

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2009 DEC -3 P11 3: 09
REGIONAL HEARING
CLIENT

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

**ORDER DENYING RESPONDENT’S MOTION TO DISMISS
AND MOTION IN LIMINE**

I. Introduction

In this proceeding under the Clean Water Act (“CWA” or “Act”), the United States Environmental Protection Agency, Region II, (“EPA” or “Complainant”) alleges that Wyeth Pharmaceuticals Company, Inc., (“Wyeth” or “Respondent”) violated Section 301 of the Act, 33 U.S.C. § 1311, by failing to comply with its NPDES permit. On October 23, 2009, Respondent filed a Motion to Dismiss, requesting that the Court dismiss this proceeding on the ground that EPA failed to establish a prima facie case. Complainant filed a Motion Opposing Respondent’s Motion to Dismiss on November 4, 2009, (“Response”) and, on November 11, 2009, Respondent filed a Reply. However, with its reply, Respondent added a Motion in Limine. EPA has also filed a Response to that Motion. For the reasons that follow, the Court finds that Respondent did not satisfy the appropriate legal standard to prevail in either motion.

II. Respondent’s Motion to Dismiss and Motion in Limine and Complainant’s Responses

As noted, Respondent requests that the Court dismiss this proceeding for failure by the Complainant to establish a prima facie case. Respondent’s Motion to Dismiss (“Respondent’s Motion”) at 1. Respondent asserts that to establish a prima facie case under the Rules of Practice, Complainant has the burden of demonstrating by a preponderance of the evidence that Respondent is liable for the claims set forth in the Complaint and that the proposed penalty is appropriate. Respondent’s Motion at 5 (citing 40 C.F.R. § 22.24). Respondent then contends that, “*at this point*, Complainant has the burden of demonstrating by a preponderance of the evidence the Respondent’s liability on all claims set forth in the Complaint and the appropriateness of its proposed penalty in regard to all such claims.” *Id.* (emphasis added).

As EPA correctly observes in its response in opposition, the issue where a dismissal is sought depends upon whether EPA has failed “to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.” EPA Opposition at 2, citing 40 C.F.R. § 22.20. EPA notes that the task of establishing that a complaint should be dismissed for

failure to state a claim is steep and that such a motion is to be denied “unless it appears beyond doubt that the [C]omplainant can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief.” *Id.* at 2. EPA’s Complaint alleges that there was an unauthorized discharge of industrial waste, mixed with stormwater, from the Respondent’s wastewater treatment plant into a nearby retention lagoon and that this discharge then flowed through an outfall and then to Las Mareas Bay, a water of the United States. The Complaint does set forth the necessary elements to establish the alleged violation of Section 301 of the Clean Water Act, as it alleges that there was a discharge from a point source by a person into waters of the United States and that the discharge was in conflict with the terms of the NPDES permit. 33 U.S.C. §§ 1311, 1318, and 1342.

EPA also addresses the possibility that the Respondent’s filing is actually a motion for accelerated decision, not a motion to dismiss the proceeding for failure to adequately allege a violation. It contends that, despite the incorrect labeling, the true nature of Wyeth’s Motion is to obtain an accelerated decision, but that denial remains appropriate. This is because, where an accelerated decision is the issue, there must be no genuine issue(s) of material fact and the moving party must be entitled to judgment as a matter of law. Significantly, EPA notes that Wyeth’s Motion does not even allege that there are no genuine issues of material fact in dispute, let alone attempt to show that none exist. Further, EPA’s Response amply demonstrates that there are material facts in dispute, which cannot be resolved absent a hearing affording the parties the opportunity to present their respective views of those facts. EPA Response at 5-9, ¶¶ 14-22.

Wyeth’s Reply simply reasserts that its motion is based on the contention that EPA failed to establish a *prima facie* case or failed to establish other grounds to show a right to relief. Reply at 2.

Discussion

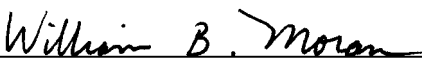
The provision cited by Respondent, both in its motion and its reply is 40 C.F.R. § 22.20, “**Accelerated decision; decision to dismiss.**” However, that Section distinguishes between the two avenues for relief listed within it. The “accelerated decision” route comes into play when “no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.” *Id.* Dismissal, on the other hand, can occur “on the basis of failure to establish a *prima facie* or other grounds which show no right to relief on the part of the complainant.” *Id.*

Respondent arguments confuse the matter raised in its motion to dismiss with its contention that, if a hearing were held, EPA would be unable to prevail under the preponderance of the evidence burden, which it carries. The preponderance standard, as distinct from a motion to dismiss or a motion for accelerated decision, comes into play in weighing the evidence after it has been presented during the hearing. In fact, Wyeth implicitly understands this distinction, as its Reply cites Section 22.24, which is one of the “Hearing Procedures” provisions. *Id.* Thus, Wyeth is not contending that there are no set of facts alleged in the Complaint that could establish a violation, nor is it contending that there are no material facts in dispute. Instead, it is asserting that its prehearing evidentiary submissions, when compared to those submitted by EPA, leave no doubt that EPA’s allegations are not supported by the evidence. *Id.* EPA notes,

correctly, that such a determination can be made properly only after the hearing has been held. **Accordingly, Respondent's Motion to Dismiss is DENIED.**

Wyeth's Reply then requests alternative relief, if the matter is not dismissed. This alternative is incorporated into its Reply, but as a new motion, namely its Motion in Limine. Briefly, the new motion seeks to: exclude two witnesses from being designated as expert witnesses; exclude the testimony of another witness, on the basis that the witness was not on duty at the time of the alleged events; exclude proposed EPA Exhibit 4d on the basis that it pertains to another facility, albeit co-located at the same site, as immaterial and irrelevant to this Complaint; that the same EPA Exhibit as it relates to prior history of violations also relates to the co-located facility, not the facility cited here and therefore should be excluded ; that EPA proposed Exhibit 7 pertains to the waste water treatment plant ("WWTP") but that the Complaint does not pertain to any malfunction of the WWTP nor does it involve a discharge to the publicly owned treatment works ("POTW") and therefore should also be excluded. *Id.* at 3-6. Wyeth contends that if the subjects of its Motion in Limine are granted, EPA then would no longer have a prima facie case.

EPA filed a response to this motion in which it notes that, as with a motion to dismiss, the required showing to grant such relief is similarly steep. The Court agrees with EPA that the Respondent has failed to make such a showing, having failed to show that the evidence would be clearly inadmissible for any purpose. **Accordingly, Wyeth's Motion in Limine is similarly DENIED.**¹



William B. Moran
United States Administrative Law Judge

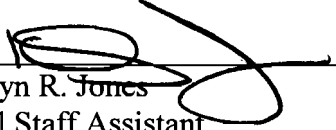
Dated: November 25, 2009

¹ Subsequently, the parties announced that they have reached a settlement in principle. Should settlement not occur, the Court will then deal with EPA's motion, first made in its response to the Motion in Limine, to strike the sworn statement of Ms. Sastre, which affidavit was included with Respondent's Reply to Complainant's Opposition to Motion to Dismiss and Motion in Limine.

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Respondent's Motion to Dismiss and Motion in Limine**, dated November 25, 2009 was sent in the following manner to the addressees listed below.



Knolyn R. Jones
Legal Staff Assistant

Dated: November 25, 2009

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