

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
DESARROLLOS ALTAMIRA I, INC., and	)	Docket No. CWA-02-2009-3462
CIDRA EXCAVATION, S.E.,	)	
	)	
Respondents	)	

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.1 *et seq.*, (“Rules of Practice”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual and significant decisions issued by the EPA Office of Administrative Law Judges are accessible on the world wide web at: <http://www.epa.gov/oalj>.

Agency policy strongly supports settlement and the procedures regarding documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. If settlement discussions in this proceeding have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. With such thoughts in mind the parties are directed to engage in a settlement conference on or before **April 5, 2010**, and attempt to reach an amicable resolution of this matter. Complainant shall file a status report regarding settlement on or before **April 12, 2010**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **April 30, 2010**, with a copy sent to the undersigned.

Should a Consent Agreement not be finalized on or before the latter date, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules of Practice, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party and on the Presiding Judge:

(A) the names of the expert and other witnesses intended to be called at 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;

(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 for each identified expert witness. The documents and exhibits shall be identified as Complainant's Exhibit ("CX") or Respondent's Exhibit ("RX"), as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 1); and

(C) a statement as to 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 whether translation services are necessary in regard to the testimony of any anticipated witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall submit the following as part of its Initial Prehearing Exchange:<sup>1</sup>

(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;

(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;

(C) a copy of the NPDES Water Compliance Inspection Report dated September 27, 2007 report 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;

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<sup>1</sup> The Answers filed in this matter suggest that the Respondents' corporate names may not be correctly identified in the caption and/or body of the Complaint and that there is an additional or alternative party (Las Quintas 957, Inc.) who may be liable for the violations alleged in the Complaint. If Complainant intends to move to amend the Complaint, it is hereby encouraged to do so in a timely manner and in accordance with the applicable Rules of Practice.

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

(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;

(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;

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

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

(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;

(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;

(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

(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.

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

(A) a narrative statement fully describing what interest or roles each of the two Respondents as well as "Las Quintas 957, Inc." had in the Hacienda Altamira I Residential Development project and/or the real property upon which construction of such Project occurred during the time period from November 25, 2007 through September 27, 2007, along with copies of all documents evidencing such various interests or roles;

(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 that the proposed penalty of \$146,425.49 “has no basis in law or fact;”

(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);”

(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 claim made on page 8 of its Answer that “the proposed penalty assessment fails to consider that respondents presented a timely application to EPA, that EPA acknowledged it as complete, and that EPA failed to review within 30 days;”

(E) 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 8 through 11 (paragraphs 1-20 thereon);

(F) if Respondent DAI 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; and

(G) if Respondent DAI 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;

4. Respondent Cidra Excavation, S.E., (“Cidra”) shall also submit 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 forth in Paragraph 14 of the Complaint;

(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 that the proposed penalty of \$146,425.49 “has no basis in law or fact;”

(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);”

(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);

(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; and

(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.

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

(A) a statement and/or any documents in response to Respondents’ Prehearing Exchanges as to provisions 3(A) through 3(F), and 4(A) through 4(F), above;

(B) a statement admitting, denying, or indicating it lacks sufficient information to either admit or deny, each and every allegation set forth in paragraphs 1-20 of the Affirmative Defenses sections (pps. 8-11) of the Answer filed by Respondent DAI, providing a detailed narrative statement setting forth the factual and legal basis for each such allegation the truth of which Complainant denies, along with a copy of any and all documentation supporting such denial; and

(C) a statement admitting, denying, or indicating it lacks sufficient information to either admit or deny, each and every allegation set forth in paragraphs 1-18 of the Affirmative Defenses sections (pps. 8-11) of the Answer filed by Respondent Cidra, providing a detailed narrative statement setting forth the factual and legal basis for each such allegation the truth of which Complainant denies, along with a copy of any and all documentation supporting such denial

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

<b>April 30, 2010</b>	-	Complainant's Initial Prehearing Exchange
<b>May 14, 2010</b>	-	Respondents’ Prehearing Exchange, including any direct and/or rebuttal evidence

May 28, 2010

- Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. Therefore, each party should thoughtfully prepare its prehearing exchange. Any supplements to prehearing exchanges shall be filed with an accompanying motion to supplement the prehearing exchange.

The Complaint herein gave Respondents notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In each of their Answers to the Complaint, Respondents requested such a hearing. In this regard, Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 556(d) provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondents each have the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of Complainant's witnesses. Respondents are entitled to elect any or all three means to pursue their defenses. If either Respondent intend to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **Respondents are hereby notified that their failure to either comply with the prehearing exchange requirements set forth herein, or to state that they are electing only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against them.** Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.

**THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.**

The parties are advised **NOT** to include, attach or refer to any terms of settlement offers or agreements in any documents submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted to the Presiding Judge except those that are fully executed and filed with the Regional Hearing Clerk.

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, shall be addressed as follows:

The-Honorable Susan L. Biro  
Chief Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express, or another delivery service that x-rays packages as part of its routine security procedures, may be delivered directly to the Office of Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.

Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, that party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900L, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests, and will send the copies by facsimile, or by e-mail at the office's discretion, but does not guarantee the party's receipt of expedited courtesy copies.

Prior to filing any motion, the moving party is directed to contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other party or parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions which do not state that the other party has no objection to the relief sought must be submitted in sufficient time to permit the filing of a response by that party and the issuance of a ruling on the motion, before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a fifteen-day response period for motions with an additional five days added thereto if the pleading is served by mail. Motions not filed in a timely manner may not be considered.

Furthermore, upon the filing of a motion, a response to a motion, or a reply to a motion, a party may submit a written request for an oral argument on the motion, pursuant to 40 C.F.R. § 22.16(d). Included in the request for oral argument shall be a statement as to the proposed

appropriate location(s) for the argument to take place. The Office of Administrative Law Judges recently acquired access to state of the art videoconferencing capabilities, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary resources in connection with such arguments. A request for oral argument may be granted, at the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), it shall be filed **within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**



Susan L. Biro  
Chief Administrative Law Judge

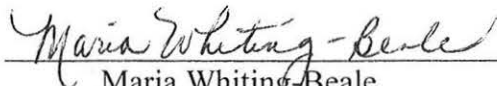
Dated: March 25, 2010  
Washington, D.C.



In the Matter of Desarrollos Altamira Inc. & Cidra Excavation, Inc., S.E., Respondents  
Docket No. CWA-02-2009-3462

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated March 25, 2010, was sent this day in the following manner to the addressees listed below:

  
\_\_\_\_\_  
Maria Whiting-Beale  
Staff Assistant

Dated: March 25, 2010

Original And One Copy To:

Karen Maples  
Regional Hearing Clerk  
U.S. EPA  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866

Copy By Regular Mail To:

Roberto M. Durango, Esquire  
Assistant Regional Counsel  
U.S. EPA  
Centro Europa Building, Suite 417  
1492 Ponce de Leon Avenue  
San Juan, PR 00907-4127

Jose A. Hernandez Mayoral, Esquire  
Bufete Hernandez Mayoral CSP  
206 Tetuan Street, Suite 702  
San Juan, PR 00901

Patricio Martinez-Lorenzo, Esquire  
Martinez-Lorenzo Law Offices  
Union Plaza Building, Suite 1200  
416 Ponce de Leon Avenue  
San Juan, PR 00918-3424