UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, NY 10007-1866

IN THE MATTER OF: **A.B.E.F. Development Corp. and Herminio Cotto Construction, Inc.** Respondents.	Docket No. **CWA-02-2010-3465** Proceeding Pursuant to § 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B)

INITIAL DECISION AND DEFAULT ORDER

By *Order on Default as to Liability* dated February 15, 2012, the Undersigned, as Presiding Officer in this matter, found Herminio Cotto Construction, Inc. ("Respondent Cotto" or "Cotto") liable for the violation of Sections 301 and 402 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1311 and 1342. By *Motion for Entry of Default as to Penalty Against Respondent Cotto and for Entry of Default as to Liability and Penalty Against Respondent ABEF* ("*2016 Default and Penalty Motion*"), as revised by subsequent motions, the Director of the Caribbean Environmental Protection Division of Region 2 of the United States Environmental Protection Agency ("Complainant," "EPA" or "Region 2"), has requested the finding of liability against Respondent A.B.E.F. Development Corp. ("Respondent ABEF" or "ABEF") and assessment of a civil penalty in the full amount of Fifty-Eight Thousand Five Hundred Eighty-Two Dollars ($58,582), broken down as follows: Forty Thousand Five Hundred and Nineteen Dollars ($40,519) against Respondent Cotto and Eighteen Thousand Sixty-Three Dollars ($18,063) against Respondent ABEF.

Pursuant to the *Consolidated Rules of Practice Governing the Administrative Assessment and Revocation or Suspension of Permits* ("*Consolidated Rules*"), 40 C.F.R. Part 22, and based upon the record in this matter and the following **Findings of Fact**, **Discussion**, **Conclusions of Law,** and **Determination of Penalty**, Complainant's *2016 Default and Penalty Motion*, as clarified and revised by subsequent motions discussed herein, is hereby GRANTED.

Respondent ABEF is hereby found in default and a civil penalty is assessed against Respondents Cotto and ABEF in the total amount of $58,582, broken down as follows: a penalty of $40,519 against Cotto, and a penalty of $18,063 against ABEF.

BACKGROUND

This is a proceeding under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B) and is governed by the *Consolidated Rules*, 40 C.F.R. Part 22. Complainant initiated this proceeding by filing an *Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing* ("*Complaint*") on September 29, 2010, against Respondents. In the *Complaint*, the Complainant alleged that Respondents violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

The *Complaint* explicitly stated on page 11, in the section entitled *Failure to Answer*, that:

> 78. If Respondents fail in any Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation, pursuant to 40 C.F.R. § 22.15(d).
> 79. If Respondents fail to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondents may be found in default upon motion, per 40 C.F.R. § 22.17(a).
> 82. Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 C.F.R. § 22.27(c), per 40 C.F.R. § 22.17(d).

On April 18, 2011, Complainant moved for an order on default finding Respondent Cotto liable for violations alleged in the *Complaint*. Complainant refrained from moving for an order on default against Respondent ABEF because of ABEF's apparent willingness to engage in negotiations at that time, as set forth in a written response from ABEF dated December 2, 2010 and discussed in more detail in the **Discussion** section, below. Complainant's *Motion for Entry of Default Against Respondent Herminio Cotto Construction, Corp.* ("*2011 Default Motion*") was granted on February 15, 2012, by the *Order on Default as to Liability* ("*2012 Default Order*"). The *2012 Default Order* is incorporated herein

As stated above, Complainant, by the *2016 Default and Penalty Motion* dated March 24, 2016, moved for an order on default as to penalty against Respondent Cotto and as to liability and penalty against Respondent ABEF.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, the Undersigned, as Presiding Officer in this matter, makes the following findings of fact:

1. Respondent ABEF is a for profit corporation organized under the laws of Puerto Rico.
2. ABEF is a person within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
3. ABEF is the owner and operator of "Extensión Praderas de Ceiba Norte" ("the Project"), as defined in 40 C.F.R. § 122.2.
4. Respondent Cotto is a for profit corporation organized under the laws of Puerto Rico.
5. Cotto is a person within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
6. Cotto is the operator of the Project, as defined in 40 C.F.R. § 122.2.
7. The Project is located at State Road PR-935, Km. 3.1, in Juncos, Puerto Rico.

8. On or about October 16, 2008, ABEF hired Cotto, a construction company, to conduct clearing, grading and excavating activities.
9. The construction activities associated with the Project consisted of clearing, grading, and the construction of 224 residential units.
10. Cotto submitted an incomplete Notice of Intent ("NOI") to EPA on September 2, 2008, seeking coverage under the Construction General Permit ("CGP").
11. According to a subsequent NOI submitted by Cotto on May 11, 2009, the Project impacted a total area of 26.50 acres and the Project start date was February 2, 2009.
12. Quebrada Ceiba is a tributary of the Río Guraba, which, in turn, is a tributary of the Río Grande de Loíza.
13. According to blueprints developed for the Project in December 2007, the Project discharges at Quebrada Ceiba at 5 distinct points.
14. The Project discharged pollutants into Quebrada Ceiba.
15. The Quebrada Ceiba, the Río Gurabo, and the Río Grande de Loíza are waters of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7).
16. The Project is a "point source" pursuant to Section 502(14) of the Act, 33 U.S.C. § 1362(14).
17. The Administrator of EPA promulgated regulations which require operators of construction activities to apply for and obtain National Pollutant Discharge Elimination System ("NPDES") permit coverage for storm water discharges, pursuant to 40 C.F.R. §§ 122.21, 122.26(b) and 122.26(e).

18. The NPDES storm water permit application regulations require operators of construction sites to submit an individual permit application no later than ninety (90) days before the date on which construction is to commence, unless the operators obtain authorization under a NPDES storm water general permit for construction activities, pursuant to 40 C.F.R. § 122.21.
19. According to the 2008 CGP, prior to commencement of construction activities of a new project, the permittee must submit a complete and accurate NOI and wait for EPA to authorize the discharge.
20. The earth movement activities at the Project are covered by the NPDES storm water regulations for construction activities, pursuant to 40 C.F.R. § 22.26(b)(14)(x).
21. Respondents were required to apply for and obtain a NPDES permit for all the discharges associated with industrial activity from their construction activities at the Project into waters of the United States, pursuant to Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and 40 C.F.R. §§ 122.21 and 122.26.
22. Based on the paragraphs above, Respondents are subject to the provisions of the Act.
23. On April 8, 2009, EPA enforcement officers, upon presentation of credentials to ABEF's representatives, performed a Compliance Evaluation Inspection ("CEI") of the Project.
24. The findings of the CEI were included in the Inspection Report dated June 24, 2009 and included as Attachment 1 to the *Complaint.*
25. The findings of the CEI revealed the following:
    a. Respondents operated the Project without applying for a NPDES storm water permit.

b. The Storm Water Pollution Prevention Plan ("SWPPP") developed for the Project, dated August 18, 2008, was incomplete and did not comply with the minimum requirements of the 2008 CGP.

c. The Project lacked implementation and maintenance of erosion and sediment controls.

d. The Project was discharging pollutants into waters of the United States.

