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.	)	

ORDER ON RESPONDENT CIDRA EXCAVATION, S.E.'S MOTION FOR PARTIAL ACCELERATED DECISION OR DISMISSAL

I. Procedural Background

On October 1, 2009, this proceeding was initiated by the United States Environmental Protection Agency, Region 2, Caribbean Environmental Protection Division ("Complainant" or "EPA") filing a Complaint against Desarrollos Altamira I, Inc.[1] ("Respondent DAI"), and Cidra Excavation, S.E. ("Respondent Cidra" or "Cidra") pursuant to Section 309(g)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2). The Complaint sets forth in two "Claims"[2] that Respondents violated Section 301(a) of the CWA (33 U.S.C. § 1311(a)) by: (a) failing to apply for a National Pollutant Discharge Elimination System ("NPDES") permit (Count 1); and (b) unlawfully discharging pollutants into waters of the United States without a NPDES permit for 245 days beginning January 25, 2007 and continuing until September 27, 2007 (Count 2). These alleged violations arose in connection with Respondent's activities at the Hacienda Altamira I Residential Development construction site (the "Project" or "site") in Canóvanas, Puerto Rico.

[1] The name of Respondent DAI has been variously spelled with a single or double letter "r" in the filings in this case. The spelling herein will match the Complaint and Respondent DAI's Answer, identifying Respondent DAI as "Desa*rr*ollos Altamira I, Inc."

[2] While paragraph 43 of the Complaint identifies the alleged violations of Section 301(a) as "Claim 1" and "Claim 2," this Order refers to these allegations as "Count 1" and "Count 2."

Each Respondent filed its respective Answer to the Complaint on December 9, 2009, denying the allegations of violation and requesting a hearing or dismissal of the Complaint. Thereafter, a Prehearing Order was issued, directing the parties to submit prehearing exchanges. Consistent therewith, Complainant submitted its Initial Prehearing Exchange ("PHE") on April 30, 2010, Respondent Cidra submitted its PHE on May 18, 2010, and Complainant submitted its Rebuttal PHE on May 28, 2010.

On July 6, 2010, Respondent Cidra submitted a Motion for Partial Accelerated Decision or Dismissal ("Motion" or "Mot.") requesting entry of an order dismissing Count 1, partially dismissing Count 2 by concluding that discharges occurred on 26 days and not a 9-month period as alleged in the Complaint, and determining that the proposed penalty is arbitrary and capricious.

Complainant filed a Response to Respondent Cidra's Motion ("Response" or "Resp.") on August 12, 2010, arguing that the Motion is untimely, fails to identify and meet the proper standard for a motion to dismiss, usurps the ALJ's role as evidentiary gatekeeper, and misconstrues the factors relevant to a penalty calculation. Resp. at 1-2. The Response also addresses Respondent Cidra's arguments as to the validity of Count 1 and the scope of Count 2.

On August 26, 2010, Cidra filed a Reply to Complainant's Response, in which Cidra clarified the relief it seeks, identified the relevant standards for adjudicating motions for accelerated decision and motions to dismiss, and expanded on its legal arguments.

II. Timeliness of Motion

EPA in its Response asserts that Cidra's Motion is untimely, having been filed after the due date for dispositive motions set forth in the Prehearing Order issued in this matter on March 25, 2010. The Motion was not accompanied by a motion for leave to file out of time, and did not state that Respondent had contacted EPA to determine whether it had any objection to the Motion, as required by the Prehearing Order. Resp. n. 1.

The Prehearing Order required all dispositive motions to be filed within 30 days after the filing of Complainant's Rebuttal Prehearing Exchange, which in this case occurred on May 28, 2010. Thus, such motions were due on or before June 27, 2010. The Certificate of Service accompanying the Motion indicates that it was *served* by certified mail on June 28, 2010, and the official date-stamp indicates that it was filed with the Regional Hearing Clerk in New York City on June 30, 2010. Therefore, its filing and service were both untimely. Further, it does not appear that Cidra complied with the requirement set forth in the Prehearing Order regarding contacting opposing parties prior to filing motions. Nevertheless, this Tribunal finds that such minor irregularities do not prevent consideration of the Motion on its merits as Complainant has not alleged any prejudice as a result thereof.

