UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: **DESAROLLOS ALTAMIRA I, INC.,** and **CIDRA EXCAVATION, S.E.** **Respondents.**	**DOCKET NO. CWA-02-2009-3462**

REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENT CIDRA EXCAVATION, S.E.'S MOTION FOR PARTIAL ACCELERATED DECISION OR DISMISSAL

TO THE HONORABLE COURT:

COMES NOW, Cidra Excavation, S.D. ("Cidra" or "Respondent"), through the undersigned attorney, and respectfully states, alleges and prays as follows:

I. INTRODUCTION

Cidra has requested pursuant to Rule 22 of the applicable Rules of Practice, 40 C.F.R. Part 22 ("Rules"), that this Court summarily address three aspects of the U.S. Environmental Protection Agency ("EPA") Complaint in the instant matter. By Motion for Partial Accelerated Decision or Dismissal ("Motion"), Cidra, relying on material facts supported by documents submitted by Complainant as part of its pre-hearing exchange ("PHE"), requests that this Tribunal, first, dismiss Claim 1 of the Complaint, as contrary to the decision in Service Oil, Inc. v. United States Environmental Protection Agency, 590 F. 3d 545 (8th Cir. 2009) ("Service Oil"); second, partially dismiss Claim 2 by determining that discharges, as acknowledged by EPA in its PHE, occurred on 26 days[1] and not 245 days as alleged in the Complaint; and, thirdly, determine that the Proposed

[1] Complainant's Rebuttal PHE, Exh. 26, at pp. 7-9.

Penalty Assessment of $134,749.00 described in EPA's revised Penalty Memorandum of May 26, 2010[2], when viewed within the context of EPA's Proposed Penalty Memorandum of September 23, 2009[3], and the agency's purported application of the Service Oil holding, clearly evidences arbitrary and capricious agency action by proposing a penalty assessment of $134,749.00 for stormwater discharges associated with construction activity that admittedly occurred during 26 days.

As will be shown, EPA has failed to rebut the specific material facts presented by Respondent, has decided to rely on the allegations set forth in its pleadings, on pre Service Oil case law and on vague generalizations, avoiding setting forth specific facts in its response to Cidra's Motion ("Response") showing that, concerning the matters presented for summary disposition by Cidra, their exist genuine issues for trial or, concerning Claim 1, a justiciable claim has been presented.

II. LAW AND ARGUMENT

A. EPA has not established that Claim 1 of the Complaint – Failure to Request and Obtain NPDES Permit Coverage for Construction related Stormwater Discharges – Is a Claim Upon Which Relief can Be Granted

Claim 1 of the Complaint, captioned "Failure to apply for coverage under the NPDES permit"[4] states:

> Respondents did not submit an individual NPDES permit application as required by 40 C.F.R. § 122.21, nor did they file a complete and accurate NOI form prior to commencement of construction activities as required by Part 2 of the Construction General Permit. The construction project started on January 25, 2007, as stated in Respondents NOI application detail, and DAI [Desarrollos Altamira I, Inc.] obtained coverage on October 24, 2007, a total of 279 days late. (Emphasis added)

[2] Complainant's Rebuttal PHE, Exh. 26.
[3] Complainant's PHE, Exh. 4.
[4] See, Complaint, at p. 8.

EPA posits that not submitting an NPDES permit application constitutes, a violation to Clean Water Act Section 301(a), 33 U.S.C. §1311(a), subjecting Cidra to civil monetary penalties. Section 301(a) provides that:

> (a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful. (Emphasis added)

Respondent's motion under CROP Rule 22 for dismissal of Claim 1 is equivalent to a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") for failure to state a claim upon which relief can be granted. FRCP Rule 8(a)(2) only requires "a short and plain statement of the claim showing that the pleader is entitled to relief". As stated in Conley v. Gibson, 355 U.S. 41, 47 (1957), the rule pursues "giv[ing] the defendant fair notice of what the ... claim is and the grounds upon which it rests." As stated by the Supreme Court in Bell Atlantic Corp. v. Twombly et al., 550 U.S. 544, No. 05-1126, slip op. at 8, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... a plaintiff's obligation to provide the 'grounds" of his entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do ..." [citations omitted]. "[O]n a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'" (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