26. Based on the findings of the CEI, EPA found that Respondents were in violation of the CWA and the 2008 CGP and issued an *Administrative Compliance Order* ("*ACO*"), Docket Number CWA-02-2009-3132, against Respondents on June 26, 2009.

27. The *ACO* incorporated the findings of violation of the CEI, and ordered Respondents to:

a. cease and desist from discharging storm water runoff from the Project into Quebrada Ceiba;

b. immediately cease and desist all clearing, grading and excavation activities at the Project;

c. provide temporary stabilization to areas where clearing, grading and excavation activities had temporarily ceased;

d. provide final stabilization to areas where clearing, grading and excavation activities will no longer be performed;

e. construct and install Best Management Practices ("BMPs");

f. provide maintenance for the existing and future BMPs;

g. install and maintain sediment and erosion controls required by the Environmental Quality Board ("EQB"), provided that a written notification is submitted no later

than 5 calendar days before the commencement of such activity. Such notification shall include a description and itinerary of implementation of the activities to be undertaken;

h. amend the SWPPP to comply with the terms and requirements of the permit and address the findings documented in the Inspection Report, and submit the amended SWPPP to EPA for review by June 24, 2009; and

i. submit a Compliance Plan to comply with the requirements of the permit and the Act.

28. On May 11, 2009, Cotto submitted a second NOI to seek coverage under the 2008 CGP.

29. By letter dated May 11, 2009, EPA acknowledged receipt of Cotto's NOI and informed Cotto that its coverage under the 2008 CGP would begin at the end of the seven-day waiting period, on May 18, 2009.

30. Cotto's 2008 CGP Tracking Number is PRR10BN72.

31. On July 14, 2009, ABEF submitted a NOI to seek coverage under the 2008 CGP.

32. By letter dated July 14, 2009, EPA acknowledged receipt of ABEF's NOI and informed ABEF that its coverage under the 2008 CGP would begin at the end of the seven-day waiting period, on July 21, 2009.

33. ABEF's 2008 Permit Tracking Number is PRR10BO92.

34. By July 21, 2009, both Respondents had coverage under the 2008 CGP.

35. On September 18, 2009, the amended SWPPP was submitted to EPA.

36. By letter dated October 26, 2009, ABEF's representative Guillermo Burgos-Amaral informed EPA that on August 24, 2009, Respondents had ceased and desisted from discharging storm water runoff from the Project into waters of the United States.

37. On November 24, 2009, EPA Enforcement Officers conducted a follow-up inspection ("Inspection") to ascertain compliance with the *ACO*.

38. During the Inspection, EPA observed that construction activities continued to be performed and that most of the houses had been constructed. It was therefore evident that Respondents failed to comply with the requirements of the *ACO.*

39. During the Inspection, Mr. Burgos (Mr. Guillermo Burgos-Amaral's father) stated that the Project had been detained approximately 2 months, around the month of August, because of financing problems.

40. During the Inspection, EPA Enforcement Officers inspected the BMPs implemented by Respondents.

41. The findings of the Inspection revealed that:

    a. construction activity was being performed and that the houses were already built, evidencing noncompliance with the provisions of the *ACO*;

    b. the concrete washout was not properly constructed; and

    c. the inlet protections showed lack of maintenance.

42. On December 2, 2009, Respondents sent Complainant an Inspection Report prepared by Guillermo Burgos-Amaral, in which Respondents addressed the observations made during the Inspection and brought evidence of the measures taken to cure said deficiencies.

43. On December 8, 2009, Complainant issued a letter notifying Respondents that the *ACO* was being closed, based on Respondents' compliance with the ordered provisions of the *ACO*.

44. Respondents failed to submit a NPDES permit application to discharge storm water associated with industrial activities into Quebrada Ceiba for the construction activities performed at the Project, in violation of Sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p).

45. 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, 33 U.S.C. § 1311(a).

46. Respondents did not post signage or otherwise provide notice at the Project concerning the NOI and did not maintain a SWPPP available at the site for EPA review and copying at the time of the CEI as required by Section 5.11 of the 2008 CGP.

47. Respondents did not prepare a complete SWPPP in order to provide storm water pollution prevention for the Project, as required under Part 5 of the 2008 CGP. The SWPPP remained incomplete until September 18, 2009, on which date the Respondents submitted a complete SWPPP.

48. Respondents did not adequately implement the SWPPP at the Project, as required under Part 5 of the 2008 CGP, until September 18, 2009.

49. On September 29, 2010, and pursuant to 40 C.F.R. §22.5(b)(1), Complainant mailed to Respondents, by certified mail with return receipt requested, a true and correct copy of the *Complaint*.

50. Based on the foregoing Findings of Violation set forth in the *Complaint,* and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), and the Debt Collection Improvement Act of 1996, EPA proposed to assess a penalty of **$58,765** for unlawful discharge of pollutants into navigable waters without authorization by a NPDES permit in violation of Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

51. The *Complaint* explicitly stated the following: if Respondents wished to avoid being found in default, Respondents must file a written answer to the *Complaint* with the Regional Hearing Clerk no later than thirty (30) days from the date of receipt of the *Complaint*; EPA, Region 2 may make a motion pursuant to § 22.17 of the *Consolidated Rules* seeking a default order thirty (30) days after Respondents' receipt of the *Complaint* unless Respondents file an answer within that time; default by the Respondents constitutes admission of all facts alleged in the *Complaint* and a waiver of Respondents' right to contest such factual allegations; and if a default order is entered, the proposed penalty may be assessed and the proposed compliance measures may be required, without further proceedings.

52. A Domestic Return Receipt indicated that the *Complaint* was received by Respondent Cotto on October 8, 2010.

53. A Domestic Return Receipt indicated that Respondent ABEF was served with the *Complaint* on October 1, 2010.

54. Respondent ABEF sent a letter dated December 2, 2010 to Complainant which responded to the factual allegations set forth in the *Complaint.*

55. Respondent ABEF's December 2nd letter did not constitute an answer because Respondent

ABEF did not file the letter with the Regional Hearing Clerk as prescribed by the *Consolidated Rules*, 40 C.F.R. Part 22.15(a). See **Discussion** section, below.

56. In response to Complainant's request that ABEF file an answer, ABEF's representative, Louis Rosado-Viana, President of LRV, stated that an answer to the *Complaint* would be filed, following the procedures prescribed in the *Consolidated Rules* and restated in the *Complaint*.

57. Complainant filed the *2011 Default Motion* dated April 18, 2011 against Cotto.

58. As stated above, Complainant did not file a motion for default order as to liability against Respondent ABEF because of ABEF's December 2nd response to the *Complaint* and intermittent communications between ABEF's representative and Complainant's attorney, discussed in more detail below.

59. Complainant's *2011 Default Motion* was granted on February 15, 2012, pursuant to the *Consolidated Rules*, the record in this matter and the Findings of Fact and Conclusions of Law as set forth in the *2012 Default Order*, which established Respondent Cotto's liability without determining a penalty against Cotto.

60. According to Respondent ABEF's letter dated December 2, 2010 (included as Attachment 3 of the *2016 Default and Penalty Motion)*, Respondent ABEF received the *Complaint* on October 6, 2010.

