

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

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

RESPONDENTS

DOCKET NUMBER
CWA-02-2009-3462

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
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REGIONAL HEARINGS
OFFICE

**RESPONSE TO RESPONDENT CIDRA'S MOTION FOR PARTIAL ACCELERATED
DECISION OR DISMISSAL**

To the Honorable Court:

COMES NOW the United States Environmental Protection Agency, Complainant in the instant action, and very respectfully avers and prays as follows:

1. Pending before this Honorable Court is the Motion for Partial Accelerated Decision or Dismissal (Motion) that Respondent Cidra Excavation S.E. (Cidra) filed on June 30, 2010, requesting that this Honorable Court: (a) dismiss claim 1 of the Complaint; (b) partially dismiss claim 2 of the Complaint; and (c) conclude that the proposed penalty was improperly calculated.

2. In addition to being untimely,¹ Cidra's Motion fails to establish, or even allege, that the appropriate standard for dismissal is met; misapplies the law to the facts and evidence in this matter; and attempts to usurp this Honorable Court's authority to rule on evidentiary matters and in determining the appropriate penalty for Cidra's egregious violations of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 et seq., and

¹ Pursuant to this Honorable Court's Prehearing Order, dated March 25, 2010, the Parties were directed to file any dispositive motion by June 28, 2010. Respondent, however, did not file its Motion until June 30, 2010, did not file a Motion for Leave to File Out of Time, and did not properly appraise Complainant of the existence of such Motion, either before or after filing it, as required by the Prehearing Order.

regulations promulgated thereunder. Further, Cidra's Motion vastly misconstrues the factors Complainant applied in determining the proposed penalty amount.

3. At issue is the appropriate standard to dismiss a Complaint under the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" at 40 C.F.R. Part 22 (Rules of Practice).

4. Pursuant to Section 22.20(a) of the Rules of Practice, "[t]he Presiding Officer, upon [Respondent's motion], *may* at any time dismiss a proceeding without further hearing or upon such limited additional evidence as [s]he requires, on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of [C]omplainant." 40 C.F.R. § 22.20(a).²

5. Under In re Quality Engineers and Contractors and Cidra Excavation, Docket No. CWA-02-2007-3411, 2008 WL 4255885, *4 (ALJ, Sep. 3, 2008) (Order Denying Respondent's Motion to Dismiss), this Honorable Court held that "[i]t is well established that *[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [C]omplainant can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief.*" (quoting Conley v. Gibson, 355 U.S. 41, 45-6 (1957)) (emphasis added). Accordingly, this Honorable Court denied Respondents' Motion to Dismiss. This Honorable Court further set forth the *burden that Respondent must overcome* on order to prevail on a motion to dismiss by holding that

² See In re Quality Engineers and Contractors and Cidra Excavation, Docket No. CWA-02-2007-3411, 2008 WL 4255885, at *3 (ALJ, Sep. 3, 2008) (Order Denying Motion Requesting Dismissal of Complaint) ("A motion to dismiss under 40 C.F.R. § 22.20(a) is analogous to a motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure: 'failure to state a claim upon which relief may be granted.'").

“Respondent must show that EPA’s allegations, assumed to be true, do not prove a violation of the CWA as charged.” Id. (emphasis added). Therefore, the standard “[i]n determining whether dismissal is warranted, [is that] *all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the [C]omplainant.*” In re Commercial Cartage Company, Inc., 5 E.A.D. 112, 117n.9 (EAB, Feb. 22, 1994) (emphasis added). Cidra’s Motion fails to establish, or even allege, that the above-referenced standard is met.

6. The Complaint contains the necessary elements to establish a *prima facie* case under Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, which include: (i) the discharge; (ii) of any pollutant; (iii) from any point source; (iv) by any person; (v) into waters of the United States; and (vi) without a NPDES Permit.

7. Further, Complainant has exchanged information,³ to wit Complainant’s witnesses will testify at the hearing, in order to establish not only that Cidra discharged pollutants from a point source into waters of the United States without a NPDES Permit, but also that Cidra’s CWA violations caused actual and potential harm to human health and the environment.

8. As drafted, Cidra’s Motion fails to meet its burden of establishing that if this Honorable Court assumes that all facts Complainant has set forth are true, and makes all reasonable inferences in favor of Complainant, it would not find a violation of the CWA as charged. Therefore, Cidra’s Motion should be denied.

