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**

MOTION FOR PARTIAL ACCELERATED DECISION OR DISMISSAL

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

I. BRIEF RELEVANT FACTUAL BACKGROUND

1. The instant proceeding commenced on September 29, 2009, with the issuance by the United States Protection Agency, Region 2, Caribbean Environmental Protection Division ("EPA"), of a Complaint against Respondent and Desarrollos Altamira I, Inc. ("DAI") pursuant to Section 309(g)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2).

2. On November 4, 2009, Respondent notified its Answer to Complaint, admitting certain facts, denying others, raising various Affirmative Defenses and requesting the celebration of a hearing.

3. On March 25, 2010, the Prehearing Order applicable to these proceedings was issued.

4. Each party notified his Prehearing Exchange ("PHE") within the times allotted pursuant to the Prehearing Order, with Complainant's Rebuttal PHE having been notified on or before the due date of May 28, 2010.

5. The Prehearing Order provides for the filing of any dispositive motions within thirty days after the due date for Complainant's Rebuttal PHE.

II. FACTS

6. Claim 1 of the Complaint, captioned "Failure to apply for coverage under the NPDES permit"[1] 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)

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

[1] See, Complaint, at p. 8.
[2] Id., at p. 9.

> 33 U.S.C. § 1311(s). The period of violations is from January 25, 2006 (date when discharges began) to September 27, 2007 (date when the Order was issued) a total 245 days of violation.[3] (Emphasis added

8. In the Complaint, EPA proposed the assessment of a penalty in the amount of $146,425.49[4] ("Proposed Penalty Amount").

9. Complainant prepared a Penalty Memorandum[5], dated September 23, 2009 ("Penalty Memorandum"), which describes the factors allegedly taken into consideration by EPA in determining the proposed penalty amount.

10. The Penalty Memorandum, as well as the Complaint, does not allocate the Proposed Penalty Amount between Claim 1 and Claim 2.

11. In calculating the Proposed Penalty Amount, Complainant reached a gravity component in the amount of $93,424.00[6] for both Claim 1 and Claim 2.

12. In calculating the gravity component of the Proposed Penalty Amount, Complainant took into consideration the "length of the violations": 279 days for Claim 1 and 245 days for Claim 2.[7]

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[3]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.
[4] Complaint, at p. 9.
[5] Complainant's PHE, Exh. 4.
[6] Id., at pp. 2-4,7.
[7] Id.

13. In calculating the Proposed Penalty Amount, Complainant allegedly took into consideration the "economic benefit" obtained by Respondents.[8]

14. In reaching the Proposed Penalty Amount, Complainant included an economic benefit component in the amount of $18,001.22.[9]

15. Complainant prepared a revised Penalty Memorandum, dated May 26, 2010 ("Revised Penalty Memorandum"), which describes the factors allegedly taken into consideration by EPA in determining the new proposed penalty amount.[10]

16. The Revised Penalty Memorandum was purportedly prepared in light of the decision in Service Oil, Inc. v. United States Environmental Protection Agency, 590 F. 3d 545 (8th Cir. 2009), and the order in In the Matter of: Municipality of Río Grande, EPA Docket No. CWA-02-2009-3458 (ALJ, Jan. 13, 2010)(Order on Complainant's Renewed Motion for Remedies and Motion for Accelerated Decision).[11]

17. In the Revised Penalty Memorandum Complainant proposes a penalty of $134,749.00 ("Revised Penalty Amount").[12]

18. The Revised Penalty Memorandum states, concerning Claim 1, as follows:

Nature for Claim 1 (Revised)

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[8] Complainant's PHE, Exh. 4, at pp. 7-11.
[9] Id., at p. 11.
[10] Complainant's Rebuttal PHE, Exh. 26.
[11] Id., at p. 1.
[12] Id., at p. 15.

Pursuant to Service Oil, Inc. and Municipality of Río Grande, the proposed penalty calculation under Claim 1 was adjusted as follows:

> *"Failure to apply for an NPDES Permit from February 20, 2007 (date when a storm water event of 1.11 inches caused discharges into waters of the United States) to October 16, 2007 (one day before the date when the Notice of Intent was filed by Desarrollos Altamira, Inc.) a total of 239 consecutive days of violation."* (Emphasis added)

19. The Revised Penalty Memorandum states, concerning Claim 2, as follows:

> Nature for Claim 2 (Revised)
>
> In compliance with Service Oil, Inc. and Municipality of Río Grande, and evidence on record of actual discharges, the proposed penalty calculation under Claim 2 was adjusted as follows:
>
> > *"Discharges of Storm Water into waters of the United States without a National Pollutant Elimination System (NPDES) Permit on February 20, 2007, March 28, 2007, April 14-18, 2007, April 21-24, 2007, April 26, 2007, May 240-25, 2007, August 5, 2007,. August 18, 2007, September 1-2, 2007, September 9,m 2007, September 14, 2007, and September 26, 2007, a total of 26 days."* (Emphasis added).