61. Respondent ABEF was required to file an answer to the *Complaint* on or before November 5, 2010, thirty (30) days after service of the *Complaint*.

62. To date, ABEF has not provided EPA with an answer to the *Complaint* in this matter that would satisfy the requirements of the *Consolidated Rules* and has not submitted payment

of the civil penalty proposed in the *Complaint*.

63. Complainant made numerous attempts to contact Respondent ABEF, including by electronic communication on February 10, 2011, April 4, 2011, May 16, 2011, May 19, 2011, March 18, 2015, March 20, 2015, March 24, 2015, March 30, 2015, August 17, 2015, August 19, 2015, and March 9, 2016, as well as by mail and by telephone. (Attachments 4 through 7 to the *2016 Default and Penalty Motion).*

64. On the occasions when Complainant was able to reach a representative of ABEF by telephone, including on August 20, 2015 and November 2, 2015, Respondent ABEF expressed a willingness to engage in further discussions with Complainant; however ABEF has not followed through.

65. On March 2, 2015, an order directing the parties to file a joint status report no later than March 20, 2015 was issued because Respondent ABEF had never filed an answer despite: 1) responding to the *Complaint* in the form of a letter to Complainant and 2) agreeing to Complainant's request that Respondent ABEF file the letter as an answer with the Regional Hearing Clerk in accordance with the *Consolidated Rules*; and 3) repeatedly expressing its willingness by numerous telephone calls and emails to negotiate with EPA.

66. On March 20, 2015, Complainant filed a *Motion Requesting an Extension of Seven (7) Days to File Motion,* claiming Complainant had not been able to contact Respondent ABEF but had recently acquired new contact information.

67. An order dated March 24, 2015, granting an extension of time to file a joint status report through March 31, 2015, was issued.

68. On March 31, 2015, Complainant submitted an *Informative Motion* setting forth

Complainant's attorney's unsuccessful attempts to contact Respondents and stating that she intended to move for default as to liability and penalty against Respondent ABEF and move for default as to penalty against Respondent Cotto no later than 30 days from the date of her *Informative Motion.*

69. An order directing parties to file a joint status report no later than August 10, 2015 was filed on July 21, 2015 because Complainant had not filed a motion for default against Respondents.

70. On August 11, 2015, Complainant's August 10th request for an extension of the deadline to August 17, 2015, for filing a status report was granted by electronic mail.

71. On August 18, 2015, by *Motion in Compliance with Order to File Status Report*, Complainant's attorney explained that her further attempts to communicate with Respondents were unsuccessful and reaffirmed her intention to move for default as to liability and penalty against Respondent ABEF and move for default as to penalty against Respondent Cotto no later than 60 days from the date of the motion.

72. On September 4, 2015 an order was filed, directing ABEF to answer by September 18, 2015, and in the event of ABEF's failure to answer, requiring Complainant to move for default no later than October 23, 2015 as to liability and penalty against ABEF and for penalty against Cotto. The order further provided that failure by Complainant to file the motions as directed could result in the dismissal of the *Complaint* against both Respondents.

73. On October 5, 2015, by letter the subject of which was *Request for Extension to Respond to Order Requiring Respondent A.B.E.F. Development Corporation and Herminio Cotto*

Construction, Inc. to File Answer and Requiring Complainant to File Motions for Default, Louis Rosado-Viana of LRV, stating that he was now responding on behalf of both Respondents, requested, with the concurrence of Complainant's attorney, a fifteen-day extension for Respondents to file an answer.

74. On October 30, 2015, an *Order in Response to Respondents' Request for Extension of Time to Respond* was filed. The order noted Respondents' unresponsiveness and inconsistent efforts to cooperate in this matter and extended Respondent ABEF's time to file an answer to November 9, 2015. The order stated that if ABEF's representatives also intended to answer for Cotto that a motion to vacate the standing *2012 Default Order* would have to be filed in addition to an answer on behalf of Respondent Cotto by November 9, 2015. In the alternative, the order required Complainant to move for default as to liability and penalty against Respondent ABEF and to move for default as to penalty against Respondent Cotto by November 30, 2015, or else risk dismissal of the *Complaint* against both Respondents with prejudice.

75. On March 21, 2016, the Undersigned issued an *Order to Show Cause* directing Complainant to show cause why the *Complaint* against both Respondents should not be dismissed with prejudice due to a failure of the Complainant to proceed in this matter in accordance with orders issued by the Undersigned. The March 21st order, reiterating the directives set forth in the October 26, 2015 order, updated the deadlines as follows: ABEF's answer was due by April 15, 2016 or Complainant must file motions as directed in the October 26, 2015 order by April 29, 2016. In the event ABEF did not answer and Complainant failed to comply with the order, the order again set forth the possibility of

dismissing the *Complaint* against both Respondents with prejudice.

76. On March 24, 2016, Complainant filed the *2016 Default and Penalty Motion*, together with its *Memorandum in Support of Motion for Assessment of Penalty on Default* ("*2016 Penalty Memorandum*") and other attachments.

77. On March 30, 2016, and pursuant to 40 C.F.R. § 22.5(b)(1), Respondent Cotto was served, by certified mail, return receipt requested, with the *2016 Default and Penalty Motion*, as set forth in Complainant's August 11, 2016 *Informative Motion*, while the copy of the *2016 Default and Penalty Motion* that was sent to ABEF was returned as unclaimed on May 5, 2016.

78. Complainant received confirmation that Respondent ABEF had been served with the *2016 Default and Penalty Motion*, as set forth in Complainant's *Informative Motion and Motion to Reiterate Request* dated January 11, 2017.

79. On May 2, 2017, the Undersigned filed an *Order Directing Complainant to Clarify Calculation of the Proposed Penalty in its Memorandum*, directing the Complainant to clarify numerous statements and calculations set forth in its *2016 Default and Penalty Motion* no later than May 23, 2017.

80. On May 23, 2017, Complainant filed a motion requesting an extension of time to submit the clarification requested in the Undersigned's May 2nd order. An extension was granted through July 7, 2017 by order dated May 25, 2017.

81. By *Motion in Compliance with Order to Clarify Memorandum and Requesting Extension of Time to Submit Modified Penalty Calculation* dated July 6, 2017 ("*2017 Motion*"), the Complainant clarified certain items set forth in its March 24, 2016 motion and requested a

seven-day extension to submit a modified penalty calculation and supporting affidavit, followed by a second request for an additional thirty days because the appropriate technical expert had been unavailable to finalize the clarification and execute an affidavit in support of the modified calculation.

82. For good cause shown, the Undersigned issued further extensions and on April 17, 2018, issued an order granting a temporary stay of this matter through June 1, 2018 due to the hurricane damage which continued to severely impact the power, telecommunications, and operations of businesses in Puerto Rico.

83. Complainant filed a *Motion in Compliance with Order to Submit Modified Penalty Calculation* dated June 1, 2018 (*2018 Motion*) and submitted a *Motion Requesting Permission to Submit Affidavit* dated June 6, 2018 to support the revised penalty calculations.

84. On March 20, 2019, the Undersigned issued an order directing the Complainant to file a supplemental motion to clarify the allotment, as set forth in its *2016 Default and Penalty Motion, 2017 Motion* and *2018 Motion,* of the gravity component of the penalty between the two Respondents no later than April 1, 2019, which deadline was extended through May 3, 2019 by the Undersigned for good cause shown.

