

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. 2  
2009 NOV 23 PM 12:50  
REGIONAL HEARING  
CLERK

In the Matter of:

**WYETH PHARMACEUTICALS COMPANY, INC.**

State Road 3, Km. 142.1  
Guayama, Puerto Rico 00784

**RESPONDENT**

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

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

**DOCKET NUMBER  
CWA-02-2009-3460**

**RESPONSE TO RESPONDENT'S MOTION *in LIMINE* AND MOTION TO STRIKE  
SWORN STATEMENT FROM THE RECORD**

To the Honorable Court:

COMES NOW Complainant through the undersigned attorney and very respectfully avers and prays as follows:

1. Pending before this Honorable Court is Respondent's Motion *in Limine*, dated, November 11, 2009 (Respondent's Motion),<sup>1</sup> requesting that certain evidentiary items proffered by Complainant in its Initial Prehearing Exchange be excluded. Respondent's Motion is, essentially, a dubious attempt to discredit Messrs. José A. Rivera, Pedro A. Modesto, and Luis Torres. In addition to being untimely,<sup>2</sup> Respondent's Motion attempts to introduce new evidence, a Sworn Statement without demonstrating that the declarant is unavailable. Moreover, Complainant timely filed its Supplemental Prehearing Exchange, rendering Respondent's request moot.
2. At issue is the appropriate standard to grant or deny a motion *in limine* under the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action

<sup>1</sup> In the Order Denying Respondent's Motion for Continuance, dated November 18, 2009, this Honorable Court also denied Respondent's Motion to Dismiss. Since ¶¶ 1-6 of Respondent's Motion merely regurgitate the statements and arguments contained in its Motion to Dismiss, Complainant limits its response to Respondent's *Motion In Limine*.

<sup>2</sup> This Honorable Court ordered the Parties to file any dispositive motions by October 23, 2009; Respondent, however, filed its Motion *in Limine* on November 11, 2009.

Orders, and the Revocation, Termination or Suspension of Permits” at 40 C.F.R. Part 22 (Rules of Practice).

3. Pursuant to Section 22.22(a)(1) of the Rules of Practice, “[t]he Presiding Officer *shall admit all evidence* which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value”. 40 C.F.R. § 22.22(a)(1) (emphasis added).
4. Under *In the Matter of Valimet, Inc.*, the court held that “a motion *in limine* should be granted *only if* the evidence sought to be excluded is *clearly inadmissible for any purpose*.” Docket No. EPCRA-09-2007-0021, at \*11 (A.L.J., Nov. 6, 2008) (Order Denying Complainant’s Motion *in Limine*) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)) (emphasis added). The court further stated that “[m]otions *in limine* are generally disfavored.” *Id.* (quoting *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993)). Moreover, the court held that “[u]nless the evidence [sought to be excluded] meets this *high standard*, evidentiary rulings should be deferred until [the hearing] so questions of foundation, relevancy, and potential prejudice may be resolved in proper context[, by the Administrative Law Judge].” *Id.* at 11 (quoting *Hawthorne Partners*, at 1400–1401) (emphasis added). Respondent’s Motion fails to meet the above-referenced standard.
5. Respondent’s Motion is essentially a dubious attempt to discredit Mr. Rivera’s testimony as an expert witness by merely arguing that “he is not qualified as a hydrologist or hydrogeologist to address runoff at [Respondent’s] site[,]” and/or by stating that Mr. Rivera “has no personal knowledge of the events which transpired on September 22, 23, and 24, 2008”. (See Respondent’s Motion at ¶ 7a.). Respondent’s Motion, however, acknowledges that Mr. Rivera has “inspect[ed Respondent’s facility] with respect to storm water permit matters for a number of years[.]”(See Respondent’s Motion at ¶ 7a.).

6. Complainant's Initial Prehearing Exchange summarized Mr. Rivera's testimony as follows:

Mr. Rivera will testify about the NPDES Permit and Enforcement Programs, and how they apply to Respondent's facility.

Mr. Rivera will testify about the factual basis of this matter and will render his opinion as to the NPDES program violations, the violations of the CWA, and the pertinent regulations, as they apply to the Respondent. Mr. Rivera will testify as to the Agency's determination to seek the maximum statutory penalty against Respondent (including Respondent's economic benefit), and the appropriateness of the penalty.

In addition, Mr. Rivera will testify about Respondent's past history of violations under the Clean Water Act.

(See Complainant's Initial Prehearing Exchange at ¶ 1(a)(i)).

