

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of:

Total Petroleum Puerto Rico Corp.

Respondent

Proceeding under Section 3008 of the Solid
Waste Disposal Act, as amended, 42 U.S.C. §
6928

**COMPLAINT, COMPLIANCE ORDER,
AND NOTICE OF OPPORTUNITY FOR
HEARING**

Docket No. RCRA-02-2018-7101

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

By Prehearing Scheduling Order of Hon. Susan L. Biro, Chief Administrative Law Judge, dated November 2, 2018, and amended on April 24, 2019, Complainant, the U.S. Environmental Protection Agency, respectfully submits the following Initial Pre-Hearing Exchange:

- I. Each party shall file with the Headquarters Hearing Clerk, serve on the opposing party, and serve on the undersigned:
 - (A) a list of names of the witnesses intended to be called at the hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness; or a statement that no witnesses will be called:

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

Zolymer Luna
Response & Remediation Branch
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
48 Road 165, Km. 1.2
Guaynabo, PR 00968-8069

Ms. Zolymar Luna occupied a position as environmental engineer in the Resource Conservation and Recovery Act (“RCRA”) program at EPA Caribbean Environmental Protection Division at all times pertinent to the Complaint. See Ms. Zolymar Luna’s resume, **Complainant’s Exhibit 2**.

Ms. Zolymar Luna will testify about the Compliance Evaluation Inspection of the St. Thomas Terminal conducted on August 20, 2015, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. Ms. Luna will also testify about the applicable regulations, the RCRA requirements and how they apply to Respondent’s facilities. She will also testify about the: factual and legal aspects of this case, the violations of RCRA and the pertinent regulations; the calculation of the assessed penalty included in the complaint (which she performed) and the reasoning behind the calculation of said assessed penalty and the appropriateness of the penalty.

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

Rosana Caballer Cruz
Response & Remediation Branch
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
48 Road 165, Km. 1.2
Guaynabo, PR 00968-8069

Ms. Rosana Caballer is an environmental engineer in the RCRA program, Response and Remediation Branch, at EPA Caribbean Environmental Protection Division. See Ms. Rosanna Caballer’s resume, **Complainant’s Exhibit 3**.

Ms. Caballer will testify about the Compliance Evaluation Inspection of the Guaynabo and Carolina terminals, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. Ms. Rosana Caballer will also testify about the applicable regulations, the RCRA requirements and how they

apply to Respondent's facilities. She will testify about the factual and legal aspects of this case, the violations of RCRA and the pertinent regulations.

Jesse Avilés Silva
U.S. Environmental Protection Agency, Region 8
Remedial Project Manager
1595 Wynkoop St,
Denver, CO 80202

At the time of the inspections relevant to the Complaint, Mr. Jesse Avilés occupied a position as environmental engineer in the Resource Conservation and Recovery Act (RCRA) program at EPA Caribbean Environmental Protection Division at all times pertinent to the Complaint. Mr. Avilés will testify about the factual aspects of this case.

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.

Complainant reserves the right to call an expert witness to testify to the issue of ability to pay a civil penalty should subsequent proceedings raise that issue.

- (B) Copies of all documents and exhibits intended to be introduced into evidence at the hearing. Included among the documents produced shall be a curriculum vitae or resume for each identified expert witness. The documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals:

Complainant's Exhibit 1 – Copies of Certified Mail Receipt and Return to Sender Notification.

Complainant's Exhibit 2 – Ms. Zolyamar Luna's resume.

Complainant's Exhibit 3 – Ms. Rosana Caballer's resume.

Complainant's Exhibit 4 – RCRA Compliance Evaluation Inspection Report, date March 29, 2016.

Complainant's Exhibit 5 – RCRA Compliance Evaluation Inspection Report, date February 21, 2017.

Complainant's Exhibit 6 – RCRA Compliance Evaluation Inspection Report, date April 13, 2017.

Complainant's Exhibit 7 – Administrative Complaint, Docket No. RCRA-02-2018- 7101

Complainant's Exhibit 8 – Complainant's Penalty Calculation.

Complainant's Exhibit 9 - Respondent's Response to request of documents made by EPA on August 28, 2015, submitted by Total on October 29, 2015 (without attachments).

Complainant's Exhibit 10 – “contact water” off-site transport records from 2016 (provided by Respondent during the April 26, 2016 Follow-up meeting).