20. The Revised Penalty Memorandum allocates the Revised Penalty Amount between Claim 1 and Claim 2.

21. In calculating the Revised Penalty Amount, Complainant included a gravity component of $23,900.00 for Claim 1.

22. In calculating the Revised Penalty Amount, Complainant reached a gravity component of $65,000.00 for Claim 2.

23. The gravity component of the Revised Penalty Amount for Claim 1 and Claim 2 totals $**88,900.00.**[13]

24. In 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.[14]

25. In calculating the Revised Penalty Amount, Complainant allegedly took into consideration the "economic benefit".

26. In reaching the Revised Penalty Amount, Complainant calculated an economic benefit component in the amount of **$23,349.00**, divided between Claim 1 and Claim 2[15] and allocated between Respondents DAI ($574.00) and Cidra ($22,775.00).[16]

III. ARGUMENT

A. Claim 1 should be Dismissed since the Clean Water Act Does not Authorize the Assessment of Civil Penalties by Complainant for Failure to Submit a Timely Permit Application

Although the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.S. §§ 1251-1387 ("CWA" or "the Act"), has been described as a "bold and sweeping legislative initiative" enacted "to protect and enhance the

[13] The gravity component of the proposed Revised Penalty Amount is $4,524.00 less than the Proposed Penalty Amount.
[14] Complainant's Rebuttal PHE, at. pp. 7-9.
[15] Id., at p. 13
[16] Id., at p. 15.

quality of the nation's water resources," United States v. Commonwealth of P.R., 721 F.2d 832,834 (1st Cir. 1983), EPA authority to pursue those policy objectives is not unlimited and, on the contrary, is subject to the operational constraints in the Act. As stated in NRDC v. EPA, 822 F.2d 104, 129 (D.C.Cir.1987), "EPA's jurisdiction [under the CWA] is limited to regulating the discharge of pollutants...."). "EPA can properly take only those actions authorized by the CWA – allowing, prohibiting, or conditioning the pollutant discharge. 33 U.S.C. § 1342." Natural Resources Defense Council, Inc. v. E.P.A. et al., 859 F.2d 156, 170 (D.C.Cir. 1988).

More recently, in Waterkeeper Alliance, Inc. et al. v. E.P.A., 399 F.3d 486, 504 (2d Cir. 2005), the Court stated 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 for point source discharges, nor are they statutorily obligated to seek or obtain an [National Pollutant Discharge Elimination System] NPDES permit."

Finally, in Service Oil, Inc. v. E.P.A., 590 F.3rd 545, (8th Cir.2009) ("Service Oil"), a case markedly similar to the instant one,[17] the Court, relying on the Second Circuit's

[17] After amending the Complaint, EPA alleged that "Service Oil's failure to apply for a storm water discharge permit before commencing construction violated 33 U.S.C. § 1318 and 40 C.F.R. § 122.21". Service Oil, Inc., at 548.

decision in Waterkeeper Alliance, Inc., supra, stated 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 for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." As a result, the Court concluded that "EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application…".[18]

This Tribunal should conclude likewise and, thus, dismiss Claim 1 of the Complaint.

B. Claim 2 should be Partially Dismissed to the Extent that Complainant has acknowledged that Actual Discharges Occurred on Only 26 Days and not 245 Days as Alleged in the Complaint

Section 502(12) of the CWA, 33 U.S.C. 1362 (12), defines the term "discharge of a pollutant" and the term "discharge of pollutants" as "(A) any addition of any pollutant, to navigable waters from any point source, [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

In the Revised Penalty Memorandum, Complainant states that "a storm event of approximately 0.5 inches or more at the site will cause a storm water discharge from the Project into the

[18] Cited fav. in In the Matter of: Municipality of Río Grande, EPA Docket No. CWA-02-2009-3458 (ALJ, Jan. 13, 2010)(Order on Complainant's Renewed Motion for Remedies and Motion for Accelerated Decision), at p. 8.

Unnamed Creek and the Río Canóvanas."[19] Complainant has identified twenty-six (26) actual discharges, and not the sub nom. 245 discharges ("violations") alleged in Claim 2 of the Complaint. The CWA "gives the EPA jurisdiction to regulate and control only *actual* discharges –- not potential discharges, and certainly not point sources themselves." Waterkeeper Alliance, Inc. v. E.P.A., 399 F.3d 486, 504 (2d Cir. 2005) (emphasis in original), cited fav. in Service Oil, Inc. v. E.P.A. supra at p. 551.