III. Statutory and Regulatory Background, and the General Permit

The statutory authority to issue the Complaint, seeking assessment of penalties, is Section 309(g) of the CWA, which provides in pertinent part:

> Whenever on the basis of any information available --
> (A) the Administrator finds that any person has violated section 1311 . . . of this title [Section 301 of the CWA], or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title [Section 402 of the CWA], by the Administrator or by a State . . . .
>
> * * *
>
> the Administrator . . . may . . . assess a . . . class II civil penalty under this subsection.

33 U.S.C. § 1319(g)(1).

Respondents are charged in the Complaint with violating Section 301(a) of the CWA which provides in pertinent part as follows:

> Except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 [Section 402], and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a). Section 402(a) of the CWA in turn, provides in pertinent part:

> (1) . . . the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311 [Section 301], 1312, 1316, 1317, 1318, and 1343 of this title, or (B) . . . such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.
>
> (2) The Administrator shall prescribe such conditions for such permits . . . .

33 U.S.C. § 1342(a). Section 402(p) of the CWA governs industrial stormwater discharges and specifically requires a permit for "[a] discharge associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). Paragraph 402(p)(4)(A) authorizes EPA to issue regulations and a regulatory program for stormwater discharges that are listed in Paragraph 402(p)(2)(B). 33 U.S.C. § 1342(p)(4)(A).

In order to implement Section 402 of the CWA, EPA promulgated regulations at 40 C.F.R. § 122.21 that require "[a]ny person who discharges or proposes to discharge pollutants . . . except persons covered by general permits under § 122.28 . . . [to] submit a complete

application" for an individual NPDES permit.[3] 40 C.F.R. § 122.21(a). Section 122.26 governs stormwater discharges and requires the operator of a facility or industrial activity to obtain a NPDES permit. 40 C.F.R. § 122.26(b)(14). Facilities considered to be engaged in "industrial activity" for purposes of paragraph (b)(14) include any "[c]onstruction activity including grading and excavation" that disturbs an area greater than five acres. 40 C.F.R. § 122.26(b)(14)(x).

The relevant EPA NPDES General Permit for Discharges from Large and Small Construction Activities ("Construction General Permit" or "CGP") was published in the Federal Register on July 1, 2003 and expired on July 1, 2008. 68 Fed. Reg. 39,087 (July 1, 2003). To obtain coverage under the CGP, new projects are required to submit a Notice of Intent ("NOI") before "commencement of construction activities." *Id.* Section II(C)(3)(i). Complainant's Prehearing Exchange ("C's PHE") Exhibit 9.

IV. Count 1

A. Standard for Motion to Dismiss

Under the Rules of Practice, Rule 22.20 provides that the Presiding Officer may, upon motion of a respondent, "dismiss a proceeding without further hearing . . . on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant." 40 C.F.R. § 22.20(a). The Environmental Appeals Board ("EAB") has elaborated:

> In determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant. This is the standard used under the Federal Rules of Civil Procedure. *See Bank v. Pitt*, 928 F.2d 1108, 1109 (11th Cir. 1991) ("In the context of a motion to dismiss, we accept as true facts alleged in the complaint, and construe them in a light favorable to the plaintiffs."). Although those rules are not applicable here, we have found them to be instructive in analyzing motions to dismiss. . . .

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[3] "General permits," issued by EPA or authorized states, establish identical permit conditions for broad categories of discharges by similarly situated facilities. 40 C.F.R. § 122.28(a)(2)(ii). Once a general permit is issued, any potential discharger who desires coverage under the general permit can submit a "Notice of Intent" to the permitting authority requesting discharge authorization including therein "basic information " on the construction project and "a certification that a Stormwater Pollution Prevention Plan has been prepared for the site describing the best management practices that the discharger will implement to control pollutants in the discharges in accordance with the requirement of the CWA." 40 C.F.R. § 122.28(b)(2)(I); 68 Fed. Reg. at 39,089. The permitting authority can then grant coverage under the general permit or require the facility to apply for an "individual permit" tailored to the site conditions. 40 C.F.R. § 122.28(b).

In re Commercial Cartage Co., Inc., 5 E.A.D. 112, 117, n.9 (EAB 1994).

