

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-RO
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REGIONAL HEARING
CLERK

In the Matter of:

DESARROLLOS ALTAMIRA I, INC., and
CIDRA EXCAVATION, S.E.,

RESPONDENTS

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

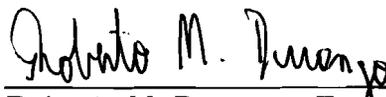
PREHEARING EXCHANGE

DOCKET NUMBER
CWA-02-2009-3462

COMPLAINANT'S INITIALPREHEARING EXCHANGE

Pursuant to the Prehearing Order, dated March 25, 2010, directing the Parties to file their prehearing exchanges in seriatim fashion, Complainant was directed to file its Initial Prehearing Exchange by April 30, 2010. Complainant hereby files its Initial Prehearing Exchange for the above-captioned matter.

Respectfully submitted, in San Juan, Puerto Rico this 29th day of April 2010.



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Complainant's Initial Prehearing Exchange
In the Matter of Municipality of Desarrollos Altamira I, Inc., and
Cidra Excavation, S.E.
Docket Number CWA-02-2009-3462
Page 1 of 14

1. **In compliance with this Court's Prehearing Order pursuant to Section 22.19(a) of the Rules of Practice, directing each party to file with the Regional Hearing Clerk and to serve on the opposing party and on the Presiding Judge, Complainant hereby files the following prehearing information:**

(A) the names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, with a brief narrative summary of their expected testimony, or a statement that no witness will be called;

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

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

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

Mr. Rivera will testify about the NPDES storm water permit application regulations and the NPDES Construction General Permit (CGP) requirements and how it applies to Respondents' facility.

Mr. Rivera will testify about the findings of violation applicable to this matter, among other things, the violations of the Clean Water Act (CWA) and the pertinent regulations, and development and implementation of Stormwater Pollution Prevention Plans at construction sites. Mr. Rivera will also testify as to his experience in CWA enforcement actions and his experience handling administrative penalty orders. Mr. Rivera will provide testimony of the different outreach efforts conducted by EPA, in

order to keep the regulated community informed of the NPDES storm water permit regulations and changes.

- ii. **David Pohle (Expert Witness)**
Environmental Scientist
Wetlands Protection Team, Enforcement Coordinator
U.S. Environmental Protection Agency, Region 2

Mr. David Pohle has been working with the U.S. Environmental Protection Agency since 1991, where he started as an Environmental Scientist in the Water Standards and Planning Branch. Mr. Pohle is currently the Enforcement Coordinator of the Wetlands Protection Team at EPA, Region 2, in New York, NY. Mr. Pohle holds a Master of Science in Marine Environmental Sciences from the State University of New York at Stony Brook, from where he graduated in 1990, and a Bachelor of Arts in Biology and German, *magda cum laude*, from Bowdoin College. Mr. Pohle will testify about jurisdictional waters issues, among other things.

- iii. **Hector Ortiz (Factual Witness)**
Multimedia Permit and Compliance Branch
U.S. Environmental Protection Agency, Region 2
Caribbean Environmental Protection Division
Storm Water Program Specialist

Mr. Héctor Ortiz has been working with EPA, Region 2, Caribbean Environmental Protection Division, since August 10, 2003, as an Environmental Engineer handling NPDES inspections in the Multi-Media Permits and Compliance Branch. Mr. Ortiz has a Bachelor in Science Degree from the University of Puerto Rico where he graduated in 1984, a Bachelor in Industrial Engineer and a Master in Environmental Management from the Polytechnic University of Puerto Rico. Mr. Ortiz has worked in several companies as an Environmental Manager.

Mr. Ortiz will testify about the NPDES storm water permit application regulations, the NPDES Construction General Permit requirements and how such apply to Respondents' project. He will also testify about the: NPDES Water Compliance Inspection Reports that he performed on April 20 and July 17, 2007, which addressed compliance by Respondents' project with the NPDES storm water permit regulations;

the Reconnaissance Inspection performed on October 18, 2007; factual findings of this matter (e.g., the violations of the CWA, pertinent regulations, and the CGP, among others); and the calculation of the assessed penalty included in the complaint, which he performed, the reasoning behind the calculation of said assessed penalty, and the appropriateness of the penalty.

