UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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

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U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II

MOTION OPPOSING RESPONDENT'S MOTION TO DISMISS

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 to Dismiss, dated October 23, 2009 (Respondent's Motion), requesting that the Complaint be dismissed, for Complainant's purported failure to establish a *prima facie* case. Respondent's Motion, however, mistakenly uses the standard for accelerated decisions, in an apparent attempt to establish that there is no genuine issue of material fact for a hearing, by merely denying the Agency's allegations; by usurping this Honorable Court's authority to rule on evidentiary matters; and by usurping the deference granted to the Agency when interpreting the Clean Water Act (CWA or the Act), 33 U.S.C. § 1251 *et seq.*, and the Agency's own regulations and policies.

2. At issue is what the requirements are to dismiss a Complaint for failure to establish a *prima facie* case under 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" at 40 C.F.R. Part 22 (Rules of Practice).

3. Pursuant to Section 22.20(a) of the Rules of Practice, "[t]he Presiding Officer, upon [Respondent's motion], *may* at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of [C]omplainant." 40 C.F.R. § 22.20(a) (emphasis added).[1]

4. Under *In re Quality Engineers and Contractors, Inc.*, Docket No. CWA-02-2007-3411, 2008 WL 4255885, at *2 (ALJ, Sep. 3, 2008) (Order Denying Respondent's Motion to Dismiss), the court held that "[i]t is well established that *[a] complaint should not be dismissed for failure to state a claim 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.*" (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *In re Minor Ridge, L.P.*, Docket No. TSCA-07-2003-0019, 2003 EPA ALJ LEXIS 21, at *3–4 (A.L.J., Mar. 26, 2003) (Order Denying Respondent's Motion to Dismiss)); *In re Julie's Limousine & Coachworks, Inc.*, Docket No. CAA-04-2002-1508, 2002 EPA ALJ LEXIS 74, at *3 (A.L.J., Nov. 26, 2002) (Order Denying Respondent's Motion to Dismiss)) (emphasis added). Accordingly, the court denied Respondents' Motion to Dismiss. The court further set forth the *burden that Respondent must overcome* in order to prevail in a motion to dismiss by holding that "*Respondent must show that EPA's allegations, assumed to be true,* do not prove a violation of the CWA as charged." *Id.* (emphasis added). Therefore, the standard "[i]n determining whether dismissal is warranted, [is that] *all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the [C]omplainant.*" *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, at *4 (ALJ, Nov. 5, 2005) (Order Denying Respondent's Motion to Dismiss) (quoting *In re Commercial Cartage Company, Inc.*, 5 E.A.D. 112,

[1] *See In re Quality Engineers and Contractors, Inc. and Cidra Excavation, Inc.*, Docket No. CWA-02-2007-3411, 2008 WL 4255885, at *2 (ALJ, Sep. 3, 2008) (Order Denying Motion Requesting Dismissal of Complaint) ("A motion to dismiss under 40 C.F.R. § 22.20(a) is analogous to a motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure: 'failure to state a claim upon which relief may be

117n.9 (EAB, Feb. 22, 1994)). Respondent's Motion fails to meet the above-referenced standard.

5. The Complaint alleges that this case involves Respondent's unauthorized discharge of industrial waste mixed with stormwater from its facility's Wastewater Treatment Plant (WWTP) into a nearby stormwater retention lagoon from September 22–24, 2009, an egregious violation of the CWA and regulations promulgated thereunder. Such discharge of pollutants (industrial waste mixed with stormwater) into the nearby stormwater retention lagoon flowed through outfall serial number 002 and eventually reached the Las Mareas Bay, a water of the Unites States. The Complaint further alleges that Respondent failed to inspect and maintain Outfall 002 (the point source) and that its sampling protocol failed to comply with the NPDES Permit and the Act.

6. The Complaint contains the necessary elements to establish a *prima facie* case under Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311and 1342, (Complaint, Claims 1–5), which include: (i) a discharge (Complaint at ¶¶ 38, 39, 42–44); (ii) of any pollutant (Complaint at ¶¶ 42–44); (iii) from a point source (Complaint at ¶¶ 22, 42–44); (iv) by any person (Complaint at ¶¶ 7–8); (v) into waters of the United States (Complaint at ¶¶ 23, 42–44); and (vi) without and NPDES permit (Complaint at ¶¶ 42–44).[2]

7. Since the Complaint adequately sets forth a *prima facie* case on all five counts; meets the burden of alleging sufficient facts to support the charges against Respondent; and adequately apprises Respondent of the nature of each alleged violation and the relevant time for each, Complainant submits that Respondent's Motion is inadequate and respectfully requests that this Honorable Court deny Respondent's Motion.

