

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY REGION II
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REGIONAL HEARING
CLERK

IN THE MATTER OF:)
)
Wyeth Pharmaceuticals Company, Inc.,)
) Docket No. CWA-02-2009-3460
)
Respondent)
)

ORDER DENYING, In Part, MOTION FOR ADDITIONAL DISCOVERY

I. Introduction and Procedural Background

In this proceeding under the Clean Water Act (“CWA” or “Act”), the United States Environmental Protection Agency, Region II, (“Complainant”) alleges that Wyeth Pharmaceuticals Company, Inc., (“Respondent”) violated Section 301 of the Act, 33 U.S.C. § 1311, by failing to comply with its NPDES permit, which authorizes Respondent to discharge storm water from the storm water retention system at its pharmaceutical manufacturing facility (“Facility”) in Guayama, Puerto Rico, into Las Mareas Bay through an underground pipeline designated Outfall 002. Specifically, Complainant alleges that Respondent discharged, into Las Mareas Bay, storm water mixed with industrial waste originating from the Industrial Wastewater Treatment Plant (“WWTP”) located at its Facility on September 22, 23, and 24, 2008; failed to inspect and provide maintenance to Outfall 002, as required by its NPDES permit and a Storm Water Pollution Prevention Plan (“SWPP Plan”), which was developed pursuant to its NPDES permit and with which Respondent is required to comply; and failed to comply with the sampling procedures established by its NPDES permit.

By a Prehearing Order dated July 6, 2009, the Court directed the parties to make their initial prehearing exchanges in this matter by September 4, 2009. Both parties timely filed their initial prehearing exchanges. On October 23, 2009, Complainant filed a Motion for Additional Discovery, which is presently before the Court. Respondent filed its Opposition to Motion for Additional Discovery on October 29, 2009. For the reasons that follow, the Court finds that granting Complainant’s Motion would be inconsistent with the Rules of Practice governing this proceeding.¹ Accordingly, Complainant’s Motion is denied in part.

¹ The Rules of Practice are set forth at 40 C.F.R. Part 22.

II. Complainant's Motion and Respondent's Opposition

In its Motion for Additional Discovery, Complainant requests that the Court order Respondent to produce the following items:

- (1) video and/or photographs depicting the WWTP and nearby storm water retention system from September 22 to September 24, 2008;
- (2) the WWTP Process Control Log Sheet records from September 15 to September 29, 2008;
- (3) the WWTP Log Sheet Records from September 15 to September 29, 2008;
- (4) a detailed explanation and description of the sampling procedures performed by Respondent in September 2008 in order to comply with the monitoring and reporting requirements set forth by Respondent's NPDES permit, including a copy of the chain of custody records; all available written documentation and electronic correspondence; and sworn statements from those individuals who conducted the monitoring activities;
- (5) video and/or photographs depicting the WWTP and nearby storm water retention system from September 18 to September 21, 2008;
- (6) video and/or photographs depicting the WWTP and nearby storm water retention system from September 25 to September 27, 2008;
- (7) all written documentation and electronic correspondence relating to the events reported by Respondent in its written report of October 3, 2008, including the results from the purported investigation that took place during and after the September 2008 events and communications held between WWTP operators, supervisors, managers, and other representatives of Respondent concerning those events;
- (8) a copy of the SWPP Plan in effect for September 2008; and
- (9) a date, time, and place at which Complainant can interview Antonio Otaño, Maria Santiago, and Juan Rivera, who Complainant believes are still Respondent's employees and possess essential information regarding the unauthorized discharges alleged in the Complaint.

In support of its requests, Complainant asserts that it requested the first four items in a letter dated July 21, 2009, and that Respondent has failed to produce these items voluntarily. With respect to the remaining items, Complainant contends that its request for these items should be granted due to the impending hearing date set by the Court for December 7, 2009, and Respondent's failure to produce the first four items voluntarily.

In its Opposition to Complainant's Motion, Respondent argues that, procedurally, Complainant's letter of July 21, 2009, could not have constituted a request for discovery because the letter requested information in reference to settlement discussions between the parties and, moreover, the letter preceded the date on which the parties were required by the Court's Prehearing Order to make their initial prehearing exchanges. With respect to the substance of the specific items requested by Complainant, Respondent contends that it has already provided many of the items to Complainant, either voluntarily or in its initial prehearing exchange, and that it does not possess certain items Complainant requests. Respondent also contends that some of the items requested by Complainant are irrelevant, immaterial, and of little probative value to the present proceeding, as they do not pertain to the dates on which Complainant and Respondent agree the discharges in question occurred or they pertain to the operation of the WWTP rather than the storm water retention system, and that it is the latter which is the subject of the alleged violations. Finally, Respondent argues that Complainant's request for interviews of Respondent's employees is tantamount to a request for depositions and, if granted, would unreasonably delay this proceeding and unreasonably burden Respondent. In sum, Respondent asserts that Complainant does not satisfy in its Motion the criteria set forth in the Rules of Practice to compel additional discovery and that the Motion is a "fishing expedition" aimed at curing Complainant's failure to state a prima facie case in the Complaint.