Accordingly, to prevail on its request for dismissal of Count 1, Respondent must show that the EPA's allegations, if true, do not state a *prima facie* case or otherwise do not show a right to relief.

B. Allegations in the Complaint

The Complaint alleges that Respondents are both "persons" under the CWA, Compl. ¶ 15, that have discharged stormwater containing "pollutants" as defined under the CWA, Compl. ¶ 25, from a "point source," Compl. ¶ 24, into waters of the United States, Compl. ¶ 26. The Complaint alleges further that the Project site consisted of 42 acres of land, that Respondents did not submit an individual NPDES permit application 90 days before construction activities commenced as required by 40 C.F.R. § 122.21, and that they did not file a "Notice of Intent" to discharge form ("NOI") prior to commencement of construction activities as required by Part 2 of the General Construction Permit. Compl. ¶¶ 21, 37, 38. These allegations are supported by specific factual allegations in the Complaint. Cidra admits the allegation in the Complaint that Respondents "began clearing activities at [the site] on or about January 25, 2007." Compl. ¶ 22, Ans. ¶ 12. The Complaint alleges in Count 1 that: "Respondents are liable for the violations of Section 301(a)" of the CWA "as specified below: . . . 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 [and] [t]he construction project started on January 25, 2007 . . . and DAI obtained [permit] coverage on October 24, 2007, a total of 279 days late." Compl. ¶ 43.

C. Arguments of the Parties

Cidra requests dismissal of Count 1 because the CWA does not authorize assessment of penalties for failure to submit a timely permit application. In support, Cidra cites to *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005), holding that unless there is a discharge of a pollutant, there is no violation and therefore point sources are not statutorily obligated to obtain an NPDES permit. Mot. at 7-8. In further support of its argument, Cidra cites to *Service Oil, Inc. v. EPA*, 590 F.3d 545 (8th Cir. 2009), in which the Eighth Circuit held that EPA could not seek administrative penalties for a violation of Section 308 of the CWA where the respondent had failed to apply for a NPDES permit 90 days before construction began, because Section 308 of the CWA applies only to "point sources" and respondent's facility could not be a "point source" until *after* construction activities commence. *Service Oil*, 590 F.3d at 551.

In its Response, Complainant points out that 40 C.F.R. § 122.21, which was promulgated pursuant to Section 402(p)(4)(A) of the CWA, establishes a duty to apply for an NPDES permit on anyone who discharges or proposes to discharge pollutants. The Complaint alleges that Cidra

actually discharged pollutants into waters of the United States, and so the Project became a point source on February 20, 2007, the date of a storm event. Therefore, Complainant argues, Cidra breached its duty to apply for an NPDES permit as required by Section 122.21, "which in turn is a violation of '*a permit condition or limitation implementing any of such sections in a permit issued under section [402 of the CWA]*' " which constitutes a violation under Section 309(g)(1)(A). Resp. at 4-6. Complainant also cites 40 C.F.R. § 122.26(c), requiring dischargers of stormwater to apply for a permit. Complainant explains that Cidra submitted its Notice of Intent to discharge late, and therefore subjected itself to the General Permit, and is liable for failure to obtain NPDES Permit coverage prior to the date of its first discharge. In support, Complainant cites to *San Francisco Baykeeper v. Tidewater Sand & Gravel Co.*, 46 ERC 1780, 1997 U.S. Dist. LEXIS 22602, *24-25 (N.D. Cal. 1997). Finally, Complainant argues that under Cidra's reasoning, a discharger of pollutants from construction activities is never required to apply for NPDES permit coverage.

In Reply, Respondent Cidra argues that there is no viable legal theory to support penalties for failure to obtain an NPDES permit. Referring to Complainant's emphasis on the permitting system, Cidra points out the statements in *Service Oil* that the issue "is one of remedial power, not regulation validity," that administrative monetary penalties are to be imposed for violating the core prohibition of discharging without a permit and not for violating other regulatory requirements, and that "EPA cannot assess monetary penalties under Section 1319 (g) [309(g) of the CWA] for a violation of Section 1342 [402 of the CWA] until a permit issues." 590 F.3d at 551.