Complainant emphasizes the legal authority of EPA to enact a permitting system and its requirements. However, as stated in Service Oil, at p. 550, the issue "is one of remedial power, not regulation validity." "Congress in § 1319(g)(1) granted EPA limited authority to assess administrative monetary penalties for violations of specific statutory

provisions related to the core prohibition against discharging without a permit, or contrary to the terms of a permit. The agency may not impose those penalties for violations of other Clean Water Act regulatory requirements, though it may be authorized to take other enforcement action by other subsections of § 1319. Id. (Emphasis added) "EPA cannot assess monetary penalties under § 1319(g) for a violation of § 1342 until a permit issues." Id., at p. 551.

Finally, the oft quoted "no set of facts" language of Conley, is no longer the standard ["after puzzling the profession for 50 years, this famous observation has earned its retirement."], see, Twombly, slip op. at 16. "In practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory". Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101,1106 (7th Cir. 1984), cited fav. in Twombly, slip op. at 15. There is no viable legal theory to support the imposition of civil monetary penalties for not having obtained, as averred by Claim 1, an NPDES permit. The claim should be dismissed.

B. EPA has not Demonstrated that a Genuine Issue of Fact Exists concerning the number of days – 26 – when Stormwater Discharges Capable of Reaching Navigable Waters Occurred

Claim 2 of the Complaint, captioned "Illegal discharges of pollutant (storm water) into waters of the United States without NPDES permit coverage",[5] states:

> 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(s). The period of violations is from January 25, 2006 (date when discharges began) to September 27, 2007

[5] Id., at p. 9.

> (date when the Order was issued) a total 245 days of violation.[6] (Emphasis added)

Although in the Complaint, EPA alleges 245 days of violation, as stated in Respondent's Motion[7], "[i]n calculating the gravity component of the Revised Penalty Amount, Complainant took into consideration the "extent or length" of the violations: 239 days for Claim 1 and 26 days when rainfall actually occurred in excess of 0.5 inches for Claim 2.[8]

In Puerto Rico Aqueduct and Sewer Authority v. U.S. Environmental Protection Agency, 35 F.3d 600,607 (1st Cir. 1994), the Court stated that "[w]ith minor individual modifications, the summary judgment procedures should be similar in most agencies [to those under Rule 56]." As a result, the Court rejected "the contention that Rule 56 precedents are inapposite in proceedings before administrative agencies." Id.

At the outset it should be emphasized that the Supreme Court has stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." Celotex Corp. v. Catrett, 477 US 317, 323-24 (1986) (Emphasis added). The "party seeking summary judgment always bears the initial responsibility of informing the ... court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the

[6] The "Order" referred to is Administrative Compliance Order Docket No. CWA-02-2007-3070, described and referred to in the Complaint, at ¶'s 39-42, and attached as Complainant's Prehearing Exchange, Exh.6.
[7] See, p. 6, ¶ 24.
[8] Complainant's Rebuttal PHE, at. pp. 7-9.

absence of a genuine issue of material fact." Id., at 323. Respondent submits that it has complied with this initial responsibility.

Applying Rule 56 precedents, this Tribunal has stated that "the opponent of the motion 'may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence." In the Matter of Puerto Rico Aqueduct and Sewer Authority, "Order on Cross Motions for Accelerated Decision", Docket No. EPCRA-02-99-4003, at p. 3 (Jan. 4, 2000). See also, In the Matter of: Strong Steel Products, LLC, "Order Granting Complainants Motion for Accelerated Decision on Counts VII and VIII", Docket Nos. RCRA-05-2001-0016, at CVAA-05-2001-0020 & MM-05-2001-2006, at 11 (September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. See, In re Bickford, Inc., Docket No.TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (EPA ALJ, Nov. 28, 1994). See also, In the Matter of Municipality of Río Grande, "Order on Complainant's Renewed Motion for Remedies and Motion for Accelerated Decision", Docket No. CWA-02-2009-3458, at p. 5 (Jan. 13, 2010).

An examination of Complainant's response to this aspect of Cidra's Motion[9] reveals that EPA has not complied with its burden, has not pointed to portions of the record that establish that discharges occurred on a total of 245 days and not on 26 as stated in its Revised Penalty Memorandum and averred by Respondent in its Motion.

