatively permanent” does not necessarily exclude waters “that might dry up in extraordinary circumstances such as drought” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months”).

<sup>26</sup> *Id.* (internal citations omitted)

<sup>27</sup> *Id.* at 2226-27 (Justice Scalia, plurality opinion).

<sup>28</sup> *Id.* at 2232 n.13 (referring to “our physical-connection requirement” and later stating that Riverside Bayview does not reject “the physical-connection requirement”) and 2234 (“Wetlands are ‘waters of the United States’ if they bear the ‘significant nexus’ of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.”) (emphasis in original). See also 126 S. Ct. at 2230 (“adjacent” means “physically abutting”) and 2229 (citing to Riverside Bayview as “confirm[ing] that the scope of ambiguity of ‘the waters of the United States’ is determined by a wetland’s *physical connection* to covered waters...”) (emphasis in original). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions”).

<sup>29</sup> While all wetlands that meet the agencies’ definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

### **3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent**

#### **Key Points**

- **The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.**
- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.**
- **“Similarly situated” wetlands include all wetlands adjacent to the same tributary.**
- **Significant nexus includes consideration of hydrologic factors including the following:**
  - **volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary**
  - **proximity to the traditional navigable water**
  - **size of the watershed**
  - **average annual rainfall**
  - **average annual winter snow pack**
- **Significant nexus also includes consideration of ecologic factors including the following:**
  - **potential of tributaries to carry pollutants and flood waters to traditional navigable waters**
  - **provision of aquatic habitat that supports a traditional navigable water**
  - **potential of wetlands to trap and filter pollutants or store flood waters**
  - **maintenance of water quality in traditional navigable waters**
- **The following geographic features generally are not jurisdictional waters:**
  - **swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)**
  - **ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,<sup>30</sup> (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).<sup>31</sup> As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

<sup>30</sup> For simplicity, the term “tributary” when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

<sup>31</sup> As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. See pp. 6-7, supra.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>32</sup> While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries,<sup>33</sup> his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in Riverside Bayview and SWANCC, "the connection between a non-navigable water or wetland may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. ... Absent a significant nexus, jurisdiction under the Act is lacking."<sup>34</sup> Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

---

<sup>32</sup> Id. at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in SWANCC. Justice Kennedy cites SWANCC with approval and asserts that the significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC.

<sup>33</sup> 126 S. Ct. at 2247-50.

<sup>34</sup> Id. at 2241 (emphasis added).

When performing a significant nexus analysis,<sup>35</sup> the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation – that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.<sup>36</sup> Other physical indicators of flow may include

<sup>35</sup> In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ..." 126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

<sup>36</sup> See 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a non-navigable tributary where there are no adjacent wetlands. See 33 C.F.R. § 328.4(c). While EPA regions

shelving, wracking, water staining, sediment sorting, and scour.<sup>37</sup> Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.<sup>38</sup> The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States

---

and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

<sup>37</sup> See Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

<sup>38</sup> See, generally, 126 S. Ct. at 2248-53; see also 126 S. Ct. at 2249 ("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries....") (citing to *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 524-25(1941)).



because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.<sup>39</sup> Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., “discernible, confined, and discrete conveyances”), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).<sup>40</sup>

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

#### Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA §404 determinations by the Corps, the Corps and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

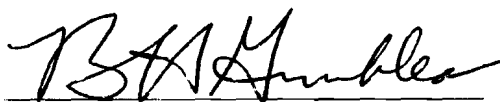
Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a

<sup>39</sup> See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

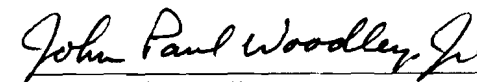
<sup>40</sup> 33 U.S.C. § 1362(14).

significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA jurisdiction.<sup>41</sup> Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.



Benjamin H. Grumbles  
Assistant Administrator for Water  
U.S. Environmental Protection Agency



John Paul Woodley, Jr.  
Assistant Secretary of the Army  
(Civil Works)  
Department of the Army

---

<sup>41</sup> For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.

Blank Page

COMPLAINANT - Exhibits 8a, b & c

RX - 1/14/14