C. Discussion

The Complaint charges Respondents with violations of Section 301(a) of the CWA, the elements of which are: (1) a discharge (2) of a pollutant (3) by any person, (4) from a point source (5) to navigable waters (6) that is not in compliance with, *inter alia,* Section 402 of the CWA (granting the EPA Administrator the authority to issue permits for the discharge of pollutants "notwithstanding" the prohibition on such discharges set forth in Section 301). *See*, CWA §§ 301, 402, 502(12). Paragraphs 15, 24, 25, 26, 37 and 38 of the Complaint state sufficient factual allegations in support of each of these elements, including that Respondents were not covered by a permit under Section 402 until October 24, 2007, months after construction commenced. Compl. ¶¶ 37, 38, 43. The Complaint further alleges that prior to that date, there were discharges of uncontrolled stormwater runoff from the Project into an unnamed creek, a tributary of the Rio Canóvanas, which are waters of the United States. Comp. ¶¶ 26, 37.d. Therefore these discharges were not in compliance with Section 402 of the CWA. As such, the Complaint on its face states a claim under Section 301(a).

Paragraph 43 of the Complaint states "[*a*]*s set forth above*, Respondents are liable for the violations of *Section 301(a)* as specified below" (emphasis added). The paragraphs "above" include the factual allegations supporting each element of a violation of Section 301(a). Paragraph 43 then "specifies" for Count 1, with the subheading "Failure to apply for coverage

under the NPDES permit," that Respondents did not submit an individual permit application or NOI form, and that the construction project started January 25, 2007, but was not covered by a permit until October 24, 2007. That paragraph focuses on the fourth element of a violation of Section 301, that is, non-compliance with a Section 402 permit, that is, the CGP, or failure to apply for an individual permit under 40 C.F.R. § 122.21. The focus in Paragraph 43 on the fourth element does not negate the existence of the factual allegations supporting the other three elements of a violation of Section 301, and does not render the allegations of the Complaint as a whole insufficient to state a claim under Count 1.

The allegations in the Complaint do not suffer any deficiency that the *Service Oil* and *Waterkeeper Alliance* cases would render fatal. In *Service Oil*, EPA relied on Section 308(a)(A) of the CWA as authority for seeking penalties for the period including the 90 days *prior to* the commencement of construction, for violations of 40 C.F.R. §§ 122.21(c)(1) and 122.26(c). 590 F.3d at 547. In the present case, EPA seeks a penalty in Count 1 only for the period of time *after* construction began at the site when the Circuit Court indicated a site would be a "point source." In *Waterkeeper Alliance,* the Second Circuit held that there is no violation of the CWA unless there is a discharge of a pollutant. 399 F.3d at 504. Here, the Complaint alleges in Paragraphs 25 and 37 that there *was* a discharge of pollutants, specifically stormwater runoff from a 5+ acre construction site, and that Respondents failed to obtain coverage under a permit until long after such construction activities commenced. The Complaint sufficiently alleges the presence of a point source and the discharge of a pollutant to subject Respondents to Section 301 and the permit requirements of Section 402.

While Complainant's Response generally argues that the Complaint sets forth the elements to establish a *prima facie* case "under Sections 301 and 402" (Resp. at 3), with respect to Count 1 Complainant appears to rely on the authority to assess penalties under the provision in Section 309(g) for "violat[ing] any permit condition or limitation," which includes the duty to apply for an NPDES permit under 40 C.F.R. § 122.21, a requirement promulgated under Section 402(p)(4)(A). Resp. at pp. 4-5. As to a theory that the failure to apply for coverage under the CGP may constitute "violat[ing] any permit condition," that is, a violation of the CGP, the allegations in Paragraphs 31 through 33 of the Complaint concern issuance of the CGP and its requirement to file a NOI prior to commencement of construction activities, and Paragraph 37(a) and 38 allege that Respondents had not filed an NOI as required by the CGP as of several months after construction commenced. However, this theory appears to be contrary to the Circuit Court's statement in *Service Oil* that "EPA cannot assess monetary penalties under Section 1319 (g) [309(g) of the CWA] for a violation of Section 1342 [402 of the CWA] until a permit issues." (590 F.3d at 551), even though in that case, as in the present case, an authorized entity, in the case EPA, had issued a comprehensive general permit for discharge of stormwater from construction activities. 590 F.3d 547. However, it is not necessary to reach an issue on this legal theory, and dismissal is not warranted where, under the statutory authority cited in the Complaint, Complainant has adequately stated a claim for relief.