Mr. Ortiz will also testify about the: Administrative Compliance Order (ACO), Docket No. CWA-02-2007-3070, issued on EPA September 27, 2007, to Respondents, ordering Respondent to comply with the storm water discharge permit regulations; visits he performed at the Project, and communications held with Respondents' representatives regarding its compliance/non-compliance with the ACO, the CWA and the NPDES storm water permit regulations.

- iv. **Casiano Ancalle, P.E.**
Certified Professional Hydrologist
CA Engineering
PO Box 190332
San Juan, Puerto Rico 00919-0332
Telephone (787) 748-6106
Fax (787) 760-0409
E-mail: ancallec@caribe.net

Complainant reserves the right to call Mr. Ancalle to testify, should Respondents challenge the admissibility of the Hydrologic-Hydraulic (HH) Study he developed for the project. In the alternative, Complainant reserves the right to interview, cross-examine Mr. Ancalle, should Respondents list Mr. Ancalle as a witness in their prehearing exchanges. Complainant has had no contact with Mr. Ancalle, at this point, in deference to Respondents' business relationship with the witness.

- v. **Vicky Sánchez (Factual Witness)**
Hydrologic Technician
NWIS Database Administrator
US Geological Survey
Caribbean Water Science Center
GSA Center
651 Federal Drive
Suite 400-15
Guaynabo, PR 00956-5703
Telephone: (787) 749-4346 xt 245
E-mail: asanchez@usgs.gov

Complainant reserves the right to call Ms. Sánchez to testify, should Respondents challenge the admissibility of the Rain Gauge data she provided Complainant in this matter.

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

(B) *copies of all documents and exhibits intended to be introduced into evidence. Included among the documents to be produced shall be a curriculum vita or resume for each identified expert witness; documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit").*

Complainant intends to introduce the following documents and exhibits at the hearing:

- i. ***Complainant's Exhibit 1***—Administrative Complaint, Docket No. CWA-02-2009-3462, dated September 29, 2009, with Certificate of Service, stamped by the Regional Hearing Clerk on October 1, 2009; Letter addressed to Mr. Israel Quintana, President, Cidra Excavation, S.E. (Cidra), with Certified Mail Receipt, ***Complainant's Exhibit 1a***, and Letter addressed to Mr. Ramon Mac-Crohon, President, Desarrollos Altamira I, Inc. (DAI), with the Certified Mail Receipt, ***Complainant's Exhibit 1b***,
- ii. ***Complainant's Exhibit 2***—Respondent DAI's Answer to the Administrative Complaint and Request for Hearing, dated June 9, 2009, Respondent Cidra's Answer to the Administrative Complaint and Request for Hearing, dated June 9, 2009, ***Complainant's Exhibit 2a***.
- iii. ***Complainant's Exhibit 3***— Letter addressed to Mrs. Wanda García, Acting Director of the Water Quality Area, PR Environmental Quality Board (EQB), dated March 31, 2009, with Certified Mail Receipt.
- iv. ***Complainant's Exhibit 4***—Penalty Memorandum, dated March 23, 2009, prepared by Mr. Hector Ortiz, Docket CWA-02-2009-3462; Ben Software Printout prepared in support of the penalty calculation, ***Complainant's Exhibit 4a***; EPA's General Enforcement Policies known as GM-21 and GM-22, a guidance document for medium specific penalties in support of the penalty calculation ***Complainant's Exhibit 4b*** and ***Complainant's Exhibit 4c***.