85. The Complainant filed a *Motion in Compliance with Order to Clarify Memorandum* dated May 9, 2019 ("*2019 Motion*") further explaining Complainant's calculation of the gravity component of proposed penalty.

86. On May 23rd, Complainant refiled the *2019 Motion* to reflect a revised address for Respondent ABEF.

87. On June 27, 2019, an order was issued, directing Complainant to further clarify the allocation of the proposed penalty between the parties and requesting a specific citation to the 'construction penalty policy' mentioned in earlier memorandums no later than July 19, 2019, which deadline was extended twice by the Undersigned, for good cause shown, thought September 20, 2019.

88. On September 26, 2019, Complainant filed a *Motion in Compliance with Order to Clarify Memorandum,* explaining errors concerning the allocation of the proposed penalty and providing a citation to the specific penalty policy relied upon. The Complainant did not serve the Undersigned with a copy of this motion, and the Undersigned did not receive a copy of this motion when it was filed.

89. On October 30, 2019, the Undersigned issued an *Order to Show Cause* why the *2016 Motion for Default and Penalty* should not be dismissed due to Complainant's failure to a file a motion as directed in the June 27th order. In the alternative, this order granted to the Complainant an extension through November 15, 2019 to file a supplemental motion.

90. Complainant filed a *Motion in Compliance with Order to Show Cause* dated November 14, 2019, explaining that Complainant had filed the September 26th motion and attaching the earlier motion together with proof of service on both Respondents.

91. An *Order to Further Clarify and Explain Penalty Calculation* was issued on May 19, 2020, directing the Complainant to provide, no later than June 12, 2020, specific information regarding its penalty calculations and its consideration of the ability to pay factor in the proposed penalty.

92. On June 12, 2020, Complainant filed a request for an extension of time to respond to the

May 19th order, which request became moot in light of the fact that ABEF was not properly served with that order, and the Undersigned reissued the May 19th order on July 14, 2020, directing the Complainant to reply no later than August 3, 2020.

93. The Complainant filed a *Motion Requesting Extension of Time to Comply With Order Directing Complainant to Clarify Calculation of its Proposed Penalty* on August 6, 2020, requesting extra time to retrieve necessary documents from EPA's offices as said retrieval was delayed by restricted access to the office due to the pandemic and a tropical storm. The Undersigned, by order dated August 10, 2020, extended Complainant's time to respond through September 30, 2020.

94. On September 30, 2020, Complainant filed a *Motion in Compliance with Order and For Leave to Amend Penantly Calculations,* explaining its penalty calculations and requesting leave to submit a supplemental motion to enable the Undersigned to duplicate the calculations.

95. The Undersigned issued an order dated October 13, 2020 granting the Complainant through November 6, 2020 to file the supplemental motion.

96. On November 6, 2020, the Complainant filed a further request for extension of time to reply to the October 13th order.

97. The Undersigned issued an order on November 12, 2020, granting the Complainant an extension, through December 11, 2020 to file its supplemental motion.

98. On February 19, 2021, the Undersigned issued an order, recognizing that the November 12th order was never filed and served on the parties, and granting the Complainant through March 5, 2021 to file its supplemental motion.

99. On March 5, 20201, the Complainant filed a *Motion in Compliance with Order*, together with a copy of the *2010 Penalty Calculation* prepared by Yolianne Maclay, Environmental Engineer, and a memorandum entitled *Calculation of Alternate Civil Administrative Penalty* ("*2021 Penalty Memorandum*").

100. By electronic message dated March 26, 2021, the Complainant's attorney notified the Undersigned that she had been contacted by Mr. Rosado on behalf of both Respondents, and she indicated that she would file an informative motion once more information became available. Based on this update, an *Order Directing Parties to File Status Report* was issued on April 2, 2021, directing the parties to file a status report no later than April 16, 2021.

101. Complainant filed a *Status Report*, with the knowledge of Mr. Rosado, on April 16, 2020, stating that Complainant's attorney and Mr. Rosado had been in contact twice to discuss the possibility of a settlement in this matter.

102. On April 29, 2021, the Undersigned issued an *Order Directing Parties to File Status Report* no later than May 16, 2021.

103. On May 17, 2021, the Complainant filed a *Status Report,* indicating that Mr. Rosado had contacted the Complainant's attorney, expressing the Respondents' intention to pay a penalty and to seek a reduction in the proposed penalty amount based on financial hardship.

104. On June 9, 2021, the Undersigned issued another *Order Directing Parties to File Status Report*, said report to include a date by which they believed the matter would be settled, no later than June 30, 2021.

105. The Complainant filed a *Status Report* on June 30, 2021, alluding to teleconferences and

electronic communications whereby the Respondents' representative reiterated his clients' commitment to submit documentation in support of its claim of financial hardship and continued efforts to settle this matter. The Complainant requested an additional thirty days to follow up on this line of communication.

106. On July 6, 2021, the Undersigned issued an *Order Directing Parties to File a Status Report* no later than August 13, 2021, stating that this would be the last such order issued.

107. On August 17, 2021, Complainant filed a *Status Report*, stating that she had not heard anything further from Respondents' representative.

108. To date, Respondents have not filed a response to the *Complaint*, the *2012 Default Order* or subsequent orders issued by the Undersigned, and the *2016 Default and Penalty Motion* or any subsequent motions filed by Complainant.

DISCUSSION: FINDING OF LIABILITY AGAINST RESPONDENT ABEF

Respondent ABEF's Letter Does Not Constitute an Answer Pursuant to 40 C.F.R. § 22.15

According to 40 C.F.R. § 22.15(b), the answer to a complaint "shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint regarding which respondent has any knowledge. Where respondent has no knowledge of a particular allegation and so states, the allegation is deemed denied." Pursuant to 40 C.F.R. § 22.15(a), an answer must be served on the Regional Hearing Clerk within thirty (30) days after service of the complaint.

Respondent ABEF, by its representative, Louis Rosado-Viana, sent EPA's attorney a letter dated December 2, 2010, a copy of which was included as Attachment 3 to EPA's *2016 Default and Penalty Motion*. In that letter, Mr. Rosado stated that an extension of time to respond to the *Complaint* had been verbally requested and approved. While the December 2nd letter

acknowledged receipt of the *Complaint*, responded to Complainant's factual allegations, and requested an informal conference, to date ABEF has failed to file the letter, or any other adequate response to the *Complaint*, with the Regional Hearing Clerk.

In *In the Matter of Rod Bruner and Century 21 Country North*, EPA Docket No. TSCA-05-2003-0009 (May 19, 2003), the Presiding Officer refused to grant complainant's motion for default order, noting that there was no attempt by respondents to delay the proceedings or any indication of bad faith when they filed a motion to strike in lieu of an answer. The decision included a quote from Moore's *Federal Practice*, § 55.05[2], p.54-24 (1991):

> Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is reason to believe that the defendant's default resulted from bad faith in his dealings with the court or opposing party the district court may properly enter default and judgment against defendant as a sanction.

