

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY U.S. ENVIRONMENTAL
REGION 2 PROTECTION AGENCY-REGION 2

In the Matter of:

MUNICIPALITY OF RÍO GRANDE
P. O. BOX 847
RÍO GRANDE, PUERTO RICO 00745

RESPONDENT

Proceeding pursuant to Section 309(g)(2)(B) of
the Clean Water Act, 33 U.S.C. § 1319(g)

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REGIONAL HEARING
CLERK

**PROCEEDING TO ASSESS A
CLASS II CIVIL PENALTY**

**DOCKET NUMBER
CWA-02-2009-3458**

**COMPLAINANT'S RENEWED MOTION FOR REMEDIES AND MOTION FOR
ACCELERATED DECISION**

To the Honorable Court:

COMES NOW the Complainant to the instant action and very respectfully avers
and prays as follows:

1. Pursuant to the Order on Motion for Remedies, dated October 19, 2009 (Order), this Honorable Court set new Initial and Rebuttal Prehearing Exchange deadlines, which the Parties were directed to strictly comply with. In addition, this Honorable Court allowed Complainant to renew its Motion for default, should Respondent fail to strictly adhere to the deadlines imposed. Complainant now moves to renew its motion for default and moves the Court for an Order granting accelerated decision.
2. Respondent was directed to file its Supplemental Initial Prehearing Exchange by November 5, 2009, to fully and completely respond to the Prehearing Order issued on July 16, 2009. Pursuant to the Order, Complainant was directed to file its Rebuttal Prehearing Exchange by November 20, 2009.

3. Respondent filed its Supplemental Initial Prehearing Exchange on November 12, 2009. Therefore, Respondent failed to comply with this Honorable Court's Order to file its Supplemental Initial Prehearing Exchange by November 5, 2009.

4. Pursuant to the Order, this Honorable Court allowed Complainant to renew its Motion for Default, "in the event that Respondent failed to **fully and timely** file its Supplemental Prehearing Exchange," as is the case here, and stated that "*such default may be granted without further prior notice to Respondent.*" (See Order at ¶ d) (second emphasis added).

5. Under *In the Matter of J.S. Chem Corporation*, Docket No. CWA-02-2000-3407, 2001 WL 931153, at *3 (A.L.J., Aug. 10, 2001) (Order on Motion for Default, Rendering an Accelerated Decision on the Issue of Liability), this Honorable Court held that "a default order may be issued as to Respondent's liability only," upon Respondent's failure to fully and timely comply with the Court's Prehearing Order.

6. Complainant, therefore, respectfully requests that this Honorable Court grant its Renewed Motion for Default, at least on the issue of Respondent's liability, for Respondent's failure to submit Notice of Intent (NOI) to obtain coverage under National Pollutant Discharge Elimination System General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (Small MS4 NPDES Permit).

7. In the alternative, Complainant moves the Court for an Order granting accelerated decision, pursuant to Section 22.20(a) of 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" (Rules of Practice), 40 C.F.R. § 22.20(a), with respect to Respondent's liability for its failure to submit a Notice of Intent (NOI) to obtain coverage under the Small MS4 NPDES Permit—the only count in the Complaint—by the February 18, 2008 deadline established in the Administrative Compliance Order (ACO), Docket

No. CWA-02-2008-3131, dated February 5, 2008. (See Complaint at ¶ 32; and Complainant's PHE, Exhibit 1).

8. At issue is what the appropriate standard for this Honorable Court to grant a motion for accelerated decision under the Rules of Practice.

9. Pursuant to Section 22.20(a) of the Rules of Practice, "[t]he Presiding Officer may at any time render an accelerated decision in favor of a party . . . *if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.*" 40 C.F.R. § 22.20(a) (emphasis added).¹

10. Under *Puerto Rico Aqueduct and Sewer Authority (PRASA) v. EPA*, 35 F.3d 600, 604 (1st Cir., 1994), the court held that "a 'material' fact is one that *may affect the outcome of the case*, [and that] a 'genuine' fact dispute is one that a *reasonable decisionmaker could decide in favor of either party* . . . one that is . . . hearing-worthy in the agencies' parlance." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. One Parcel of Real Property*, 960 F.2d 200, 204 (1st Cir.1992)) (emphasis added).

Statement of Facts

11. The undisputed facts and issues in this matter have been established through the following documents: the Complaint, Respondent's Answer, Complainant's Initial Prehearing Exchange (Complainant's PHE), Respondent's Initial Prehearing Exchange (Respondent's PHE), and Respondent's Supplemental Initial Prehearing Exchange (Respondent's SPHE). All of which have been submitted to this Honorable Court by the respective Parties to this matter.