³ See Complainant’s Exhibits 5, 7–7d, 9, 9a, 13–13f, 18, 19, 20, 21, 23, 24, 25, 26, 26a, and 27.

a. Claim 1 should not be Dismissed as Respondent Cidra actually discharged pollutants into waters of the United States without a NPDES Permit, in violation Sections 301 and 402 of the CWA

9. At issue is whether Complainant may seek an administrative penalty for Cidra's failure to apply for coverage under the NPDES permit, as alleged in the Complaint.

10. Pursuant to Section 309(g)(1)(A) of the CWA,

[w]henver on the basis of any information available—the Administrator finds that any person violated section [301, 302, 306, 307, 308, 318 or 405 of the CWA], or has violated any permit condition or limitation implementing any of such sections in a permit issued under section [402 of the CWA] . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

33 U.S.C. § 1319(g)(1)(A) (emphasis added).

11. Pursuant to Section 402(p)(4)(A) of the CWA, the Administrator was required to “establish regulations setting forth the permit application requirements for stormwater discharges described in [Section 402(p)(2)(B)].” Accordingly, the Administrator promulgated 40 C.F.R. § 122.21(a), which establishes the *duty to apply for a NPDES Permit* on any person who discharges or proposes to discharge pollutants.

12. The Complaint alleges that since Cidra actually discharged pollutants into waters of the United States, it breached the duty to apply for a NPDES Permit, as required by 40 C.F.R. § 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.] 33 U.S.C. § 1319(g)(1)(A) (emphasis added).⁴

13. Pursuant to 40 C.F.R. § 122.26(c), “[d]ischargers of storm water associated with industrial activity are required to apply for an individual permit, apply for a permit through a group application, or seek coverage under a [General Permit].”

14. Under San Francisco Baykeeper v. Tidewater Sand & Gravel Co., 46 ERC 1780, 1997 U.S. Dist LEXIS 22602, *24–25 (N.D. Cal. 1997), the court held that once Defendant filed its NOI late, “it indicated that it did not intend to seek an individual permit and thereby subjected itself to the requirements of the General Permit” and therefore Defendant violated regulations promulgated under Section 402(p)(4)(A) of the Act by failing to obtain coverage under a storm water discharge permit in a timely manner. Similarly, Cidra submitted its NOI late, subjecting itself to the General Permit, and is liable for its failure to obtain NPDES Permit coverage prior to the date of its first actual discharge, as required by the CWA. See Complainant’s Exhibit 12.

15. Cidra’s Motion points out that “EPA’s jurisdiction [under the CWA] is limited to *regulating the discharge of pollutants.*” NRDC v. EPA, 822 F.2d 104, 129 (D.C. Cir. 1987) (emphasis added). Cidra’s Motion also points out that “unless there is a *discharge of any pollutant*, there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations to seek or obtain an

⁴ See Part 2 of the NPDES General Permit for Storm Water Discharges From Construction Activities (Jan. 21, 2005), Complainant’s Exhibit 9 (NPDES Permit), details the steps Cidra was required to follow in order to obtain NPDES Permit coverage; Environmental Protection Information Center v. Pacific Lumber Co., 469 F. Supp. 2d 803, 826–27 (N.D. Cal. 2007) (holding that in order to establish a violation of Section 402, in a *citizen-suit* action under 505(a) of the CWA, 33 U.S.C. § 1365(a), Complainant needs to establish that Respondent “failed to comply with the NPDES Permit.”).

[NPDES] Permit.” Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added). Finally, Cidra’s Motion reiterates that “*unless there is a discharge of any pollutant*, there is no violation of the Act”. Service Oil, Inc. v. EPA, 590 F.3d 545, 550 (8th Cir. 2009) (emphasis added).

16. Recently, this Honorable Court held that “the operator of an *existing [point source that] is already discharging, is required under the regulations and general permits to apply for coverage under a NPDES permit.*” In the Matter of Municipality of Rio Grande, EPA Docket No. CWA-02-2009-3458, 2010 WL 520898, *8 (ALJ, Jan. 13, 2010).

17. Moreover, the court in Service Oil acknowledged that since “storm water discharges can happen any time after the start of construction mak[ing] the site a point source[.]” prudent builders still have the duty to “apply and obtain permits before starting construction to avoid penalties for unlawful discharge that may prove to be severe [in compliance with] the regulatory regime Congress crafted.” 590 F.3d at 551.