Accordingly, Respondent Cidra has not demonstrated that Complainant fails to state a claim in Count 1, and the Motion as to Count 1 is denied.

V. Count 2

The Complaint alleges in Count 2 that Respondents "discharged pollutants from the Project into waters of the United States without NPDES permit coverage, in violation of Section 301(a) of the Act." Compl. ¶ 43. The Complaint explicitly identifies a "period of violations" for this Count beginning "January 25, 2007 (date when discharges began) to September 27, 2007 (date when the [Compliance] Order [CWA 02-2007-3070] was issued), a total of 245 days of violation." *Id.* The penalty proposed in the Complaint is calculated as a single penalty for both counts, $146,425.49, based upon a memorandum presented in Complainant's Prehearing Exchange as Exhibit 4. Included in that figure is a gravity component of $93,424 for both Counts. C's PHE Exhibit 4 p. 7.

Complainant later revised its penalty calculation as presented in its Rebuttal PHE Exhibit 26, entitled "Revised Calculation of Proposed Penalty" ("Revised Calculation"). The revision was prepared "in light of the *Service Oil Inc.*[*v. EPA*, 590 F.3d 545 (8th Cir. 2009)] and *In the Matter of Municipality of Rio Grande* [EPA Docket No. CWA-02-2009-3458 (ALJ, Jan. 13, 2010) (Order on Complainant's Renewed Motion for Remedies and Motion for Accelerated Decision)] decisions." Rebuttal PHE Ex. 26 at 1. The revised penalty is calculated separately for each count, but the total penalty for both counts, as revised, is $134,749. In the Revised Calculation, the gravity component of the penalty for Count 2 is $65,000, representing 26 days of violation multiplied by $2,500 per day. *Id.* p. 11.

A. Standard for Accelerated Decision

The applicable regulations provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

A motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and thus federal court rulings on motions under FRCP 56 provide guidance in ruling on a motion for accelerated decision. *See Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148. The initial determination is whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986) (quoting FRCP 56(c)). In reviewing the record, the facts must be construed in the light most favorable to the non-moving party. *See Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526, 528 (10th Cir. 1994). In an administrative proceeding, the Prehearing Exchanges offered by each party, along with the pleadings and attachments to the motion, constitute the "record" for purposes of deciding a motion for accelerated decision.

For respondent to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it.'" *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *BWX Techologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000)). "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers Corp.*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.*; *see also O'Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989). When ruling on a motion for summary judgment it is the court's function to ascertain whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985).

When the movant has met its burden, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." *Id.*; FRCP 56(e). Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216, *reh'g denied*, 762 F.2d 1004 (5th Cir. 1985); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). The non-movant cannot demonstrate a fact issue by resting on the mere allegations of his pleadings. *Galindo*, 754 F.2d at 1216.

Even where it is technically proper to grant a motion for summary judgment, "sound judicial policy and proper exercise of judicial discretion" may permit denial of the motion and full development of the case at hearing. *Roberts v. Browning,* 610 F2d. 528, 536 (8th Cir. 1979).

B. Arguments of the Parties

Cidra asserts that it is undisputed that there were no discharges of a pollutant on any day between January 25, 2007, and September 27, 2007 other than the 26 days specifically identified in the Revised Calculation. Reply at 5-6; *see also* Rebuttal PHE Ex. 26 at 4, 8. Therefore, Cidra seeks partial accelerated decision as to the remaining 219 days not listed in the Revised Calculation, Complainant's Exhibit 26 on page 8, because Complainant has "acknowledged" that the other 219 "alleged discharges . . . did not occur" and has not adduced any evidence that establishes illegal discharges on the remaining 219 days. Mot. at 9.

In its Response, EPA points out that pleadings in the Complaint are not evidence of alleged facts, and that an exhibit is not evidence unless identified and introduced in evidence as an exhibit at a hearing. EPA argues that Count 2 of the Complaint adequately informs Cidra that "Complainant seeks a penalty for violations occurring in the *period* between January 25, and September 27, 2007, where its construction activities could result in the illegal discharges of pollutants into waters of the United States without NPDES coverage." Resp. at 8. EPA asserts that the Motion "inadequately attempts to usurp" this Tribunal's authority to rule on evidentiary matters that have not been presented at the hearing.