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granted.'").

[2] Section 301 of the Act, 33 U.S.C. § 1311, states that "[e]xcept as in compliance with [Section 301] and [S]ections . . . 402(a),(i), and (k) [of the Act], the discharge of any pollutant by any person *shall* be unlawful." (emphasis added).

8. Assuming *arguendo* that Respondent's Motion is mislabeled, and that Respondent actually intended to file a motion for accelerated decision, instead of a motion to dismiss, Respondent's Motion also fails to meet the required standard under the Rules of Practice.

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

10. 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).[3]

11. Pursuant to Section 22.22(a) 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) (emphasis added). Pursuant to Section 22.24(b) of the Rules of Practice, "[e]ach matter in controversy *shall be decided by the Presiding Officer* upon a preponderance of evidence." 40 C.F.R. § 22.24(b) (emphasis added).

12. 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).

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[3] *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

13. Respondent's Motion fails to demonstrate—or even allege—that there is no genuine issue of material fact that would render a hearing to be unnecessary. Respondent's Motion constitutes an attempt to usurp this Honorable Court's authority to rule on evidentiary matters by merely denying the allegations set forth in the Complaint, and by attempting to substitute the Agency's interpretation of the CWA, and EPA regulations and policies, for its own.

14. Respondent's Motion alleges that "[a]s a protective measure, even though [Respondent] did not believe there was any noncompliance with the NPDES Permit discharge limitations, [Respondent] made an oral report . . . [which was] followed with a written report dated October 3, 2008". (*See* Respondent's Motion at 3). Complainant, however, submits that Respondent's allegations concern credibility issues that this Honorable Court needs to evaluate after examining the testimony of the witnesses proffered by Complainant in its prehearing exchange, pursuant to Section 22.22 of the Rules of Practice. 40 C.F.R. § 22.22. Further, Complainant also believes that this Honorable will be able to evaluate Respondent's true motivation in submitting the aforementioned written report.

15. Respondent's Motion alleges that "there is no evidence of such overflows in the WWTP Log Book entries for September 22, 23, and 24, 2008, the dates on which [Respondent] had discharges through Outfall 002 and which correspond to Claims 1–3 of the Complaint." (*See* Respondent's Motion at 4, ¶ 1). Contrary to what Respondent alleges, whether there is evidence of such discharges is a matter that needs to be adjudicated at the hearing by this Honorable Court, pursuant to Section 22.22 of the Rules of Practice. 40 C.F.R. § 22.22. Merely denying Complainant's allegations does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

Rule 56 of the Federal Rules of Civil Procedure").

16. Respondent's Motion alleges that "Complainant has not provided any evidence whatsoever of a discharge of industrial waste through Outfall 002, especially in light of the fact that neither the North Lagoon nor the South Lagoon [are] connected to Outfall 002." (*See* Respondent's Motion at 7, ¶ b.). Contrary to what Respondent alleges, whether there is evidence of such discharge of industrial waste through Outfall 002 is a matter that needs to be adjudicated at the hearing by this Honorable Court, pursuant to Section 22.22 of the Rules of Practice. 40 C.F.R. § 22.22. Merely denying Complainant's allegations does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

17. Respondent's Motion alleges that "Claim No. 5 (failure to comply with the NPDES sampling protocol) is likewise not supported by the evidence submitted by Complainant." (*See* Respondent's Motion at 9, ¶ 3). Contrary to what Respondent alleges, whether there is evidence of Respondent's failure to comply with the NPDES sampling protocol is a matter that needs to be adjudicated at the hearing by this Honorable Court, pursuant to Section 22.22 of the Rules of Practice. 40 C.F.R. § 22.22. Merely denying Complainant's allegations does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

18. Respondent's Motion generally alleges that "[t]he evidence provided in support of Complainant's proposed penalty does not justify the amount assessed." (*See* Respondent's Motion at 11–13, ¶¶ 4, 4a.–4f.). Contrary to what Respondent alleges, whether there is evidence in support of Complainant's proposed penalty is a matter that needs to be adjudicated at the hearing by this Honorable Court. Further, during the telephone conference held on September 29, 2009 (the September 29 Teleconference), this Honorable Court instructed the Parties, pursuant to its authority to increase or decrease the amount of civil penalty under Section 22.27(b) of the Rules, 40 C.F.R. § 22.27(b), on its position regarding the

proposed penalty. Merely denying the justification provided for the proposed penalty does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

