

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

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In the Matter of :
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A.B.E.F. Development Corp. and :
Herminio Cotto Construction, Inc., :
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 : Docket No. CWA-02-2010-3465
Respondents :
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**ORDER DIRECTING COMPLAINANT TO CLARIFY CALCULATION
OF THE PROPOSED PENALTY IN ITS MEMORANDUM**

On March 24, 2016, Complainant's Attorney filed a *Motion for Entry of Default as to Penalty Against Respondent Cotto and for Entry of Default as to Liability and Penalty against Respondent ABEF (Motion)*, including a *Memorandum in Support of Motion for Assessment of Penalty on Default (Memorandum)* in that filing. Complainant encountered difficulties in serving Respondent A.B.E.F. Development Corp. (ABEF) with the Motion.

However, according to an *Informative Motion* filed by Complainant on January 11, 2017, Complainant received confirmation that ABEF was successfully served on that date. In its *Informative Motion*, Complainant also reiterated its request for an order of default as articulated in its March 2016 *Motion for Entry of Default*.

The Undersigned, upon reviewing Complainant's *Motion for Entry of Default, Memorandum* and attachments thereto, has determined that clarification of certain statements and calculations made in Complainant's filings are required, as set forth below.

The Undersigned requests information from Complainant as to the form of confirmation it received regarding the successful service, on January 11, 2017, of Respondent ABEF with the

Motion for Entry of Default.

In addition, on page 12 the *Memorandum* provides that “Attachment 5 of this Memorandum includes a spreadsheet printout contains [sic] an estimate of soil loss reduction.” However, the Undersigned could not locate the spreadsheet in the package, and directs Complainant to either provide it or omit the reference thereto.

On page 14, the *Memorandum* states “see Ben Calculation printout”. Similarly, the Undersigned could not locate the referenced printout in the package and requests that either the printout is provided or reference to it is omitted.

On page 6 of the *Memorandum*, regarding Claim 2, it is stated that ABEF discharged pollutants without permit coverage from February 2, 2009 through May 18, 2009, the date when ABEF obtained coverage under the 2008 Construction General Permit. On page 7, regarding claim 2, it is stated that the illegal discharge lasted through July 14, 2009, the date when ABEF filed the NOI. On page 10, it is stated that the illegal discharge continued through July 21, 2009, the date when ABEF obtained authorization to discharge storm water under the 2008 CGP. The length of this violation must be clarified.

On page 9 of the *Memorandum*, there is a statement that HCC illegally discharged pollutants on 11 occasions, and, later in the paragraph, on 21 occasions. In addition, it should be noted that in this paragraph it stated that ABEF did not obtain coverage under the CGP until July 21, 2010. While the Undersigned believes these discrepancies may be typing errors (and that ABEF was in fact covered as of July 21, 2009 and that it was ABEF that illegally discharged pollutants 21 times) the information set forth in this paragraph must be clarified.

The Undersigned notes that the extent of the various violations committed by each Respondent, as reflected in the length of time the violations continued or the number of violations each Respondent is estimated to have made, sometimes differ. Because both Respondents violated the same statutes and regulations and the extent of their violations were very similar, a proposal that the Respondents are jointly and severally liable for one penalty arising from these violations is justifiable.

However, regarding two elements of the proposed penalty, it is more appropriate to propose a separate penalty against each Respondent. Specifically, based on the information set forth on pages 13-15 of the *Memorandum*, there is a disparity between the Respondents in economic benefit realized due to the violations. The penalty proposed against both Respondents was increased to reflect the total economic benefit realized by both Respondents even though HCC realized a greater economic benefit.

In addition, HCC had a history of violations under CWA Section 301 of the Clean Water Act, while ABEF did not. The penalty proposed against both was increased by \$5,000 to reflect HCC's past violations.


Each Respondent should be assessed a separate additional penalty reflecting their respective economic benefit and prior history of violations, and the *Memorandum* should be revised to reflect the calculation of separate penalties for these items. In the alternative, these adjustments could be removed from the penalty calculation, as the inclusion of economic benefit and prior violations is discretionary under the specific facts of this case.

Finally, the Undersigned requests that the record is supplemented with a declaration or affidavit from the party within EPA that either calculated the proposed penalty or who has the technical expertise to explain and support the calculations.

ORDER

The Complainant is hereby directed to file a Supplemental Motion addressing the issues set forth herein no later than May 23, 2017. The Respondents are hereby directed to respond to the Complainant's Supplemental Motion within 15 days after service of such Supplemental Motion.

Date: May 2, 2017



Helen Ferrara
Presiding Officer