In its Reply, Cidra argues that EPA has not established that a material issue of fact exists regarding the number of days of violation, and has not pointed to portions of the record that establish that discharges occurred on a total of 245 rather than 26 days. Reply at 6-7. Cidra points out that the number of violations and number of days of violation is a material fact for determining penalties under the CWA, citing *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F2d 1128 (11th 1990). *Id.* at 7.

C. Discussion

The first question to address is whether the number of violations or days of violation is a "material fact." As the Supreme Court has stated, "materiality is . . . a criterion for categorizing factual disputes in their relation to the legal elements of the claim," and a fact is "material" if it "might affect the outcome of the suit under the governing law" and is not "irrelevant or unnecessary." *Anderson v. Liberty Lobby*, 477 U.S. at 248. The governing law, Section 301 of the CWA, providing that "the discharge of any pollutant . . . shall be unlawful," indicates that each separate *discharge* is a unit of violation. *See, e.g, Borden Ranch P'ship v. U. S. Army Corps of Engineers,* 261 F.3d 810, 819 (9th Cir. 2001) (each pass by a "deep ripper," discharging fill material into wetlands, is a separate violation of the CWA), *aff'd*, 537 U.S. 99 (2002) (per curiam); *cf., Tyson Foods, Inc.*, 897 F.2d at 1139 and n. 22 (under Section 309(d) of the CWA, each distinct violation on a particular day is subject to the daily maximum penalty limit).

The Complaint does not specify separate discharges. Each count of violation alleges multiple days of violation, and Count 2 refers to a "period of violations" and "245 days of violation" but does not assert each day of violation as a separate violation, and does not assert any particular number of discharges. The Revised Calculation states that Respondents "discharged 26 times without a permit" (C's PHE Exhibit 26 at 7) and refers to the "number of events that caused discharges" (*Id.* at 12), but considers these statements in assessing the penalty factor of "circumstances for Count 2" for "the violation" or "days of violation" rather than as separate violations of Section 301. *Id.* at 3, 5, 11. The Revised Calculation was prepared by Jose Rivera, Regional Storm Water Specialist, Caribbean Environmental Protection Division, "to revise the proposed penalty calculation" which was included in the Complaint. C's Ex. 26 at 1. These statements in the Revised Calculation are not clear and unambiguous assertions that the 26 events are separate violations under the CWA and are therefore not binding judicial admissions.

MacDonald v. General Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997) ("in order to qualify as admissions, an attorney's statements must be deliberate, clear and unambiguous."). Furthermore, these statements are not binding as they were not made by in a motion or brief, but in an unsworn memorandum which is merely a proposed exhibit. *See, Medcom Holding Co. v. Baxter Travenol Labs.*, 106 F.3d 1388, 1403-4, (7th Cir. 1997) (financial statements containing information adverse to defense were not judicial admissions).

Complainant has not amended the Complaint with respect to the number of violations or number of discharges in violation of Section 301. In its Initial Prehearing Exchange, EPA included a reference to Exhibits 5, 6, 7-7d, and 13-13f in response to the requirement in the Prehearing Order to "a copy of any and all documentation evidencing that 'Respondents discharged pollutants from the Project into waters of the United States' during the specified period, as alleged in Paragraph 43(b) [Count 2] of the Complaint," and expanded the list of relevant exhibits to include Exhibits 18-21, 23-26, 26a, and 27, in its Rebuttal PHE. C's PHE at 11; C's Rebuttal PHE at 11. The exhibits Complainant references include site inspection reports, along with photographs, reports prepared by Respondent, rainfall data, and maps of the site and surrounding areas. Simply by citing 26 specific dates of rainfall in its Revised Penalty Calculation, EPA does not alter the factual allegations pled in the Complaint. Therefore, the 26 instances referenced in the Revised Calculation are deemed to refer to the days of violation rather than separate violations under the CWA.

Indeed, the statute provides that the number of days of violation is considered in calculating a penalty under Section 309(g)(2)(B), as follows: "The amount of a Class II civil penalty ... may not exceed $10,000 per day for each day during which the violation continues." Determining the number of days of violation in this case is material only to the penalty calculation. Cidra concedes that the number of days of violation, and even the number of violations, is material to the penalty assessment. Reply at 7.