18. Here, Complainant alleges that the Project Cidra operated became a point source on February 20, 2007, when a storm water event of 1.11 inches caused the discharge of pollutants into waters of the United States. Since Cidra failed to apply for a NPDES permit on or before February 20, 2007, as required by 40 C.F.R. § 122.21, it violated a permit condition established under Section 402 of the CWA.

19. Under the position Cidra sets forth, the operator of a point source that knows that its construction activities will cause the discharge of pollutants,⁵ and actually discharges those pollutants into waters of the United States, is never required to apply for NPDES Permit coverage. Such position is in direct conflict with the regulatory regime Congress crafted and should, therefore, be denied.

b. Claim 2 should not be Partially Dismissed as it properly alleges that Cidra is liable for the illegal discharges of pollutants into waters of the United States without NPDES Permit coverage

20. At issue is whether Complainant can seek an administrative penalty for Cidra's illegal discharges into waters of the United States without NPDES Permit coverage, as alleged in the Complaint.

21. Pursuant to Section 309(g)(1)(A) of the CWA,

[w]henver on the basis of any information available—the Administrator finds that any person violated section [301 of the CWA]. . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

33 U.S.C. § 1319(g)(1)(A).

22. Pursuant to Section 301(a) of the CWA, “the discharge of any pollutant by any person shall be unlawful[,]” except as in compliance with Section 402 of the CWA.

33 U.S.C. § 1311.

23. The Complaint sufficiently alleges all elements of the *prima facie* case under Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, which include: (i) the

⁵ Based on the H-H Study, Respondents knew, since March 2006, that the Project would discharge into the Unnamed Creek and the Rio Canovanas. See Complainant's Exhibit 5.

discharge; (ii) of any pollutant; (iii) from any point source; (iv) by any person; (v) into waters of the United States; and (vi) without a NPDES Permit.

24. Cidra's Motion erroneously alleges that Claim 2 should be partially dismissed as it only violated the Act on 26 days between the January 25 and September 27, 2007 *period*, as alleged in the Complaint.

25. It is well-established that pleadings contained in the Complaint are not evidence of alleged facts. See Pullman Co. v. Bullard, 44 F.2d 347, 348 (5 Cir. 1930). In Pullman, the court explained that the purpose of pleadings "is to fix the contentions of each party [and it noted that] statements of fact . . . are merely [its] contentions and are not evidence". 44 F.2d at 348. In addition, "unless identified and introduced in evidence as an exhibit during [the hearing]" an exhibit is not evidence. Bishop v. Flournoy, 319 Fed. Appx. 897, 899 (Fed Cir. 2009).

26. It is equally well-established that the purpose of pleadings contained in the Complaint is to provide Respondents with fair notice of what the claim is and the grounds upon which it rests. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

27. Claim 2 of the Complaint adequately apprised 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 permit coverage. In addition, the exhibits Complainant has exchanged thus far, establish that during the aforementioned *period* the CWA violations alleged in the Complaint did in fact occur.

28. Cidra's Motion inadequately attempts to usurp this Honorable Court's authority to rule on evidentiary matters that have not even been properly presented at the hearing. This Honorable Court should therefore deny Cidra's request to partially dismiss Claim 2 of the Complaint.

c. **Cidra's Motion vastly misconstrues the factors Complainant considered in seeking the appropriate penalty amount for its egregious violations of the Act**

29. At issue is who determines the amount of the recommended penalty and what constitutes a final agency action, reviewable under the arbitrary and capricious standard.

30. Pursuant to Section 22.27(b) of the Rules of Practice, this Honorable Court "shall 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). This Honorable Court has the discretion "to assess a penalty different in amount from the penalty proposed by complainant" by either increasing or decreasing such amount. Id. The penalty amount this Honorable Court recommends constitutes an initial decision by the Agency, which may become final under 40 C.F.R. § 22.27(c). Cidra's Motion attempts to usurp this Honorable Court's authority in determining the appropriate penalty for Cidra's violations of the Act and regulations promulgated thereunder.

31. Further, it is well-established that the arbitrary and capricious standard, for abuse of discretion review, applies only to agency actions that become final. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416–18 (1971).

Therefore, at this stage of the proceedings the issue of whether the Agency has acted

arbitrarily and capriciously, as Cidra's Motion claims, is neither ripe for review, nor in the appropriate forum.