- v. **Complainant's Exhibit 5**—Hydrologic-Hydraulic (HH) Study, submitted by DAI, as prepared for the project in March 2006, by Mr. Casiano Ancalle.
- vi. **Complainant's Exhibit 6**—Administrative Compliance Order (ACO), Docket Number: CWA-02-2007-3070, dated September 27, 2007; Letter addressed to Mr. Israel Quintana, President, Cidra, with Certified Mail Receipt, which accompanied the ACO, **Complainant's Exhibit 6a**; Letter addressed to Mr. Juan Valdés, President, DAI, with Certified Mail Receipt, **Complainant's Exhibit 6b**; Acknowledgments of Receipt of Administrative Compliance Order, signed by Mr. Israel Quintana, Managing Partner, Cidra, and by Ramon Mac-Crohon, **Complainant's Exhibit 6c**;
- vii. **Complainant's Exhibit 7**— NPDES Water Compliance Inspection Report, performed on April 20, 2007; NPDES Water Compliance Inspection Report, performed on July 17, 2007; **Complainant's Exhibit 7a**; Reconnaissance Inspection Report performed on October 18, 2007, **Complainant's Exhibit 7b**; Rain Gauge Data Summary Table, prepared by Mr. Ortiz, **Complainant's Exhibit 7c**; Rain Gauge Data submitted by USGS for the Rio Las Curias Rain Gauge Station, **Complainant's Exhibit 7d**.
- viii. **Complainant's Exhibit 8**— Progress Report submitted by Mr. Israel Quintana, President, Cidra Excavation, S.E., on October 12, 2007, Progress Report submitted by Mr. Israel Quintana, President, Cidra Excavation, S.E., on October 16, 2007, **Complainant's Exhibit 8a**; Compliance Plan Letter submitted by Eng. José R. Iglesias, P.E., Project Manager, Cidra Excavation, S.E., on October 24 2007, **Complainant's Exhibit 8b**; Letter addressed to Mr. Israel Quintana, President, Cidra Excavation, S.E., with Certified Mail Receipt, advising Respondent of Compliance with Provisions 1–4 of the ACO, **Complainant's Exhibit 8c**; the Letter addressed to Mr. Juan Valdés, President, Desarrollos Altamira I, Inc., with Certified Mail Receipt, advising Respondent of Compliance with Provisions 1–4 of the ACO, **Complainant's Exhibit 8d**.
- ix. **Complainant's Exhibit 9**—NPDES General Permit for Storm Water Discharges from Construction Activities, as modified effective January 21, 2005; Federal Register 68 Fed. Reg. 39,087, providing Final NPDES General Permit for Storm Water Discharges From Construction Activities, **Complainant's Exhibit 9a**.
- x. **Complainant's Exhibit 10**—Copy of 40 C.F.R. § 122.2 in support of ¶ 16 of the Complaint.
- xi. **Complainant's Exhibit 11**—Copy of the Puerto Rico Online Corporations Registry, search results Desarrollos Altamira I, Inc., Cidra Excavation, Inc., and Las Quintas 957, Inc., in support of ¶ 14 of the Complaint.

- xii. **Complainant's Exhibit 12**—NOI Application Detail, submitted on October 17, 2007; NOI Application Search Results, for the Project, **Complainant's Exhibit 12a**; NOI Application Search Results, for the Cidra Excavation, S.E., **Complainant's Exhibit 12b**; Construction Storm Water Pollution Prevention Plan (SWPPP), developed for the Project in January 2007, **Complainant's Exhibit 12c**; SWPPP—Second Report, developed for the Project in February 2008, **Complainant's Exhibit 12d**, Cover Page of the Construction Contract Agreement, entered between "The Owner—Desarrollos Altamira I, Inc." and "The Contractor—Cidra Excavation, S.E." on May 22, 2006, **Complainant's Exhibit 12e**; SWPPP Inspection and Maintenance Report Form, indicating land disturbance activities between January 24 and 31, 2007, **Complainant's Exhibit 12f**.
- xiii. **Complainant's Exhibit 13**—Aerial Photograph of the Project with water bodies and the distance to them; Aerial Photo of the Project with the Topographic Map Overlapped, **Complainant's Exhibit 13a**; the Project's First Retention Pond with the Distance to the Outfall, **Complainant's Exhibit 13b**; the Project's Retention Pond with the Distance to the creek, **Complainant's Exhibit 13c**; Aerial Photograph of the Project with the Elevation Map overlapped, **Complainant's Exhibit 13d**; Aerial Photograph of the Project depicting the Floodable Areas, **Complainant's Exhibit 13e**; and Aerial Depiction of the Natural Resources Conservation Service (NRCS) Soils at the Project, **Complainant's Exhibit 13f**.
- xiv. **Complainant's Exhibit 14**—Mr. José A. Rivera's Resume.
- xv. **Complainant's Exhibit 15**—Mr. David Pohle's Resume.
- xvi. **Complainant's Exhibit 16**—Mr. Hector Ortiz's Resume

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

(C) *a statement of its views as to the appropriate place of hearing and an estimate of the time needed to present its direct case. See, Sections 22.21(d) and 22.19(d) of the Rules of Practice. Also state if translation services are necessary in regard to the testimony of any anticipated witnesses, and, if so, state the language to be translated.*

Pursuant to 40 CFR §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondents conduct business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional office is located, or in

Washington, D.C. Complainant requests that the hearing be held in San Juan, where the relevant Environmental Protection Agency Regional office is located. This location is more convenient for both parties and witnesses than the county where the events that gave rise to this action occurred. The Complainant can assist by providing the Regional Hearing Clerk with information on facilities that may be available for purposes of holding the hearing.