[9] See, Response, ¶s 20-28, at pp. 7-9.

Neither has EPA referred to portions of the record that establish that discharges did not occur on 26 days. The number of violations and the number of days of violation is a material fact for purposes of determining civil penalties under the Clean Water Act. See, Atlantic States Leg. al Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990). Contrary to Celotex and the applicable requirements, Respondent has not met the burden of establishing that a material issue of fact exists concerning the number of days when discharges occurred but has opted to rely on unsupported allegations with ultimate or conclusory facts and conclusions of law. These are clearly insufficient to defeat Respondent's Motion. See, Lujan v. National Wildlife Fed., 497 U.S. 871,888 (1990).

C. Complainant's two Penalty Memorandum, with their corresponding initial and revised Penalty Amounts of, respectively, $146,425.49 and $134,749.00, when examined within the Context of EPA's Expressed Reason for Modifying the Proposed Penalty, its Purported Application of the Service Oil holding, Clearly Evidence a Penalty Calculation Process that is Arbitrary and Capricious, an Abuse of Discretion, which calls for the Exercise by this Court's of One of its Core Functions: Assisting to Maintain a System that is both viewed as, and operated with, Legitimacy and Fairness.

The final aspect of Respondent's Motion is a request that this Court, having reviewed Complainant's Initial Penalty Calculation and subsequent Revised Penalty Calculation of May 26, 2010[10], and the revised penalty amount, within the context of Complainant's interpretation of the Service Oil holding and its application to the proposed revised penalty assessment in the instant matter, determine that the proposed penalty assessment is arbitrary and capricious and contrary to law.

At the outset, Complainant seems to assert that this Court cannot, at this stage, evaluate EPA's proposed penalty, because Respondent's claims are not "ripe for review, nor in the appropriate forum".[11] This position, clearly untenable, appears to hark EPA's position in In the Matter of: John A. Biewer et al., "Initial Decision Regarding Penalty", Docket No. RCRA-05-2008-0007, at p. 12 (April 30, 2010), questioning agency Administrative Law Judge involvement in penalty assessment matters. As stated in Employers Insurance of Wausau and Group Eight Technology, Inc., 6 E.A.D. 735, 758-59 (1997):

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

See also, In the Matter of Coleman Trucking, Inc., Docket No. 5-CAA-96-0025, at p. 11 (May 5, 1998).

Finally, it should be noted that Complainant's action, in interpreting the Service Oil decision and its application to the proposed penalty calculation, to the extent that it does not solely entail the interpretation of a statutory scheme entrusted to the EPA's administration, is not entitled to deference by the Court pursuant to Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). Neither would Respondent's revised penalty assessment be entitled to deference if it was solely prepared as part of a litigation position, see, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

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[11] See, Complainant's Response, ¶31, at pp. 9-10.

WHEREFORE, pursuant to Rule 22.20(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Respondent respectfully requests, that its Motion for Partial Accelerated Decision or Dismissal be Granted.

CERTIFICATE OF SERVICE: Respondent Cidra Excavation, S.E.'s Motion For Partial Accelerated Decision or Dismissal has been notified by certified mail, return receipt requested: Original and Copy, to **Regional Hearing Clerk**, U.S. EPA, Region II, 290 Broadway - 16th Floor, New York, New York 10007; and, copy was notified by certified mail, return receipt requested to: **Hon. Susan L. Biro**, Chief Administrative Law Judge, U.S. EPA, Mail Code 1900L, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460; **Roberto M. Durango, Esq.**, Assistant Regional Counsel, U.S. EPA, Region 2, 1492 Ponce de León Ave., Suite 417, San Juan, PR 00907-4127; **Jose A. Hernández Mayoral, Esq.**, Bufete Hernández Mayoral CSP, 206 Tetuan Street, Suite 702, San Juan, PR 00901.

In San Juan, Puerto Rico this 23rd day of August, 2010.

Respectfully submitted.

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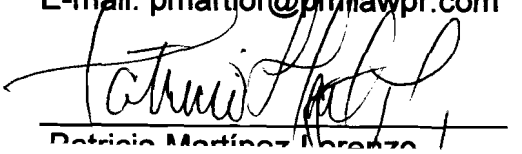
By: 
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