¹ See, *Puerto Rico Aqueduct and Sewer Authority (PRASA) v. EPA*, 35 F.3d 600, 604 (1st Cir., 1994) (explaining that the requirements of 40 C.F.R. § 22.20(a) are "very similar to the requirement set forth in Rule 56 of the Federal Rules of Civil Procedure").

A. Undisputable Facts

12. Respondent is a “person” pursuant to Section 502(5) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1362(5). (See Complaint at ¶¶ 7). Respondent admitted it is a person under the Act. (See Respondent’s Answer at ¶ 7).

13. Respondent owns and operates a Small Municipal Storm Sewer System (Small MS4). (See Complaint at ¶¶ 6(j)(i.–iii.), 8; and Complainant’s PHE, Exhibits 9, 10, 10a, 10b, and 10c) (See *a/so*, 40 C.F.R. § 122.26(b)(16), Complainant’s PHE, Exhibit 9, defining the terms “owned or operated” for Small MS4 purposes). Although Respondent initially denied that it owns and operates a Small MS4 in its Answer, Respondent now states that “[t]he Municipality has no evidence from developer or whoever it corresponds to transfer title of the [Small MS4].” (See Respondent’s Answer at ¶ 8; Respondent’s SPHE at ¶ 3(a)). Complainant’s PHE provides sufficient, undisputable evidence of Respondent’s Small MS4 ownership.

14. Respondent’s Small MS4 is a “point source” pursuant to Section 502(14) of the Act, 33 U.S.C. § 1362(14). (See Complaint at ¶ 9).

15. Respondent’s Small MS4 is located in an urbanized area of Río Grande, Puerto Rico. (See Complaint at ¶ 10, Complainant’s PHE, Exhibits 10, 10a, 10b, and 10c). Although Respondent initially denied that the Small MS4 it owns and operates is located in an urbanized area of Río Grande in its Answer, Respondent now states that “[t]he Municipality has no evidence [of the Small MS4’s location].” (See Respondent’s Answer at ¶ 10; Respondent’s SPHE at ¶ 3(b)). Complainant’s PHE provides sufficient, undisputable evidence of the location of Respondent’s Small MS4.

16. Respondent’s Small MS4 discharges into the Río Espíritu Santo and the Atlantic Ocean, both of which are waters of the United States pursuant to 502(7) of the Act, 33 U.S.C. § 1362(7). (See Complaint at ¶¶ 11–12, Complainant’s PHE, Exhibits 10,

10a, 10b, and 10c). Respondent has admitted that both the Río Espiritu Santo and the Atlantic Ocean are waters of the United States. (See Respondent's Answer at ¶ 12).

17. Respondent admitted that it failed to produce evidence that it submitted a NOI to obtain coverage under the Small MS4 NPDES Permit, the only count in the Complaint. (See Complaint at ¶¶ 27, 32; Respondent's Answer at ¶ 27).²

B. Argument

18. It is well-established that administrative courts have the authority to issue decisions on the question of liability and determine that the Respondent has violated regulatory requirements based on the information presented in a Motion for Accelerated Decision. (See, *In the Matter of J.S. Chem Corporation*, Docket No. CWA-02-2000-3407, 2001 WL 931153, at *5 (A.L.J., Aug. 10, 2001) (Order on Motion for Default, Rendering an Accelerated Decision on the Issue of Liability) (See also, *In the Matter of U.S. Aluminum, Inc.*, Docket No. II EPCRA-89-0124 (Ruling granting EPA's Motion for Accelerated Decision and declaring Respondent violated EPCRA as charged in the Complaint; Judge Hoya, 1992); *In the Matter of J.A.G. Industries, Inc.*, IF&R Docket No. III-429-C (Rulings on Motions for Partial Accelerated Decision and Dismissal wherein it was determined that Respondent had violated FIFRA; Judge Hoy, 1993)).

19. More specifically, administrative courts have issued decision on the question of liability where the basis for the motion for accelerated decision rested on the Respondent's documentary admissions. Such admissions have included, inter alia, those made in the pleadings and other documents submitted to EPA prior to the onset of any litigation. (See, *In the Matter of J.S. Chem Corporation*, Docket No. CWA-02-2000-3407, 2001 WL 931153, at *4-5 (A.L.J., Aug. 10, 2001)); (See also, *In re Colonial Processing Inc.*, Docket No. II EPCRA-89-0114 (Interlocutory Order granting in part

² Respondent submitted a NOI on July 6, 2009, over a year later than the February 18, 2008, deadline set forth in the ACO.