This Tribunal has ruled that an aspect of a penalty assessment, such as whether a particular penalty factor is applicable, may be determined on accelerated decision. *U.S. Army, Ft. Wainwright Central Heating and Power Plant*, Docket No. CAA-10-99-0121, 2002 EPA ALJ LEXIS 24 (EPA ALJ April 30, 2002) (accelerated decision on whether Economic Benefit and Size of Business penalty factors apply to a federal facility); *Zaclon, Inc.*, Docket No. RCRA-5-2004-0019, 2006 EPA ALJ LEXIS 23 (EPA ALJ May 23, 2006) (granting accelerated decision as to respondent's ability to pay where respondent failed to adequately support claim of ability to pay). However, those accelerated decisions as to the penalty were made after the respondent had been found liable for violations upon which the penalty was sought. *Id.* Accelerated decision may be denied where it is not clear that a decision as to a portion of a penalty would constitute "judgment as a matter of law," or where there may be no particular benefit in granting accelerated decision on merely an aspect of the penalty assessment. *Wisconsin Plating Works of Racine*, Docket No. CAA-05-2008-0037, 2009 EPA ALJ LEXIS 11, at *23-24 (EPA ALJ July 2, 2009) (denying accelerated decision as to the penalty but making an undisputed finding of fact that EPA calculated the preliminary deterrence amount consistent with the penalty policy, where respondent did not respond to the motion and did not present any documents in mitigation of a

penalty other than for inability to pay). Respondents have not stipulated to liability, nor has any ruling been made that they are liable for any violations alleged in this proceeding. If Respondents are held not liable for Count 2, then the number of days of violation would be irrelevant or unnecessary, and would not affect the outcome of this case. Therefore, the number of days of violation is not a "material fact" at this point in the proceeding.

It is concluded that Cidra has not shown that it is entitled to judgment as a matter of law with respect to the number of violations or days of violation for Count 2.

VI. Proposed Penalty

A. Parties' Arguments

Respondent Cidra argues that the proposed penalty was calculated using improper considerations and in an arbitrary and capricious manner. Mot. at 9. Cidra points out that the penalty proposed in the Complaint, $146,425.49, is "divided between 279 days for [Count] 1 and 245 days for [Count] 2." Mot. at 9. By contrast, argues Cidra, the Revised Penalty Calculation, which is based on a reduced number of days for each Count, 245 for Count 1 and 26 for Count 2, is "*only* $11,676.49 less than the original proposal." *Id.* at 10 (emphasis supplied). Cidra goes on to argue that the correct application of the holding in *Service Oil* brings the number of days of violation for Count 1 to zero. According to Cidra's calculations, the total number of days for which EPA may seek a penalty is only 26. Based on this reduction in the actionable days of violation, Cidra argues, "one would expect that the penalty amounts proposed by the EPA would reflect a minimally objective application of Section 309 (g) criteria to known facts and not reflect . . . the outcome of a clearly arbitrary calculus." *Id.* at 11. Cidra concludes by asking this Tribunal to find that "EPA has acted arbitrarily and capriciously in proposing [the penalty]." *Id.* at 12.

In its Response, EPA counters with three arguments. First, that the authority to determine the penalty in an administrative proceeding rests with the ALJ who "may assess a penalty different in amount from the penalty proposed by complainant." Resp. at 9 (citing 40 C.F.R. § 22.27(b)). Second, EPA argues that "it is well-established that the arbitrary and capricious standard . . . applies only to agency actions that become final." Resp. at 9 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-18 (1971)). Because a proposed penalty is not a final agency action, EPA argues, Cidra's claim is "neither ripe for review, nor in the appropriate forum." Resp. at 10. Third, even if an examination of the penalty's propriety were appropriate at this stage, EPA has satisfied its statutory guidelines and proposed a penalty that is well within the statutory maximum. *Id.* at 10-12.