32. Also in issue are the factors Complainant may rely upon in order to propose the assessment of a penalty.

33. Pursuant to Section 22.19(a)(3) of the Rules of Practice, when Complainant specifies a proposed penalty in the Complaint, as is the case here, "[C]omplainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act." 40 C.F.R. § 22.19(a)(3).

34. Pursuant to Section 309(g)(3) of the Act,

In determining the amount of any penalty assessed under [Section 309(g), EPA] shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).

35. Complainant has met the burden imposed by 40 C.F.R. § 22.19(a)(3), by explaining in its prehearing information exchange how the proposed penalty was calculated. See Complainant's Exhibit 26 (Proposed Penalty Memorandum).

36. The Proposed Penalty Memorandum explains in detail how each of the factors outlined in Section 309(g)(3) were considered, including: (1) the nature, circumstances, extent and gravity of the violations, 3–12; (2) the ability to pay, 15; (3) Cidra's prior history of such violations, 14; (4) Cidra's degree of culpability, 14–15; and (5) Cidra's economic benefit or savings resulting from its violations, 12–13. Cidra will have the opportunity to cross-examine the expert witness that prepared the Proposed

Penalty Memorandum at the hearing, pursuant to Section 22.22(b) of the Rules of Practice.

37. Further, the proposed penalty amount is within EPA's discretion.

38. Pursuant to Section 309(g)(2)(B) of the CWA, EPA may assess a class II civil penalty for violations listed under Section 309(g)(1) of the CWA, that "may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount . . . shall not exceed \$125,000." 33 U.S.C. § 1319(g)(2)(B).

39. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2641 (Pub. L. 101-40, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvements Act of 1996, 31 U.S.C. § 3701 (Pub. L. 101-34, April 23, 1996, 110 Stat. 1321), EPA promulgated the Civil Monetary Penalty Inflation Adjustment Rule. Under that Rule, EPA may seek civil penalties of up to \$32,500 per day or administrative penalties of up to \$11,000 per day for each violation occurring after March 15, 2004, through January 12, 2009. 61 Fed. Reg. 69,364 (Dec. 13, 1996); 69 Fed. Reg. 7,121 (Feb. 13, 2004); 73 Fed. Reg. 73,345 (Dec. 11, 2008). A class II administrative penalty may not exceed \$157,500. Id.

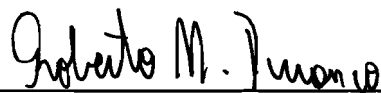
40. Therefore, the total civil penalty amount that EPA had the discretion to assess for Cidra's 26 violations within the January 25 and September 27, 2007 *period*, as alleged in Claim 2 of the Complaint, is \$845,000 (627% less than what the Complaint seeks for both claims). In the alternative, EPA had the discretion to assess an administrative civil penalty of up to \$11,000 per day for each violation, up to a maximum

of \$157,500. The Proposed Penalty Memorandum, however, seeks a total penalty of \$134,749, in total, which is well within EPA's authority under the Act.⁶

41. Cidra's Motion vastly misconstrues the factors Complainant considered in seeking the appropriate penalty amount for its egregious violations of the Act. It inadequately focuses, on one of the multiple factors EPA considered in assessing the proposed penalty amount.

WHEREFORE Complainant respectfully requests, for all of the foregoing reasons, that this Honorable Court deny Cidra's Motion for Partial Accelerated Decision or Dismissal.

Respectfully submitted in San Juan, Puerto Rico, on August 11, 2010.



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⁶ See Kelly v. EPA, 203 F.3d 519, 523–24 (7th Cir. 2000) (holding that the administrative penalty EPA determined was not an abuse of discretion, based on the fact that the penalty was not grossly disproportionate to the violation and that the Act authorized EPA to seek civil penalties of up to \$25,000 per day for each violation).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Response to Respondent Cidra's Motion for Partial Accelerated Decision or Dismissal**, dated August 11, 2010, was sent in the following manner to the addresses listed below:

Original and Copy by Overnight:

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Regional Hearing Clerk
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Copy by Overnight and Facsimile:

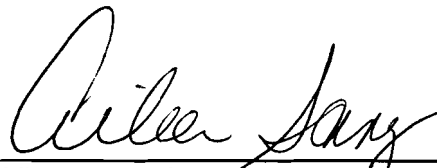
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