7. Respondent's Motion fails to demonstrate that Mr. Rivera's testimony is *clearly inadmissible for any purpose*. Contrary to what Respondent alleges, whether Mr. Rivera qualifies as an expert witness is an evidentiary matter that needs to be adjudicated at the hearing by this Honorable Court. Further, this Honorable Court instructed Respondent during the September 29 Teleconference, pursuant to Section 22.22(b) of the Rules, 40 C.F.R. § 22.22(b), that it would have the opportunity to cross-examine Mr. Rivera at the hearing. Merely denying that Mr. Rivera is an expert witness does not disprove that his testimony is clearly inadmissible for any purpose. For example, Respondent has challenged how the amount of the penalty Complainant seeks was calculated and its prior history of violations. Mr. Rivera will testify as to both those matters, among others.
8. Complainant takes particular issue with Respondent's re-assertion that Mr. Rivera is not qualified as expert witnesses to testify in this matter. In addition to being involved in stormwater permitting and compliance issues for nearly two decades, Mr. Rivera is EPA Region 2's Stormwater Specialist—he

possesses Region 2's highest technical expertise in stormwater permitting and compliance issues. As Mr. Rivera's resumé indicates, he possesses vast experience in: permitting activities; inspections; operations and maintenance evaluations; sampling; and enforcement and compliance assistance on NPDES program activities. Further, EPA Region 2 and the United States Department of Justice customarily use Mr. Rivera's expert testimony in numerous administrative and judicial enforcement actions, where his contributions have been proven to be an invaluable asset for the United States Government.

9. Similarly, Respondent's Motion also attempts to discredit Mr. Modesto's testimony as an expert witness as he purportedly "has no experience relating to the design of wastewater treatment systems for pharmaceutical manufacturing facilities". (See Respondent's Motion at ¶ 7b.).<sup>3</sup>
10. Similarly, Respondent's Motion fails to demonstrate that Mr. Modesto's testimony is *clearly inadmissible for any purpose*. Contrary to what Respondent alleges, whether Mr. Modesto qualifies as an expert witness is an evidentiary matter that needs to be adjudicated at the hearing by this Honorable Court. Further, this Honorable Court instructed Respondent during the September 29 Teleconference, pursuant to Section 22.22(b) of the Rules, 40 C.F.R. § 22.22(b), that it would have the opportunity to cross-examine Mr. Modesto at the hearing. Merely denying that Mr. Modesto is an expert witness does not disprove that his testimony is *clearly inadmissible for any purpose*.
11. Finally, Respondent's Motion argues that Mr. Torres' testimony "must be excluded, as he was off-duty on September 22, 23 and 24, 2008[,]" by attempting to introduce new evidence, a Sworn Statement by Ms. María del Pilar Sastre, that has not a modicum of truthfulness.

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<sup>3</sup> Some items relating to the relevance of Mr. Modesto's testimony are discussed below. (See *infra*. ¶ 16).

12. According to Ms. Sastre's statement, "the KRONOS system evidences that Mr. Luis Torres-Pérez was off-duty on Monday, September 22, 2008". (See Respondent's Motion, Attachment 3). The Time Detail report Respondent provides in Attachment 3, however, clearly indicates that Mr. Torres was present on Monday, September 22, 2008, from 12:00 a.m to 6:20 a.m. (See Respondent's Motion, Attachment 3).
13. Undoubtedly, Respondent's Motion fails to demonstrate that Mr. Torres' testimony is *clearly inadmissible for any purpose*. In addition, contrary to what Respondent alleges, whether Mr. Torres qualifies as a factual witness is an evidentiary matter that needs to be evaluated at the hearing by this Honorable Court. Further, this Honorable Court instructed Respondent during the September 29 Teleconference, pursuant to Section 22.22(b) of the Rules, 40 C.F.R. § 22.22(b), that it would have the opportunity to cross-examine Mr. Torres at the hearing. Merely denying that Mr. Torres qualifies as a factual witness does not disprove that his testimony is *clearly inadmissible for any purpose*.
14. Respondent's Motion requests that Complainant's Exhibits 4 and 4d are excluded. (See Respondent's Motion at ¶¶ 7d., e.). The issue is moot as Complainant already filed, in its Supplemental Prehearing Exchange on November 6, 2009, an updated Exhibit 4 that adequately addresses the issues Respondent alludes to. Further, Respondent's Motion fails to demonstrate that the Exhibits 4 and 4d are *clearly inadmissible for any purpose*.
15. Respondent's Motion requests that its prior history of violation be excluded from the record. (See Respondent's Motion at ¶¶ 7e.). Respondent's Motion states that "Complainant is attempting to induce this Honorable Court to believe" that Respondent violated a similar environmental requirement. The issue is equally moot as Complainant filed, in its Supplemental Prehearing