This Tribunal should partially dismiss the Complaint by dismissing those 219 additional alleged discharges ("violations") in the Complaint, which Complainant has acknowledged did not occur, thus, conforming the Complaint to the 26 actual discharges acknowledged by Complainant in its own Rebuttal PHE.

C. Complainant's Proposed Penalty Assessments, as evidenced from its own Penalty Memoranda, have relied on improper considerations and evidently been calculated in a clearly arbitrary and capricious manner

The Complainant proposed a penalty amount of $146,425.49 for violations that allegedly occurred during a total of 524 days, divided between 279 days for Claim 1 and 245 days for Claim 2. The penalty amount proposed in the Complaint contains a gravity component in the amount of $93,424.00 and an economic benefit component in the amount of 18,001.22.

[19] Complainant's Rebuttal PHE, at p. 7.

Complainant has stated that, in acknowledgment of the Service Oil holding which solely recognizes EPA authority under the CWA to assess fines for actual discharges and not for failure to timely apply for a permit, it has performed a new penalty calculation. However, this Revised Penalty Calculation, which reduced the discharges alleged in Claim 2 from 245 to 26 days, still proposes a penalty assessment for alleged violations in Claim 1 of 239 days that, pursuant to Service Oil, should have been voluntarily dismissed by Complainant. The end result is that the substantial reduction in the proposed penalty amount that should have been the outcome of the voluntary dismissal by Complainant of Claim 1, and the reduction of alleged violations - from 245 to 26 - for Claim 2 has not occurred. On the contrary, Complainant now proposes a Revised Penalty Amount that, actually ends up increasing the economic benefit component of the penalty calculation by $5,347.78, from the original amount of 18,001.22, to $23,349.00, a 30% increase over the original economic benefit calculation. At the same time, the new gravity amount proposed by Complainant ($88,900.00) is only $4,524.00 less that the original gravity amount ($93,424.00), a 4.8% decrease, while the Revised Penalty Amount ($134,749.00) is only $11,676.49 less than the original proposal ($146,425.49), a 7.9% decrease.

In sum, a 51% decrease in the days of alleged violations for Claim 1 and Claim 2, from 524 days in the Complaint and Penalty Memorandum, to 265 in the Revised Penalty Memorandum, has resulted in Complainant recalculating a 30% increase in economic benefit, a 4.8% decrease in alleged gravity and a 7.9% decrease in total penalty assessment proposal. EPA has clearly misapplied the CWA Section 309(g) criteria, 33 U.S.C.1319 (g) (history of such violations, the degree of culpability & economic benefit) by proposing a Revised Penalty Amount that is clearly out of proportion with the reduction in days of violation mandated by Service Oil concerning Claim 1, and acknowledged by EPA concerning Claim 2. In so doing, EPA has acted arbitrarily and capriciously and has reached a decision, in proposing the Revised Penalty Amount that "rests on an impermissible basis". Kelly v. EPA, 203 F.3d 519,523 (7th Cir. 2000).

Although it is necessary to recognize that the assessment of penalties involves highly discretionary calculations, Tull v. United States, 481 U.S. 412.427 (1987), one would expect that the penalty amounts proposed by the EPA would reflect a minimally objective application of Section 309 (g) criteria to known facts and not reflect, as Cidra submits is the instant case, the outcome of a clearly arbitrary calculus, used as a bargaining chip, at the expense of Respondents.

WHEREFORE, pursuant to Rule 22.20(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Respondent respectfully requests, for the reasons hereinabove stated that the Presiding Officer: (a) Dismiss Claim 1 of the Complaint, (b) Partially Dismiss Claim 2 of the Complaint by concluding that discharges occurred on 26 days and not on 245 days as therein alleged; and (c) concerning the Proposed Penalty Amount Assessment of $146,425.49, subsequently revised by EPA to the amount of $134,749.00, conclude that EPA has acted arbitrarily and capriciously in proposing amounts clearly excessive in view of the days of violation resulting from the application of the Service Oil holding to Claim 1, and Complainant's own admissions concerning Claim 2.

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 to: **Hon. Susan L. Biro**, Chief Administrative Law Judge, U.S. EPA, Mail Code 1900L, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 200460; **Ms. Silvia Carreño-Coll, Esq.**, Assistant Regional Counsel, U.S. EPA, Region 2, 1492 Ponce de León Ave., Suite 417, San Juan, PR 00907-4127; **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 4th day of June, 2010.

Respectfully submitted.

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