In its Reply, Respondent cites several cases for the proposition that the ALJ may properly "evaluate EPA's proposed penalty" at this stage of the proceedings, namely *John A. Biewer*, EPA Docket No. RCRA-05-2008-0007, slip op. at 12 (ALJ, April 30, 2010), *Employers Ins. of Wausau and Group Eight Tech., Inc.*, 6 E.A.D. 735, 758-59 (EAB 1997), and *Coleman Trucking,*

Inc., EPA Docket No. 5-CAA-96-005, slip op. at 11 (ALJ, May 5, 1998)). Reply at 8.

B. Discussion

As Complainant notes, the ALJ does not have authority to find a proposed penalty "arbitrary and capricious" and otherwise not in accordance with law because such a standard of review is reserved for judicial review of final agency actions. As the Rules of Practice make clear, there is no final agency action in these administrative proceedings until a Final Order is issued, either by the ALJ after the expiration of the appeal period, or by the EAB after an appeal. *See* 40 C.F.R. § 22.31.

Moreover, in the cases cited by Respondent, each tribunal involved was concerned with the statutory constraints placed upon the ALJ when *assessing* a penalty *after hearing*. These cases do not support Respondent's effort to obtain a *prehearing* ruling on the propriety of EPA's *proposed* penalty. Rather, the language Respondent quotes in its Reply stands for the opposite proposition. Respondent quotes *Employers Ins. of Wausau* in which the EAB stated:

> The Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide "specific reasons" for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of a sanction not be an "abuse of discretion" or otherwise arbitrary and capricious).

6 E.A.D. at 758-59. Respondent suggests that the final parenthetical, describing the constraints of the Administrative Procedure Act ("APA"), states some standard which the ALJ must apply to rule on EPA's proposed penalty before hearing. The constraints of the APA, however, are placed on the ALJ when assessing a penalty, not on the agency when proposing a penalty, as only the ALJ's decision, once final, will be subject to review under the "arbitrary and capricious" standard.

Under the Rules of Practice, the Complaint is required only to include "a brief explanation of the proposed penalty" when a penalty is proposed at all. 40 C.F.R. § 22.14(a)(4). The Prehearing Order in this case, at Paragraph (K), further instructed Complainant to provide in its PHE: "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." Complainant's Exhibits 4-4c, of the Initial PHE, and Exhibits 26-26a, of the Rebuttal PHE, meet that requirement.

Short of proposing a penalty that exceeds the statutory cap limiting the size of the assessable penalty or disregarding the mandatory penalty factors, Complainant has considerable discretion in proposing a penalty in the Complaint. *See, e.g., In re Donald Cutler*, EAJA App. No. 05-01, 2007 WL 38380 (EAB Jan. 4, 2007) (finding that a proposed penalty based on

statutory penalty criteria and within the statutory maximum is not an excessive or unreasonable penalty). Still, Respondents are not without protection from the imposition of an arbitrary penalty. The Rules of Practice direct the ALJ, in assessing penalties, to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Rules further provide that the ALJ "shall consider any civil penalty guidelines issued under the [applicable] Act." *Id.*; *see also In re Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506 (EAB 2008) (noting that the EAB reviews the penalty assessed by the ALJ, and not the penalty proposed by EPA).

At hearing, Respondent will have the opportunity to cross-examine Complainant's penalty witness(es) and submit its own evidence to support any argument that the penalty was calculated based on impermissible factors. It is therefore premature to rule on the propriety of the Complainant's proposed penalty. *See, Wood Waste of Boston, Inc.*, Docket No. CWA-01-2006-0090, 2007 WL 2192955 (EPA ALJ Jan 3, 2007) (Order Denying Respondent's Motion to Compel Attendance and Testimony) (rejecting the argument that a proposed penalty is arbitrary and capricious and reminding respondent that any penalty in a CWA case "is to be determined through an evaluation of the record evidence alone" and is not based on EPA's proposed penalty narrative). Because Complainant has met the requirements of the Rules of Practice and the additional directives in the Prehearing Order, and its penalty comports with the statutory limits of the CWA, Respondent Cidra's Motion as it relates to the penalty is denied.

ORDER

Based upon the foregoing, Respondent Cidra's Motion for Partial Accelerated Decision or Dismissal is hereby **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: October 13, 2010
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent Cidra Excavation, S.E.'s Motion For Partial Accelerated Decision Or Dismissal** dated October 13, 2010, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Staff Assistant

Dated: October 13, 2010

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