19. Respondent's Motion states that "the penalty justification memorandum . . . was prepared after the Complaint was issued." (*See* Respondent's Motion, at 12, ¶ 4a.). Contrary to what Respondent states, Complainant followed the notice pleading approach, which does not require Complainant to prepare a penalty memorandum prior to issuing the Complaint. (*See* EPA'S GUIDANCE ON ADMINISTRATIVE PENALTY PLEADINGS IN THE WATER ENFORCEMENT PROGRAMS, at 4 (May 29, 2002)). Pursuant to Section 22.19(a)(4) of the Rules of Practice, Complainant is not required to produce a penalty justification memorandum until "15 days after respondent files its prehearing information exchange." 40 C.F.R. § 22.19(a)(4). Further, Complainant fully-complied with ¶ 2 of the Prehearing Order, which required Complainant to "submit a statement explaining in detail how the proposed penalty amount was determined." (*See* Complainant's Exhibit 4).

20. Respondent's Motion alleges that "[t]he purported evidence of 'prior history of violations' . . . does not correspond to [Respondent], and neither is it related to the NPDES Permit." (*See* Respondent's Motion at 13, ¶ 4d.). Contrary to what Respondent alleges, 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. Under EPA General Enforcement Policy, # GM—21, POLICY ON CIVIL PENALTIES, at 21 (Feb. 16, 1984), "[w]here a party has violated a *similar* environmental requirement before, *this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response*."[4] In turn, under EPA General Enforcement Policy, # GM—22, A FRAMEWORK FOR STATUTE-

[4] EPA'S GENERAL ENFORCEMENT POLICY ON CIVIL PENALTIES # GM 21, at 21 (Feb. 16, 1984), sets four factors for deciding how to adjust for Respondent's prior history of violation, which Complainant considered under the penalty policy, including: (i) how similar the previous violation was; (ii) how recent the previous violation was; (iii) the number of previous violations; (iv) violator's response to previous

SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, at 21 (Feb. 16, 1984), a "similar violation" is one that "should have alerted the party to a particular type of compliance problem. . . . [for example, where] the same statutory or regulatory provision was violated[,]" as Complainant alleges is the case here. *Id.* Further, EPA's Penalty Policies indicate that "if the same corporation was involved, the adjustments for history of noncompliance should apply." *Id.*, at 22. In essence, EPA's Penalty Policies, taken together, stand for the proposition that an adjustment for prior history of non-compliance applies where Respondent had notice of the consequences of a CWA or NPDES Permit violation, as is the case here. Merely denying Respondent's history of prior violations does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

21. Respondent's Motion alleges that "[t]he factual witnesses proffered by Complainant do not have personal knowledge of the facts surrounding the alleged violations." (*See* Respondent's Motion at 14, ¶ 5). Contrary to what Respondent alleges, whether the factual witnesses proffered by Complainant have personal knowledge of the facts surrounding the alleged violations 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 Complainant's proffered witnesses at the hearing. Merely denying that the witnesses proffered by Complainant have personal knowledge of the facts surrounding the alleged violations does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

22. Respondent's Motion alleges that "[t]he expert witnesses proffered by Complainant are either factual witnesses or are not qualified to testify as experts." (*See* Respondent's Motion at 14–15, ¶ 6). Contrary to what

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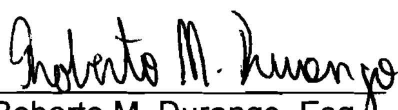
violation(s) in regard to correction of the previous problem.

Respondent alleges, whether the expert witnesses proffered by Complainant qualify as experts 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 Complainant's proffered witnesses at the hearing. Merely denying that the witnesses proffered by Complainant are experts does not disprove that there is a genuine issue of material fact for which a hearing is necessary.

23. For all of the foregoing reasons, Respondent fails to overcome its burden of establishing that if this Honorable Court assumes all allegations to be true and draws all reasonable inferences therefrom in favor of Complainant, that the Complaint does not prove a violation of the CWA as charged. Further, Respondent's Motion fails to overcome its burden of establishing that there is no genuine issue of material fact for which a hearing would not be necessary.

WHEREFORE, Complainant respectfully requests that this Honorable Court deny Respondent's Motion as the Complaint adequately sets forth a *prima facie* case on all five counts; meets the burden of alleging sufficient facts to support the charges against Respondent; and adequately apprises Respondent of the nature of each alleged violation and the relevant time for each.

Respectfully submitted, in San Juan, Puerto Rico this 4th day of November 2009.



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CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Motion Opposing Respondent's Motion to Dismiss**, dated November 4, 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
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