Exchange, a copy of *In the Matter of Wyeth Pharmaceuticals Company*, Docket No. CWA-02-2000-3314 (Consent Agreement and Final Order) (stemming from a Complaint that charged Respondent with violating Sections 301(a) and 308(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1318(a), and regulations promulgated thereunder at its facility in Guayama, Puerto Rico). Contrary to what Respondent's Motion alleges, Complainant's Motion Opposing Respondent's Motion to Dismiss states that "whether there is evidence of Respondent's prior history of violations is a matter that needs to be adjudicated at the hearing by this Honorable Court." (See Motion Opposing Respondent's Motion to Dismiss, at ¶ 20). Further, Respondent's Motion fails to introduce any legal argument as to why its history of prior violations is *clearly inadmissible for any purpose*.

16. Respondent's Motion finally requests that Complainant's Exhibit 7 be excluded from the record. (See Respondent's Motion at ¶ 7f.). Respondent states that "[t]he allegations in the Complaint do not involve any alleged malfunction of the facility's WWTP, nor do they involve a discharge to the POTW." Complainant plans on using Exhibit 7 at the hearing to support Mr. Modesto's testimony:

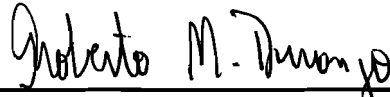
Mr. Modesto will testify about the factual basis of this matter and render his opinion as to, among other things, Respondent's failure to properly operate the facility's wastewater treatment plant prior to and during the illegal discharges of process wastewater through the Facility's outfall 002, which occurred at relevant times, as alleged in the Complaint. He will also testify about the alternatives Respondent had to address the process wastewater during the relevant rain events of September 2008.

(See Complainant's Initial Prehearing Exchange at ¶ 1(a)(ii)). As stated previously, Respondent's Motion fails to demonstrate that Mr. Modesto's testimony is *clearly inadmissible for any purpose*. In addition, Respondent's Motion fails to introduce any legal argument that would render Exhibit 7 *clearly inadmissible for any purpose*.

17. Therefore, in addition to being untimely, Respondent's Motion merely regurgitates the same issues and arguments offered in its Motion to Dismiss. Thus, the only outstanding issue is whether Respondent should be allowed to introduce new evidence, Ms. Sastre's Sworn Statement. Since Respondent's Motion fails to demonstrate—or even allege—that Ms. Sastre is unavailable, Complainant moves the Honorable Court to strike her Sworn Statement from the record.
18. At issue is what the appropriate standard to admitting affidavits under the Rules of Practice.
19. Pursuant to Section 22.22(d) of the Rules of Practice, "[t]he Presiding Officer may admit into evidence affidavits of witnesses who are unavailable [to testify]." 40 C.F.R. § 22.22(d).
20. Respondent's Motion fails to demonstrate—or even allege—that Ms. Sastre is unavailable to testify. Moreover, admitting Ms. Sastre's Sworn Statement would be unduly prejudicial, as it would deprive Complainant of the right to cross-examine Ms. Sastre, pursuant to Section 22.22(b) of the Rules of Practice. 40 C.F.R. § 22.22(b). Admitting Ms. Sastre's testimony, via a Sworn Statement, would also deprive this Honorable Court's the opportunity to ascertain Ms. Sastre's character for truthfulness and veracity. In light of the fact that Ms. Sastre's statement contravenes with the Time Detail Respondent provided, Complainant moves to strike her statement from the record.
21. In the alternative, Complainant moves the Honorable Court to admit Ms. Sastre's Sworn Statement as compelling evidence of Respondent's propensity to subterfuge the Court and the Agency, via documentary evidence.

WHEREFORE, Complainant respectfully requests that this Honorable Court deny Respondent's Motion as, in addition to being untimely, it attempts to introduce a Sworn Statement with not a modicum of truthfulness.

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



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**CERTIFICATE OF SERVICE**

I certify that this day I have caused to be sent the foregoing **Motion *in Limine* and Motion to Strike Sworn Statement from the Record**, dated November 20, 2009, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

**Original Federal Express to:**

Judge William B. Moran  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Franklin Court Building  
1099 14<sup>th</sup> Street, N.W. Suite 350  
Washington, D.C. 20460  
Ph: 202.564.6255 / Fax (202) 565-0044

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

Karen Maples  
Regional Hearing Clerk  
Region 2  
U.S. Environmental Protection Agency  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866.

**Copy by Certified Mail to:**

Attorney for Respondents:

Karín G. Díaz-Toro, Esquire  
Torres & García, P.S.C.  
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San Juan, Puerto Rico 00910-1539