Complainant estimates it will need approximately four days to present its direct case. Translation services will not be necessary in regard to the testimony of witnesses Complainant anticipates to call.

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

(A) a copy of all documents in support of the factual allegations made in Paragraphs 14, 16–22, 25, 26, and 38 of the Complaint;

- i. Paragraph 14 states: “Respondents, DAI and CESE, are corporations organized and authorized to do business under the laws of the Commonwealth of Puerto Rico.”

See, Complainant’s Exhibit 11. Also, please note that Complainant has requested information from Respondents and will amend the Complaint, if necessary, based on the information Respondents submit, in compliance with footnote 1 of the Prehearing Order. See also, Complainant’s Exhibits 12–12f.

- ii. Paragraph 16 states: “DAI is the owner and operator and CESE is an operator, as defined in 40 C.F.R. § 122.2, of a housing construction project known as the Hacienda Altamira I Residential Development.”

See, Complainant’s Exhibits 12–12f.

- iii. Paragraph 17 states: "Respondents' Project is located at State Road PR-957, Km. 0.2, Hato Puerco Ward, in Canóvanas, Puerto Rico 00729."

See, Complainant's Exhibits 12c, 12d.

- iv. Paragraph 18 states: "Hacienda Altamira is a residential development, which consists of the construction of one hundred and fifty two (152) single-family housing units."

See, Complainant's Exhibits 12c, 12d.

- v. Paragraph 19 states: "[t]he construction activities at the Project are best described by the Standard Industrial Classification Code 1521 (Single-Family Housing Construction)."

See, Complainant's Exhibits 12-12f.

- vi. Paragraph 20 states: "[t]he construction activities at Hacienda Altamira involve, among others, land disturbance, site preparation, utilities installation, and construction of residential units and recreational areas."

See, Complainant's Exhibits 12-12f.

- vii. Paragraph 21 states: "[e]arth movement activities at the Project involve clearing, grading and excavation on approximately 42.05 acres of land."

See, Complainant's Exhibits 12-12f.

- viii. Paragraph 22 states: "Respondents began clearing activities at Hacienda Altamira on or about January 25, 2007."

See, Complainant's Exhibits 12-12f.

- ix. Paragraph 38 states: "[o]n May 15, 2007, an EPA official conducted a review of the EPA National Storm Water Processing Center database and the EPA files and it revealed that as of such date Respondents had not filed a NOI form as required by the Construction General Permit."

See, Complainant's Exhibits 12-12b.

(B) a copy of the NPDES Water Compliance Inspection Report dated September 27, 2007 regarding the EPA Compliance Evaluation Inspection performed on April 20, 2007 referred to in paragraphs 36 and 37 of the Complaint, including all notes, maps, photographs, statements, correspondence, or other documentation created or obtained in connection with such Inspection and/or Report’;

See, Complainant’s Exhibit 7.

(C) a copy of the NPDES Water Compliance Inspection Report dated September 27, 2007 regarding the EPA Compliance Evaluation Inspection performed on July 17, 2007 referred to in paragraphs 36 and 37 of the Complaint, including all notes, maps, photographs, statements, correspondence, or other documentation created or obtained in connection with such Inspection and/or Report’;

See, Complainant’s Exhibit 7a.

(D) a copy of the Administrative Compliance Order referenced in Paragraph 39 of the Complaint;

See, Complainant’s Exhibits 6–6c.

(E) a copy of the Report of the Reconnaissance Inspection performed on October 18, 2007 referred to in paragraph 41 of the Complaint, including all notes, maps, photographs, statements, correspondence, or other documentation created or obtained in connection with such Inspection;

See, Complainant’s Exhibit 7b.

(F) a copy of all documents regarding closure of the Compliance Order referred to in paragraph 42 of the Complaint and the determination upon which it was based;

See, Complainant’s Exhibits 6–7d.