In the instant case, Respondent ABEF's failure to file the December 2, 2010, letter with the Regional Hearing Clerk after more than ten years since the *Complaint* was filed can hardly be considered de minimus or technical. The failure to file is further compounded by the fact that Complainant explained to Respondent ABEF that the letter needed to be filed with the Regional Hearing Clerk to comply with Section 22.15(a) of the *Consolidated Rules* and Respondent ABEF subsequently agreed to file the letter. Therefore, although modern procedure does not favor findings of default *(Id.)*, Respondent ABEF's failure to file the December 2nd letter as an answer with the Regional Hearing Clerk does not constitute a trivial failure to comply with the regulations and is grounds for a finding of default.

Respondent ABEF's Failure to Comply with Orders of the Presiding Officer Also Constitutes a Default

Respondent ABEF failed to respond to multiple orders issued by the Undersigned, including orders directing both parties to file joint status reports issued on March 2, 2015, July 21, 2015, and July 6, 2021.

Respondent ABEF also failed to follow up on its response to an *Order Requiring Respondent A.B.E.F. to File Answer and Requiring Complainant to File Motions for Default* dated August 31, 2015. Mr. Rosado, responding to the August order on behalf of both Respondents by letter dated October 5, 2015, requested, with the concurrence of Complainant's attorney, a fifteen-day extension for Respondents to file an answer. However, despite the fact that Mr. Rosado's request for an extension was granted, neither Respondent filed a response to the order and Respondent ABEF never filed an answer.

On October 30, 2015 and March 21, 2016, the Undersigned also issued orders directing ABEF to answer by specified deadlines, and ABEF failed to respond to these orders. To summarize, ABEF has failed repeatedly to respond to numerous orders issued by the Undersigned.

In relevant part, 40 CFR 22.17(a) and (c) states:

> A party may be found in default: after motion, . . .upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or **an order of the Presiding Officer**; or upon failure to appear at a conference or hearing. (Emphasis added).

In *In the Matter of Mario Loyola, M.D.*, EPA Docket No. CWA-02-2000-3604 (February 16, 2005), the Undersigned found the respondent in default for failure *inter alia* to respond to orders to show cause, as well as numerous other orders and motions. In *In the Matter of RM Oil &*

Gas Company, EPA Docket No. CWA-06-2001-1615 (May 1, 2001), the Presiding Officer found the respondent in default on three grounds: failure to file an answer to the complaint; failure to submit a prehearing exchange of information; and failure to appear at a hearing, stating "Respondent's failure to comply with 40 CFR Part 22 hearing procedures are inexcusable." In *In the Matter of Central Bus Co., Inc, Estate of Salvatore DiPaolo, Sr., and Salvator DiPaolo, Jr.,* EPA Docket No. RCRA-02-2003-7501 (April 27, 2004), the Administrative Law Judge found the respondents to be in default for failing to comply with the prehearing exchange requirements and two orders issued by the court.

Respondent ABEF also failed to respond to the Complainant's *2016 Default and Penalty Motion,* as well as the numerous other motions filed by Complainant. As provided in 40 CFR § 22.16(b) of the *Consolidated Rules*, a party who fails to respond to a motion, including a motion for default order, within 15 days of service of same, waives its objections to the granting of the motion. See *In the Matter of Mario Loyola, M.D., supra*; *In the Matter of Napoleon Elevator Co*., EPA Docket No. FIFRA-07-2003-0027 (August 3, 2004)*; In the Matter of Hoops Agri Sales Company*, EPA Docket No. FIFRA-07-2003-0055 (June 29, 2004).

In the instant case, Respondent ABEF's failure to file an answer with the Regional Hearing Clerk, failure to respond to numerous orders issued by the Undersigned, and failure to respond to the Complainant's motions, as well as less formal attempts at communication by the Complainant, have been conclusively established, constitute inexcusable failures to comply with the hearing procedures set forth in the *Consolidated Rules*, and constitute grounds for a default determination. The procedures set forth in Part 22 governing administrative civil penalty actions are clear concerning the failures of Respondent as identified above.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred by Section 309 of the CWA, 33 U.S.C. § 1319.

2. Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), as amended by the Debt Collection Improvement Act of 1996, implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, provides that any person who violates Section 301(a) and 402 of the Act shall be liable to the United States for a civil penalty of up to $16,000 for each day the violation continues, up to a maximum penalty of $177,500, for each such violation that occurred on or after January 13, 2009.[1]

3. Respondent ABEF failed to comply with Sections 301(a) and 402 of the CWA, as set forth in the **Findings of Fact**, above.

4. The Complaint in this action was served upon Respondents in accordance with 40 C.F.R. § 22.5(b)(1) of the *Consolidated Rules.*

5. Respondent ABEF's failure to file an answer to the *Complaint* constitutes a default pursuant to 40 C.F.R. § 22.17(a).

6. ABEF's failure to file a timely response to or otherwise comply with the numerous orders of the Presiding Officer constitutes a default pursuant to 40 C.F.R. § 22.17(a).

7. ABEF's default constitutes an admission of the allegations as they apply to ABEF and a waiver of ABEF's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

[1] In 2008, EPA promulgated a Civil Monetary Penalty Inflation Adjustment Rule pursuant to the Debt Collection Improvement Act of 1996, increasing the statutory maximum penalty under Section 309(g)(2)(b) of CWA. 73 Fed. Reg. 75345 (Dec. 11, 2008).

8. ABEF is hereby found liable for violating Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342, and is subject ot the assessment of a civil penalty pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. §1319(g)(2)(B).

9. The *2012 Default Order* against Respondent Cotto, which found Cotto liable for violations alleged by Complainant, did not constitute an initial decision in accordance with 40 C.F.R. § 22.17(c). A default order that does not determine remedy along with liability is not an initial decision unless it resolves "all issues and claims in the proceeding." Based upon a reading of the regulation along with pertinent portions of the preamble, there is an expectation that a motion for default on liability and order granting same contemplates a subsequent motion for penalty.

10. Respondents ABEF and Cotto failed to respond to the Complainant's *2016 Default and Penalty Motion*, as well as numerous other motions filed by Complainant and discussed herein. As provided in 40 CFR § 22.16(b) of the *Consolidated Rules*, a party who fails to respond to a motion, including a motion for default order, within 15 days of service of same, waives its objections to the granting of the motion.

11. Respondents' failure to file a timely answer or otherwise respond to the *Complaint*, numerous motions filed by the Complainant, including the *2016 Default and Penalty Motion* and subsequent penalty motions, as well as numerous orders issued by the Undersigned, is grounds for entry of an order against Respondents assessing a civil penalty for the aforementioned violations pursuant to 40 C.F.R. § 22.17(a).

12. As described in the **Determination of Penalty** section below, I find that the Complainant's proposed civil penalty of $58,582 is proper based on the statutory requirements of Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

DETERMINATION OF PENALTY

Section 309(g) of the CWA, 33 U.S.C. § 1319(g), provides that in a case in which the Administrator is authorized to bring a civil action with respect to any applicable requirement, the Administrator also may assess a penalty. As stated above, Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g) (2)(B), as amended, provides that any person who violates Section 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342, shall be liable to the United States for a Class II civil penalty up to $16,000 per day that the violation continues, up to a maximum of $177,500, for each such violation that occurred on or after January 13, 2009.