III. Standard for Adjudicating a Motion for Additional Discovery

In an administrative proceeding conducted under the Rules of Practice, discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs through a prehearing information exchange. 40 C.F.R. § 22.19(a). Subsequent to the prehearing exchange, a party may seek additional discovery by way of written motion. 40 C.F.R. § 22.19(e)(1). The Court may grant such a motion only if the additional discovery (i) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. *Id.*²

²Subpoenas for the attendance and testimony of witnesses and the production of documentary evidence are also available for discovery purposes in this proceeding. 33 U.S.C. § 1319(g)(10). The Court's authority to order depositions or issue subpoenas is subject to the same limitations provided in 40 C.F.R. § 22.19(e)(1), as well as the additional requirement that (i) the information sought cannot reasonably be obtained by alternative methods of discovery; or (ii) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing. 40 C.F.R. § 22.19(e)(3),(4).

IV. Discussion

The Court agrees with Respondent's contention that, with one exception, Complainant's Motion for Additional Discovery does not satisfy the criteria set forth by 40 C.F.R. § 22.19(e)(1). While Complainant states that Respondent has failed to provide the first four items requested voluntarily per Complainant's letter of July 21, 2008, requesting the information, Complainant addresses the remaining criteria for assessing requests for additional discovery by merely reciting that its requests "[w]ill neither unreasonably delay the proceeding nor unreasonably burden [Respondent]" and that "[the information sought] has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." Complainant's Motion at 2. Such conclusory statements are insufficient to satisfy Complainant's burden under 40 C.F.R. § 22.19(e)(1). In contrast, Respondent raises valid arguments to support its position that some of the items requested by Complainant will unreasonably delay this proceeding³ or have little probative value on a disputed issue of material fact relevant to liability or the proposed penalty.⁴

The Court finds, moreover, that many of Complainant's requests are moot. For example, with respect to the video and/or photographs depicting the WWTP and nearby storm water retention system that Complainant requests from various dates, Respondent indicates that the closed circuit security camera system at the facility does not customarily take images of the WWTP and nearby areas as the system is used to monitor the Facility's perimeters, and in any case, the videos are stored for only 30 to 45 days. Respondent's Opposition at 2. Thus, Respondent asserts that it does not possess video and/or photographs of the WWTP and nearby areas from all of the dates requested by Complainant and that it has already provided to Complainant the photographs from that time period that it does possess, which were taken on September 18 and 27, 2008. Respondent's Opposition at 2, 4, 5. Because the Court cannot compel Respondent to produce items that do not exist, these requests must be denied. The Court also cannot compel Respondent to produce discovery that it has already produced. Respondent asserts that, in addition to the aforementioned photographs, it has already provided to

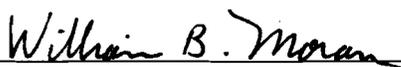
³ As noted, Respondent asserts that Complainant's request for "interviews" of its employees is tantamount to a request for depositions, which would unreasonably delay the proceeding, as the hearing is scheduled to commence only a little over a month from the time Respondent filed its Opposition to Complainant's Motion.

⁴ Respondent asserts that Complainant's request for video and/or photographs from September 25 through 27, 2008, must be denied because such video or photographs do not pertain to the dates on which Complainant and Respondent agree the discharges in question occurred and, therefore, are irrelevant, immaterial, and of little probative value. Respondent's Opposition to Motion for Additional Discovery ("Respondent's Opposition") at 5. Similarly, Respondent asserts that Complainant's request for WWTP Process Control Log Sheets from September 15 to September 28, 2008, must also be rejected because those records pertain to the operation of the Facility's wastewater treatment system and have no bearing on the storm water discharge system, which is the subject of the alleged violations.

Complainant the WWTP Process Control Log Sheet records from September 15 to September 29, 2008; information related to the sampling activities it conducted in September 2008, including laboratory results and chain of custody records; and a copy of the requested SWPP Plan.⁵ Respondent's Opposition 3, 4, 5. Accordingly, Complainant's requests for these items must be denied as moot. Although the opportunity existed for EPA to file a Reply, it did not do so. Accordingly, Respondent's factual assertions in opposing the discovery are taken at face value.

For the reasons set forth above, except as noted in footnote 5, the Court denies Complainant's Motion for Additional Discovery.

So ordered.



William B. Moran
United States Administrative Law Judge

Dated: November 18, 2009

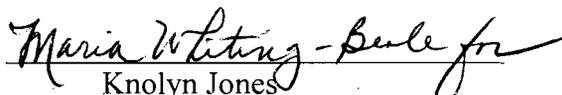
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⁵ In its Motion, Complainant requests a copy of the SWPP Plan in effect for September 2008. Respondent provided in its initial prehearing exchange a copy of the SWPP Plan that became effective in June 2009. Respondent's Exhibit 4. The Court directs the requested SWPP Plan to be provided to EPA promptly.

In the Matter of Wyeth Pharmaceuticals Company, Inc., Respondent
Docket No. CWA-02-2009-3460

Certificate of Service

I certify that the foregoing **Order Denying, In Part, Motion For Additional Discovery**, dated November 18, 2009, was sent this day in the following manner to the addressees listed below.


Knolyn Jones
Legal Assistant

Dated: November 18, 2009

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