(G) a copy of the “two Project status reports” referenced in Paragraph 42 of the Complaint;

See, Complainant’s Exhibits 8, 8a.

(H) a copy of the “Respondents NOI application” referenced in Paragraph 43(a) of the Complaint;

See, Complainant’s Exhibit 12.

- (I) *a copy of any and all documentation evidencing that Respondent Desarrollos Altamira I, Inc., (“DAI”) obtained coverage on October 24, 2007, as alleged in Paragraph 43(a) of the Complaint;*

See, Complainant’s Exhibits 12–12b.

- (J) *a copy of any and all documentation evidencing that “Respondents discharged pollutants from the Project into the waters of the United States” during the specified period, as alleged in Paragraph 43(b) of the Complaint;*

See, Complainant’s Exhibits 5, 6, 7–7d, 13–13f.

- (K) *a detailed narrative statement of the penalty Complainant proposes to assess against Respondents, addressing each penalty determination factor listed in Section 309(g)(3) of the Clean Water Act and any considered penalty policy or guidelines; and*

The proposed civil penalty for this case has been determined after taking into account the applicable factors identified at Section 309(g) of the Act, 33 U.S.C. § 1319(g). EPA has taken into account the nature, circumstances, extent and gravity of the violations, and Respondent’s prior history of violations, degree of culpability, economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent’s ability to pay the proposed penalty. The Agency has also taken into account EPA’s General Enforcement policies known as GM-21 and GM-22 (see, Complainant’s Exhibits 4b, 4c), which provide guidance about the development of medium-specific penalties. The particular facts and circumstances of this case were also considered, based on inspections at the Project, among others.

Complainant proposes, subject to receipt and evaluation of further relevant information from Respondents, that a civil penalty in the amount of **\$146,425.49** be assessed for the violations alleged in the Complaint. A penalty memorandum and narrative explanation supporting the penalty figure for the violations cited in the Complaint is included in **Complainant’s Exhibits 4–4c**.

- (L) *a statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. § 3501 et seq. applies to this proceeding, whether there is a current Office of Management and Budget Control number involved herein*

and whether the provisions of Section 3512 of the PRA are applicable in this case.

Complainant believes that the Paperwork Reduction Act (PRA) does not apply to the alleged violations in this proceeding. Sections 301(a) and 308(a) of the Act, 33 U.S.C. §§ 1311(a) and 1318(a), requirements are independently enforceable regardless of the PRA. Section 3512, the public protection provision of the PRA, does not preclude the Agency from seeking enforcement directed at statutory mandates. See 5 C.F.R. § 1320.6(e) (1997). Courts construing the PRA have held that it does not apply to requirements imposed by statute. See, Gossner Foods, Inc. v. EPA, 918 F. Supp. 359 (D. Utah 1996). The violations in this matter, failure to timely apply for coverage under the NPDES permit and illegal discharges of pollutant (storm water) into waters of the United States without NPDES permit coverage are statutorily mandated. Complainant believes there is no applicable NOI Form OMB Number for the Final NPDES General Permit for Storm Water Discharges from Construction Activities. Complainant believes that the provisions of Section 3512 of the PRA do not apply to the alleged violations in this proceeding.

3. Respondent DAI shall also submit the following as part of its Prehearing Exchange:

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

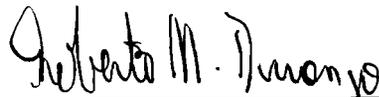
4. Respondent Cidra Excavation, S.E., (“Cidra”) shall also submit the following as part of its Prehearing Exchange:

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

5. Complainant shall submit as part of its Rebuttal Prehearing Exchange the following:

At present, this section of the Prehearing Order does not apply to the Complainant. Complainant, however, takes notice of this section of the Prehearing Order and the May 28, 2010 deadline set by this Honorable Court.

Respectfully submitted, in San Juan, Puerto Rico this 29th day of September
2010.



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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused to be sent the foregoing **Complainant's Initial Prehearing Exchange**, dated April 29, 2010, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Copy by **Overnight** to:

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

Original and copy by **Overnight** to:

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

Copy by **Overnight** to:

Patricio Martínez-Lorenzo
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Date: 4/29/10


Aileen Sanchez
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