The EPA Environmental Appeals Board has held that, "as the proponent of an order seeking civil penalties in administrative proceedings", the EPA bears the burden of proof as to the "appropriateness" of a civil penalty. *In re: Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB 2000). The "appropriateness" of a civil penalty is to be determined in light of the factors set forth in the relevant statutes. *Id.* (*citing, In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994)). However, although the EPA bears the burden of proof on the appropriateness of a civil penalty, "it does not bear a separate burden with regard to each of the statutory factors." *Spitzer Great Lakes*, 9 E.A.D. at 320. Rather, to meet its burden and establish a *prima facie* case, the EPA "must show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors." *Id.* Having established its *prima facie* case, the burden then shifts to the respondent to rebut the EPA's case by showing

that the proposed penalty is not appropriate either because the EPA "failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Id.* (*citing*, *New Waterbury*, 5 E.A.D. at 538-39); *In re: Chempace Corp.*, 9 E.A.D. 119 (EAB, 2000).

Under the *Consolidated Rules*, for purposes of calculating a civil penalty to be assessed in an initial decision, a Presiding Officer is required to determine the penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the underlying statute. 40 C.F.R. § 22.27(b). A Presiding Officer is also required to consider any applicable civil penalty guidelines. *Id.*

In both its *Complaint* and *2016 Default and Penalty Motion,* Complainant sought a civil penalty of $58,765 based upon the statutory factors set forth in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and in accordance with EPA's *General Enforcement Policies (GM-21 and GM-22).* The statutory factors listed under Section 309(g)(3) of the CWA include the nature, circumstances, extent, and seriousness of the violations, and, with respect to the violator, the prior history of such violations, the degree of culpability, economic benefit obtained through non-compliance, the respondent's ability to pay considering the information available at the time of the issuance of the complaint, and such other matters as justice may require.

In response to an order of the Undersigned dated May 2, 2017, Complainant, by motion dated June 1, 2018, proposed a breakdown of both the gravity components and other factors between the two Respondents based on the specific responsibilities of, as well as the violations committed by, each Respondent. In its final clarification to the proposed penalty set forth in the

2021 Penalty Memorandum, the final proposed penalty was allocated as follows: $40,519 against Cotto and $18,063 against ABEF, for a total penalty of $58,582.[2]

In finding that the proposed penalty is reasonable, the Undersigned took the following findings into consideration:

Calculation of Gravity Component:

Nature: As established by the record, Respondents violated Sections 301(a) and 402 of the CWA.

Circumstances: The circumstances of the violations have been described in detail in the **Findings of Fact** section, above.

Extent: The period of violations covered February 2, 2009, through September 18, 2009, for a total of 229 days of violation. Complainant's *2016 Penalty Memorandum* states that Respondents failed to file a complete and accurate NOI for earthmoving activities that began on February 2, 2009. Respondent Cotto filed a NOI form seeking NPDES coverage under the CGP on May 11, 2009, therefore illegally discharging pollutants from the date the project began, February 9, 2009, through May 18, 2009 when coverage began. Respondent ABEF filed a NOI form seeking NPDES coverage under the CGP on July 14, 2009, illegally discharging pollutants until July 21, 2009, the date coverage began.

As set forth in the Complainant's *2016 Penalty Memorandum*, the Complainant estimated the number of discharges made by each party based on 2009 rain event data at the appropriate

[2] In the Initial Decision and Default Order issued in I*n the Matter of David L Stergion d/b/a Stergion Automotive*, EPA Docket No. CAA-07-2001-0014, the RJO upheld an adjustment of the proposed penalty based on a prior miscalculation made by the Complainant. The RJO emphasized that this determination was made because the revision benefited the Respondent, noting that the RJO does not have the authority to raise the penalty amount (40 C.F.R. §22.27(b)).

station, which data was included in the *2016 Penalty Memorandum,* as well as the date that each Respondent obtained NPDES coverage. The Complainant concluded that Respondents illegally discharged pollutants from the Project to a water of the United States, in violation of Section 301(a) of the Clean Water Act, as follows: Respondent Cotto illegally discharged pollutants on 11 occasions and Respondent ABEF on 21 occasions.

During an inspection on April 8, 2009, EPA noticed that Respondents did not post a sign or other notice at the Project concerning the NOI and did not maintain a SWPPP at the site for EPA review. Respondents did not develop a complete and adequate SWPPP nor adequately implement the SWPPP from February 2, 2009 until September 18, 2009. Thus, Respondents were in violation of Section 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, from February 2, 2009 through September 18, 2009. See the table below for a comparison of the number of days each violation was committed by each Respondent.

Claim	Respondent ABEF		Respondent Cotto		Difference
	Extent	Days of Violation	Extent	Days of Violation	
1 (failure to apply)	2/2/2009 to 7/21/2009	169	2/22009 to 5/18/2009	105	Respondent ABEF has 61 more days
2 (discharge without NPDES permit)	N/A	21	N/A	11	Respondent ABEF has 10 more days
3 (failure to post sign and retain SWPPP)	4/8/2009 to 6/26/2009	80	4/8/2009 to 6/26/2009	80	Same amount
4 (development of SWPPP)	2/2/2009 to 9/18/2009	228	2/2/2009 to 9/18/2009	228	Same amount
5 (implement SWPPP)	2/2/2009 to 9/18/2009	228	2/2/2009 to 9/18/2009	228	Same amount

Based on the above, I agree with the Complainant's determination, as set forth in its *2021 Penalty Motion*, that an alternate penalty under the gravity component is warranted. Consideration of the roles and responsibilities that each Respondent had at the Project is addressed below.

Seriousness of the Violation: Storm water can wash nutrients, metals, oils, and other substances associated with construction activities into surface waters. Requiring certain construction sites to apply for NPDES storm water permits provides EPA regions and the states with the means to monitor and manage these discharges and reduce or ultimately eliminate the amount of pollutants present in them. EPA's requirement that certain industrial facilities obtain permits is designed to minimize the discharge of pollutants which impair or degrade the quality of receiving waters.

On June 26, 2009, EPA issued to Respondents an *ACO* which required Respondents to cease and desist all clearing, grading and excavation activities at the Project. On October 26, 2009, ABEF's representative Guillermo Burgos-Amaral informed EPA that on August 24, 2009, Respondents had ceased construction activities at the Project. EPA's Inspection revealed that Respondents did not comply with the *ACO*.

Respondents' violations are serious and have a direct effect on human health and the environment. Respondents' failure to comply with the *ACO* impedes implementation of the NPDES program and negates the benefits of this program, such as protecting the water quality of the Río Grande de Loíza, which is a public water supply. Respondents' recalcitrance also hinders EPA's ability to carry out its duties to protect the environment. In applying the formula set forth in the applicable penalty policy, EPA assigned values to the appropriate factors to reflect the actual impact to human health and the environment.