EPA's motion for accelerated decision; Judge Frazier, 1990) (Respondent's liability determined based upon its belated submission of EPCRA documents to the EPA); *In re Crown Metal Finishing Company*, Docket No. II EPCRA-89-0103 (Opinion addressing Interlocutory Order granting Complainant's Motion for Partial Accelerated Decision; Judge Greene, 1992) (Respondent's liability established as a matter of law based, *inter alia*, upon stipulations and Respondent's belated submissions of required documents (also Forms R) to EPA); *In re J F and M Company*, Docket No. TSCA III-057 (Initial decision; Judge Yost, 1985) (Where the Respondent in his answer admits violation of all counts in the complaint, a motion for accelerated decision on the issue of liability is properly granted.).

20. Courts have often held that a party's admissions can serve to demonstrate that no genuine issue of material fact exists and thus that summary judgment may be granted as a matter of law. (See, e.g., *O'Bryant v. Allstate Insurance Co.*, 107 F.R.D. 45, 48 (D. Conn. 1985) (where the District Court, in denying the plaintiff permission to create a record contradicting his earlier admissions, stated: "[a]dmissions may demonstrate the want of a genuine issue of material fact on which summary judgment may be granted."). The rule has been that a party's admissions, made at any stage of the proceeding, may be utilized against that party for summary judgment. See, e.g., *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650 (2d Cir. 1983) (Labor Secretary granted partial summary judgment against an employer for the latter's violations of a federal statute; admissions made subsequent to the commencement of the litigation).

21. Equally well-established is the principle that a party's admissions made in an Answer can also establish the requisite basis for a Court to grant summary judgment. (See, e.g., *Smith v. Chapman*, 436 F. Supp. 58, 62 (W.D. Tx. 1977), *aff'd*, 614 F.2d 968 (5th Cir. 1980) (where the Court, in granting the plaintiff's motion for summary judgment, noted that "[i]t is a settled rule of law that what the Defendant admits in his answer is binding on him.").

22. Also, a Court can grant a Motion for Accelerated Decision even where the Respondent denies all allegations in its Answer if the Court finds it is evident that no material facts are at issue. (See, e.g., *In the Matter of Northville Square Associates*, Docket No. TSCA-V-C-017-92; Judge Greene; March 1994).

23. Accordingly, Complainant submits that Respondent's admissions, made in its Answer, in pre-litigation documentary submissions to the Agency, through admissions made in its correspondence and communications with the EPA, combine to demonstrate irrefutably that no genuine issue of material fact exists in this litigation with regard to Respondent's liability to the EPA.

24. It is undisputable that Respondent failed to submit a Notice of Intent (NOI) to obtain coverage under the Small MS4 NPDES Permit—the only count in the Complaint—by the February 18, 2008 deadline established in the ACO.

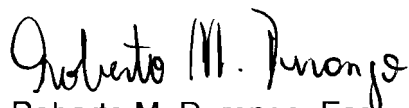
25. Insofar as Complainant has proven all the elements of the violation alleged in the Complaint, Complainant is entitled to an accelerated decision as a matter of law. Complainant has met its burden of submitting documentary evidence that shows that there is no genuine issue of material fact.

26. Complainant expressly reserves its right to supplement its initial prehearing exchange to include an expert witness to testify on its behalf on the issue of Respondent's ability to pay the proposed penalty.

WHEREFORE, Complainant respectfully requests that this Honorable Court enter a Default Order against Respondent, pursuant to the Order and the Rules of Practice. Complainant respectfully requests that this Honorable Court strike all evidence provided in Respondent's Supplemental Prehearing Exchange and not allow any witnesses to testify on behalf of Respondent. In the alternative, Complainant

respectfully requests that this Honorable Court enter an Accelerated Decision against Respondent on the issue of liability for Respondent's failure to submit NOI to obtain coverage. If none of the remedies requested are granted, then Complainant requests an extension to the November 20, 2009, deadline for filing its Rebuttal Prehearing Exchange.

Respectfully submitted in San Juan, Puerto Rico, on this 20th day of November, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused to be sent the foregoing **Complainant's Renewed Motion for Remedies and Motion for Accelerated Decision**, dated November 20, 2009, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original by **Federal Express** to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Building
1099 14th Street, N.W., Suite 350
Washington, D.C. 20460
Ph: 202.564.6291 / Fax (202) 565-0044.

Original and copy by **Federal Express** to:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by **Regular Mail** to:

Alejandro Carrasco-Castillo, Esq.
Legal Counsel
Municipality of Rio Grande
Parana 1684
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San Juan, Puerto Rico 00926-3144

A handwritten signature in cursive script, appearing to read "Aileen Sany", is written over a horizontal line.