UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of	**Prehearing Exchange**
Aguakem Caribe, Inc.	Docket No. RCRA-02-2009-7110
Respondent	

RESPONSE TO RESPONDENT'S OPPOSITION TO EPA'S MOTION *in LIMINE* AND MOTION TO STRIKE, AND MOTION TO DENY RESPONDENT'S REQUEST FOR DISCOVERY AND RESCHEDULING OF HEARING

To the Honorable William B. Moran:

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

1. Pending before this Honorable Court is Respondent's Opposition to EPA's Motion *in Limine* and Motion to Strike, and Request for Discovery and Rescheduling of Hearing (Respondent's Motion) dated, February 25, 2010.

2. Respondent's Motion is, essentially, Respondent's evidentiary Shangri-La, where documents and testimony may be introduced at will, in patent disregard of the Rules of Practice or the Federal Rules of Evidence. In addition, Respondent's Motion is a dubious attempt to introduce new witnesses, and to depose Complainant's witnesses and the undersigned. Finally, Respondent's Motion unjustifiably requests that the Hearing be rescheduled. For the reasons set forth herein, Complainant opposes Respondent's Motion and respectfully requests that this Honorable Court deny Respondent's request for discovery and rescheduling of hearing.

Emails and Memorandums

3. Respondent's Motion reiterates that the emails and memorandums it attempts to introduce, through Prehearing Exchange, complies with 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).

4. At issue is what the appropriate standard is for admitting emails and memorandums (written testimony) under the Rules of Practice.

5. Pursuant to Section 22.22(c) of the Rules of Practice, "[t]he Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. . . . subject to [cross examination, under oath or affirmation]." 40 C.F.R. § 22.22(c).

6. Respondent's Motion states that both Respondent and Respondent's counsel will authenticate the emails and memorandums. Nonetheless, Respondent's counsel is not listed as a witness in Respondent's Prehearing Exchange, for purposes of cross-examination about the content of such emails and memorandums, as required under Section 22.22(c) of the Rules of Practice. Even if Respondent's counsel is willing to suffer the rare indignity of being called as a factual witness—subjecting himself to cross-examination in the present case—Complainant argues that doing so would inevitably breach Respondent's Attorney-Client privilege. As a result, Complainant will not have meaningful opportunity for cross-examination.

7. Respondent's Motion must also be denied as Respondent's counsel is not listed as either a factual or an expert witness as required by this Honorable Court's Prehearing Order and the Rules of Practice.

8. Pursuant to Section 22.19(a) of the Rules of Practice, "*except in accordance with Section 22.22(a), any document not included in the prehearing*

exchange ***shall not be admitted into evidence****, and* ***any witnesses*** *whose name and testimony summary are not included in the prehearing exchange* ***shall not be allowed to testify****.*" (40 C.F.R. § 22.22(a) (emphasis added).

9. Respondent's Prehearing Exchange fails to list Respondent's counsel name and summary of his testimony are not included in the Prehearing exchange, he is precluded from testifying. Further, Respondent's counsel is not identified in Respondent's Prehearing exchange as either a factual or an expert witness.

10. Respondent's Motion also alleges that the emails and memorandums are admissible under Rule 803(6) as "business records kept in the ordinary course of business." Fed. R. Evid. 803(6).

11. Pursuant to FED. R. EVID. 902(11) such records must be "accompanied by a written declaration of its custodian or other qualified person . . . certifying that the record -- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the *regularly conducted activity*; and (C) was made by the *regularly conducted activity as a regular practice*." Fed. R. Evid. 902(11) (emphasis added)

12. Respondent's Prehearing Exchange fails to include such written declaration. Moreover, the emails and memorandums were clearly prepared in response to EPA's enforcement action and/or in preparation for litigation for the instant case. As such, the emails and memorandums must be excluded from the record. Further, admitting the emails and memorandums, subjecting Respondent and Respondent's counsel to cross-examination, opens the

door to all other communications between Respondent and Respondent's counsel. Thus, if such request is granted, Complainant respectfully requests that all communications, including confidential communications, pertaining to this matter, between Respondent and Respondent's counsel, also be disclosed.

13. Even if the aforementioned emails and memorandums may be properly authenticated, as Respondent's Motion proposes, Complainant maintains that they should be excluded under Section 22.22(a)(1) of the Rules of Practice, as such documents are irrelevant, immaterial and of little probative value as to the violations of the Complaint.

14. Therefore, Complainant respectfully requests that the emails and memorandums be excluded from the record.

Financial Statement and Environmental Contamination Report

15. Respondent's Motion reiterates that the Financial Statement and Environmental Contamination Report it attempts to introduce, through Prehearing Exchange, complies with the Rules of Practice.

16. At issue is what the appropriate standard is for admitting Financial Statements and Environmental Contamination Reports (written testimony) under the Rules of Practice.

17. Pursuant to Section 22.22(c) of the Rules of Practice, "[t]he Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. . . . subject to [cross examination, under oath or affirmation]." 40 C.F.R. § 22.22(c).

18. As this Honorable Court has pointed out, "cross-examination is the greatest legal engine ever invented for the discovery of the truth [and that t]his vital tool can expose inconsistencies, incompleteness, and inaccuracy in [] testimony." *In the Matter of John A. Biewer Company of Toledo, Inc.*, Docket No. RCRA-05-2008-0006, *7 (ALJ, Dec. 23, 2009) (quoting *Perry v. Leeke*, 488 U.S. 272, 283 (1989)). This Honorable Court held that the Parties must have the opportunity to inquire about such documents, to learn about potential flaws and about potential errors in their preparation. *Id.*, at *9.