Proposed Gravity Component: In addition to the description of the seriousness of the violations in this case in the *2016 Penalty Memorandum,* the Complainant, in its *2021 Penalty Memorandum*, re-evaluated the roles and responsibilities of Respondents ABEF and Cotto related to the Project and considered other factors that were not addressed in the *2016 Penalty Memorandum*, which factors are applicable to similar cases concerning residential construction projects.

1. ***Equal Responsibilities for the Owner/Developer and Site Contractor***

   Pursuant to the NPDES permit application regulations, Respondents ABEF and Cotto were equally responsible for submitting the Notice of Intent for coverage under the NPDES Construction General Permit at least fourteen (14) days prior to becoming an operator at the Project. Therefore, the seriousness of the violations concerning Claim 1 (failure to apply) applies to both Respondents equally.

2. ***Key Responsibilities for the Owner/Developer***

   It is a common practice that the owner/developer work with engineers and other professionals in the development of projects and generally present to potential contractors a full range of drawings, specifications, studies, endorsements and permits for the contractor to develop construction estimates and construction documents (e.g., construction schedules). The owner/developer relies on professionals for the following: performing construction according to approved permits and endorsements; conducting and documenting inspections; and submitting reports to regulatory agencies. Generally, the owner/developer does not perform or manage construction work and activities. In this case, more responsibility must be allocated to Respondent ABEF concerning Claim 3 (failure to

post signs and retain SWPPP) and Claim 4 (development of SWPPP), as these are tasks for which the owner/developer is generally responsible. These two claims are generally known as "paper" violations and do not have a direct impact on the environment.

3. ***Key Responsibilities for the Site Contractor***

The site contractor is generally involved with earth movement activities, site improvements, utilities installations, and the implementation of the erosion and sediment controls; these controls are necessary to comply with state and federal permits, and are fundamental for the prevention, reduction, and elimination of sources of pollutants and discharges of sediments into receiving waters. In this case, more responsibility must be allocated to Respondent Cotto concerning Claim 2 (discharge without NPDES permit) and Claim 5 (implement SWPPP); as stated above, these responsibilities are generally within the province of site contractors.[3] Based on Complainant's careful re-evaluation of these factors, the Undersigned finds an alternate penalty is warranted, as set forth below.

Claim	Respondent ABEF	Respondent Cotto
1 (failure to apply)	Failure to Apply = $1,000.00 21 events * $500/event = $10,500.00 SWPPP Development = $5,000.00 Sign Posting = $500.00 **Total = $17,000.00**	Failure to Apply = $1,000.00 10 events * $2,500/event = $25,000.00 Implement SWPPP = $10,000.00 **Total = $36,000.00**
2 (discharge without NPDES permit)		
3 (failure to post sign and retain SWPPP)		
4 (development of SWPPP)		
5 (implement SWPPP)		

[3] The implementation of the SWPPP includes the installation and maintenance of sediment and erosion controls to prevent and/or minimize the discharge of pollutants into the receiving waters.

The Undersigned believes that the proposed gravity penalty of $53,000, allocated as set forth in the table above and based on the considerations outlined herein, is reasonable.

Calculation of Economic Benefit: Respondents have an obligation under the law to obtain a NDPES permit for storm water discharges which are considered a "discharge of a pollutant" within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(12). The EPA's enforcement officer determined that Respondents together incurred an economic benefit of $1,582 as a result of their failure to comply in a timely manner with NOI and SWPPP requirements at the Project by calculating the costs which Respondents would have had to undertake to comply with the applicable statutes and implementing regulations.

The calculation of the economic benefit realized by Respondents was initially broken down in a table entitled *BEN Calculation Summary for ABEF and HCC dated 4/26/05* in the *2016 Penalty Memorandum*. The EPA BEN Model Software was used for the calculation of each estimated benefit or saving in the absence of cost information from Respondents. The Complainant complied with the orders seeking clarification of the penalty calculation by submitting revised BEN calculations, most recently in its *2021 Penalty Memorandum*. The Complainant's calculations assign benefits to the Respondents based on which Respondent was primarily responsible for complying with the statute and regulatory requirements that were violated.

Respondent ABEF obtained an economic benefit of $9.00 for its delay in submitting the NOI form for coverage under the construction permit. Respondent Cotto gained a benefit of $6.00 for its delay in submitting the NOI form. ABEF also gained a $57 benefit from the incomplete SWPPP.

Additionally, Respondent Cotto failed to implement storm water controls at the project site, which resulted in the discharge without a permit, and Complainant calculated an economic benefit realized by Cotto for this failure to be $1,513. This economic benefit is fully assigned to Cotto because Cotto, as established above, was responsible for the implementation and maintenance of best management practices ("BMPs").

The following table summarizes Complainant's calculation of the economic benefit and savings for the Respondents, with which the Undersigned agrees:

Claim	Respondent ABEF	Respondent Cotto
1 (failure to apply)	$9.00	$6.00
2 (discharge without NPDES permit)	No benefit	See Claim 5
3 (failure to post sign and retain SWPPP)	Negligible	Negligible
4 (development of SWPPP)	$57.00	No benefit
5 (implement SWPPP)	No Benefit	$1,513.00
Total	**$63.00**	**$1,519.00**

To summarize, Respondent ABEF was assigned a penalty of $63 for economic benefit, and Cotto was assigned $,1519, for a total economic benefit component of the penalty of $1,582.

Calculation of Penalty Adjustment Factors:

Prior History of Violation: Only Respondent Cotto has a prior history of violations under Section 301 of the CWA. In 2006, an order (Docket Number CWA-02-2006-3041) was issued against Cotto seeking $10,000 for unpermitted discharges; this prior history of violation was considered by EPA in calculating the degree of culpability factor as set forth in the next section.

Degree of Culpability: Respondents should have been aware of the requirement to obtain a permit prior to the commencement of construction activities at the Project and of their obligations to comply with the NPDES permits and the Act, but, as established above, Respondents failed to timely apply for NPDES permit coverage and develop and implement the SWPPP at the Project.

More importantly, on June 26, 2009, EPA served Respondents with an *ACO* to cease all clearing, grading and excavation activities at the Project and from discharging storm water runoff into Quebrada. Despite a statement by ABEF's representative that operations had ceased, EPA's Inspection revealed that construction had continued at the Project and demonstrated that Respondents knowingly defied the *ACO* and the CWA. Based on the information set forth above, Complainant correctly concluded that Respondents knowingly violated Section 301(a) of the Act and the NPDES regulations which implement the Act and are therefore culpable.

As to the degree of culpability, Complainant assigned a greater degree of culpability to Cotto based on the role that each Respondent had in the development and construction of the project. Cotto was responsible for the day-to-day control on the Project, the implementation of the SWPPP, timely applying for a permit, and providing notice to ABEF about the CWA and NPDES permit program requirements. Further, as discussed above, Cotto had a prior history of violations, further demonstrating that Cotto was familiar with NPDES requirements.

Based on the analysis of the degree of culpability factor set forth in Complainant's *2021 Penalty Memorandum* and summarized above, I agree with Complainant's proposal to increase the penalty of Respondent ABEF by $1,000 and the Respondent Cotto by $3,000 based on this factor.