- (C) a statement explaining its view as to the place for the hearing and the estimated amount of time needed to present its direct case. Also, state whether translation services are necessary in regard to the testimony of any witness, and if so, state the language to be translated:

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent conducts business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional office is located, or in Washington, D.C. Complainant requests that the hearing be held in San Juan, where the relevant Environmental Protection Agency Regional office is located. This location is convenient for both parties and witnesses, Respondent's facilities are located in the nearby islands of St. Thomas and in the municipalities of Carolina and Guaynabo, Puerto Rico. We foresee no problem for Respondent's witnesses to attend the hearing. The Complainant can assist by providing the Regional Hearing Clerk with information on facilities which may be available for purposes of holding the hearing.

Complainant estimates it will need one day and a half to present its direct case. Translation services will not be necessary.

2. Complainant also shall submit the following:

- (A) a copy of any documents in support of the factual allegations in the Complaint which were not admitted by Respondent:

Please see **Complainant's Exhibits 4 to 10.**

- (B) A narrative statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty. A penalty worksheet with supporting narrative statement may be submitted:

The proposed civil penalty for Total has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." To develop the proposed penalty in this Complaint, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy. Complainant intends to have Ms. Zolymar Luna and Ms. Rosana Caballer testify to the calculation of the penalty at hearing.

The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that the Respondent be assessed a civil penalty for the violations alleged in the Complaint. A penalty calculation worksheet and narrative explanation to support the penalty figure for the violation cited in the Complaint is included in **Complainant's Exhibit 8.**

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

- (A) documentation showing that service of the Complaint was completed in accordance with Section 22.5(b)(1) of the Rules of Practice, 40 C.F.R. § 22.5(b)(1):

Pursuant to Section 22.5(b)(1), Complainant mailed by certified service with return receipt requested a copy of the Complaint on a representative authorized to receive service on Respondent's behalf on April 30, 2018. However, service was finally made personally on June 19, 2018. As explained by Respondent on its Answer to Administrative Complaint, Compliance Order, and Notice of Opportunity for Hearing: "[...] the Complaint was mistakenly returned to sender (i.e. EPA) by the U.S. Postal Service on June 15th, 2018 [...] and the Complaint was obtained by hand on June 19th, 2018[...]"

Please see **Complainant's Exhibit 1**.

(B) a brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer:

Allegations in paragraphs 1-98 are either admitted by Respondent or "denied." The allegations characterized as "denied" by Respondent are intended to be supported by the general statement that Respondent does not have enough information, either because (as stated by Respondent): (1) Total's personnel that provided the information at the time of inspections no longer works for Total; and/or (2) Total did not receive a copy of an Inspection Report from EPA at the time. (See Respondent's denial to allegations in paragraphs 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 46, 47, 59, 72, 76, 77, 78, 80, 81 of the Answer to Administrative Complaint, Compliance Order, and Notice of Opportunity for Hearing.) **Complainant's Attachments 4, 5, 6, 7, 8, 9, and 10**, contain the factual and legal bases for the allegations not admitted in Respondent's answers.

(C) all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied on by Complainant in calculating a proposed penalty;

RCRA Civil Penalty Policy (June 2003)

<https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf>

Also please see **Complainant's Attachments 4, 5, 6, 8, 9 and 10**.

(D) a copy, or a statement of the internet address (URL), of any EPA guidance documents and/or policies, including any updates or revisions to such guidance and/or policies, and any preambles to regulations that Complainant has relied upon with regard to the allegations set forth in the Complaint:

The Complaint, Compliance Order, and Notice of Opportunity for Hearing addresses violations to the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation

and Recovery Act, and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. §§ 6901-6991 (together hereafter the "Act" or "RCRA"), for injunctive relief and the assessment of civil penalties. Complainant's findings of violation rely on the regulations governing the handling and management of hazardous waste at 40 C.F.R. Parts 260-273 and 279.

(E) a detailed explanation of the factors considered and methodology utilized in calculating the amount of the proposed penalty, in accordance with the penalty factors and policies referenced in the proposed civil penalty section of the Complaint.

See RCRA Civil Penalty Policy (June 2003)

<https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf>

Also please see **Complainant's Exhibit 8**.

Respectfully submitted. In Guaynabo, Puerto Rico, June 14th, 2019.



Carolina Jordan-García
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
48 Road 165, Km. 1.2
Guaynabo, PR 00968-8069

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CERTIFICATE OF SERVICE

I certify that on 6/12/2019 I caused to be sent the foregoing **Complainant's Initial Prehearing Exchange**, dated and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and One Copy by UPS to:
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by **Certified Mail, Return Receipt Requested** to:
Attorney for Respondent:
Rafael Rivera-Yankovich, Esq.
Toro, Colón and Mullet, PSC
P.O. Box 195383
San Juan, PR 00919-5383

Copy by **Overnight Mail** to:
The **Honorable Susan L. Biro**
Chief, Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460