Ability to Pay: Prior Agency decisions have noted that EPA's ability to gather financial information about a respondent is limited at the outset of a case, and a respondent is in the best position to provide relevant financial records about its own financial condition. *Spitzer Great Lakes*, 9 E.A.D. at 321; *New Waterbury*, 5 E.A.D. at 541. Therefore, the complainant may presume that the respondent has an ability to pay the penalty until respondent puts its ability to pay at issue. *New Waterbury*, 5 E.A.D. at 541; *Spitzer Great Lakes*, 9 E.A.D. at 321*; In re: CDT Landfill Corp.*, 11 E.A.D. 88, 122 (EAB 2003); and, In *re: Donald Cutler*, 11 E.A.D. 622, 632 (EAB 2004).

If a respondent fails to properly notify EPA that it plans to assert an inability to pay claim or fails to produce supporting financial documentation, then the presiding officer has the discretion to waive consideration of the ability to pay factor. *Spitzer Great Lakes*, 9 E.A.D. at 321; *New Waterbury*, 5 E.A.D. at 542. In those situations when a respondent places its ability to pay a penalty at issue, EPA is "required to present some evidence to show that it considered the respondent's ability to pay a penalty as part of the Region's *prima facie* case that a proposed penalty is appropriate taking all penalty criteria into consideration." *In re: JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 398 (EAB 2005) (*citing, New Waterbury*, 5 E.A.D. at 542).

In this proceeding, Complainant indicated in its *2016 Default and Penalty Motion* that "no inability to pay argument is anticipated" as Respondents had not raised such an argument. More recently, when Respondents' representative reappeared and requested extensions of time in which to negotiate with Complainant, one of the issues the representative broached was ability to pay. But it is noted that, to date, although the Undersigned granted numerous requests for

extensions of time to permit the Respondents to submit documentation supporting an inability to pay the proposed penalty, no such documentation has been submitted by either Respondent. The record reveals that, for purposes of calculating the proposed penalty, the Complainant had been provided no information regarding the Respondents' financial status despite Complainant's repeated efforts to obtain that information from Respondents. Therefore, the Complainant continued to maintain through the *2021 Penalty Memorandum* that an adjustment to the penalty based on this factor was not warranted.

I find that Complainant's conclusion as to Respondents' ability to pay the proposed penalty was reasonable and appropriate considering its obligation regarding the statutory factors and the fact that neither Respondent provided any information to support an ability of pay claim. Information concerning Respondents' financial situation rested primarily with the Respondents. Additionally, it is important to note that in the *Complaint,* the Complainant specifically advised the Respondents that they could raise the effect the proposed penalty would have on Respondents' ability to continue in business and/or any other special facts or circumstances Respondents wished to raise. (*Complaint* at 12). The burden to demonstrate mitigating circumstances, such as inability to pay, rests with the Respondents. By failing to answer the *Complaint* and all subsequent orders and motions, Respondents failed to present any information as to any mitigating circumstances, including any indication that the penalty might adversely impact either Respondent's ability to continue in business.

Based on a careful review of the record, I conclude that Complainant adequately considered Respondents' ability to pay and that a downward adjustment to the penalty based on this factor is not warranted.

Summary:

Therefore, I conclude that the final total penalty proposed by the Complainant, $58,582, as modified by the *2021 Penalty Memorandum,* is fully supported by the application of the statutory factors for determining a civil penalty in Section 309(g)(3) of the CWA, EPA policies on civil penalties, and the record. Specifically, Respondent Cotto is assigned penalties of $36,000 for gravity component, $1,519 for economic benefit, and $3,000 for culpability, for a total penalty of $40,519. Respondent ABEF is assigned a gravity component penalty of $17,000, an economic benefit penalty of $63 and a culpability penalty of $1,000, for a total penalty of $18,063.

Complainant provided the *Sworn Statement of Yolianne Maclay* on June 6, 2018. The statement establishes that Ms. Maclay was the employee of the Complainant who conducted the inspection of the construction project and recommended the original penalty amount. The statement also declares that Ms. Maclay revised the penalty calculation taking into account the difference in violations, economic benefit and history of non-compliance for each Respondent.

DEFAULT ORDER

Pursuant to the Consolidated Rules, including 40 C.F.R. § 22.17, Complainant's *2016 Default and Penalty Motion*, as modified by the *2021 Penalty Memorandum*, is GRANTED, an INITIAL DECISION AND DEFAULT ORDER is hereby ISSUED, and Respondents are ORDERED to comply with all the terms of this Order:

1. Respondents are assessed a civil penalty in the amount of Fifty-Eight Thousand Five Hundred Eight-Two Dollars ($58,582), broken down as follows: Respondent Cotto is ordered to pay $40,519 and Respondent ABEF is ordered to pay $18,063, and ordered to pay the civil penalty as directed in this Order.

2. Respondents shall pay the civil penalty to the "Treasurer of the United States of America" within thirty (30) days after this default order has become a final order pursuant to 40 C.F.R. § 22.27(c). Respondents shall clearly identify, regardless of the form of payment, the name and docket number of the case, set forth in the caption on the first page of this document. The payment methods are described below:

a. If Respondent chooses to pay by cashiers' or certified check, the check shall be mailed to:

BY U.S. POSTAL SERVICE	BY OVERNIGHT MAIL
United States Environmental	U.S. Bank
Protection Agency	1005 Convention Plaza
Fines and Penalties	Mail Station SL-MO-C2GL
Cincinnati Finance Center	ATTN Box 979077
P. O. Box 979077	St. Louis, MO 63101
St. Louis, MO 63197-9000	Contact: Natalie Pearson
	Tel.: (314) 418-4087

b. If Respondent chooses to pay electronically, the transfer shall be made to:

i. BY WIRE TRANSFER

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency." or

ii. BY AUTOMATED CLEARINGHOUSE (ACH) (also known as REX or remittance express)

ACH for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006—CTX Format
Contact: Jesse White
Tel.: (301) 887-6548

c. Online Payment Option is available through the Department of Treasury. This payment option can be accessed through WWW.PAY.GOV. Enter sfo 1.1 in the search field. Open form and complete required fields.

3. Respondents shall also send copies of this payment to each of the following:
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007
Maples.karen@epa.gov and

Carolina Jordán-Garcia, Esq.
U.S. Environmental Protection Agency, Region 2
City View Plaza II, Suite 7000
Road PR-165, Km 1.2, #48
Guaynabo, PR 00968
Jordan-garcia.carolina@epa.gov

4. The payment must be received at the above address on or before thirty (30) calendar days after this Default Order has become final.

5. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for Collection.

6. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

7. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondents and without further proceedings unless: (1) a party moves to reopen a hearing; (2) a party appeals this Initial Decision to the EPA Environmental Appeals Board within thirty (30) days of service of the Initial Decision, in accordance with 40 C.F.R.§ 22.30; (3) a party moves to set aside the Default Order that constitutes this Initial Decision, or; (4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. See 40 C.F.R. § 22.27(c).

8. Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this Initial Decision is served upon the parties.

IT IS SO ORDERED.

Dated: November 30, 2021

HELEN FERRARA
Digitally signed by HELEN FERRARA
Date: 2021.11.30 15:07:28 -05'00'

Helen S. Ferrara
Regional Judicial Officer/Presiding Officer
U.S. EPA Region 2