19. Here, the Financial Statement states that "[a]lthough management is working with its indebtedness and is currently evaluating methods to reduce costs, improve profit margins and increase capital, *the ability of the Company to continue as a going concern is dependent on increasing gross sales and gross margins, obtaining additional capitalization and or restructuring debt.*" Financial Statement, at 8 (emphasis added). Pursuant to Section 22.22(c) of the Rules of Practice, Complainant must have a meaningful opportunity to cross-examine the author of such statement or opinion.

20. Similarly, Complainant must have a meaningful opportunity to cross-examine the author of the Environmental Contamination Report. Specifically, Complainant must be able to cross-examine the author to determine how the sampling was conducted, where the samples were taken, what protocol was followed, if any, and the chain of custody of such samples. As stated, only the individual who prepared the Report or certified the results is qualified to answer such questions. Moreover, the Report addresses Asbestos and Lead contamination, which are irrelevant and immaterial here.

21. Respondent's Prehearing Exchange failed to include the authors of the Financial Statement and Environmental Contamination Report.

22. Respondent's Motion is a dubious attempt to introduce new witnesses, Mr. Eduardo Guzman, the person who prepared the Financial Audit, and Mr. Benjamin Cintron Pagan, the person who prepared the Environmental Contamination Report. Respondent's Motion fails to comply with this Honorable Court's Prehearing Order and the Rules of Practice, as Messrs Guzman and Cintron Pagan are not listed in Respondent's Prehearing Exchange as either factual or expert witnesses.

23. Pursuant to Section 22.19(a) of the Rules of Practice, "*except in accordance with Section 22.22(a),* ***any witnesses*** *whose name and testimony summary are not included in the prehearing exchange* ***shall not be allowed to testify***." 40 C.F.R. § 22.22(a) (emphasis added).

24. Even if the Environmental Contamination Report may be authenticated, as Respondent's Motion Proposes, Complainant maintains that they should be excluded under Section 22.22(a)(1) of the Rules of Practice, as such documents are irrelevant, immaterial and of little probative value as to the violations of the Complaint. Such report addresses the Asbestos and Lead Contamination at Respondent's Former Facility. The Complaint has three counts: failure to make a hazardous waste determination, failure to minimize risks of a fire, explosion or release, and failure to comply with the used oil requirements. The claims are not related to the Asbestos and Lead Contamination at Respondent's Former Facility, rendering the report irrelevant, immaterial and of little probative value.

Request for Discovery

25. Respondent's Motion requests that a discovery schedule be set in order to provide Respondent an opportunity to garner information in EPA's possession. Respondent's Motion also requests to depose Messrs Eduardo Gonzales, Angel Rodriguez and Raymond Basso, and the undersigned.

26. At issue is the standard is for adjudicating a motion for additional discovery.

27. Pursuant to Section 22.19(e)(1), this Honorable Court may grant such 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." 40 C.F.R. § 22.19(e)(1).

28. This Honorable Court has held that "[i]n 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." *In the Matter of Wyeth Pharmaceuticals*, Docket No. CWA-02-2009-3460, *3 (A.L.J., Nov. 18, 2009) (Order Denying Motion for Additional Discovery).

29. Respondent's Motion does not satisfy the criteria set forth by Section 22.19(e)(1) of the Rules of Practice.

30. First, Respondent's Motion requests additional time to garner such information. Although, Respondent's Motion states that such request will not unreasonably delay the proceeding, it also requests that the proceeding be rescheduled, which in itself acknowledges that such request will "unreasonably delay the proceeding." 40 C.F.R. § 22.19(e)(1)(i).

31. Second, Respondent's Motion fails to demonstrate—or even allege—that Complainant is "in possession of information that is most reasonably obtained from [Complainant], and which the [Complainant] has refused to provide voluntarily." 40 C.F.R. § 22.19(e)(1)(i). Respondent's Motion states that it is seeking to discover information held by non-parties to this proceeding, the Municipality of Ponce and the Ponce Port Authority. Respondent's Motion fails to demonstrate why Respondent did not include such information in its Prehearing Exchange, as required by the Rules of Practice.

32. Third, Respondent's Motion fails to demonstrate that it "seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." 40 C.F.R. § 22.19(e)(1)(i).

Complainant has included all relevant and pertinent information in its possession for the instant action in Exhibit 13 of its Prehearing exchange. Respondent does not specify what information is allegedly in Complainant's possession, what probative value it has, and whether it is relevant to liability or the relief sought. It appears that Respondent is attempting to engage in a fishing expedition. Moreover, Messrs Gonzales and Rodriguez are listed in Complainant's Prehearing exchange as witnesses, whose testimony has been properly summarized pursuant to the Rules of Practice. Although Mr. Basso participated in the Removal Action at Respondent's Former Facility, he is not involved in the instant action.

33. Moreover, Respondent's Motion fails to show any legal or factual basis as to why the undersigned should either be deposed or should testify.

34. Therefore, Complainant respectfully requests that Respondent's Request for Discovery be denied.

Rescheduling of Hearing

35. Respondent's Motion requests that the hearing be postponed. On February 12, 2010, a Prehearing teleconference was held, where both Parties confirmed availability for a hearing commencing at 9:30 a.m. on Tuesday, May 4, 2010 and continuing as necessary, through Wednesday, May 6, 2010 in San Juan, Puerto Rico. On February 17, 2010, Your Honor issued a Notice of Hearing confirming that on such dates the hearing would be held.

36. At issue is the appropriate standard for postponement of a hearing.

37. Pursuant to Section 22.21(c), "[n]o request for postponement of a hearing shall be granted except upon motion and for good cause shown." 40 C.F.R. § 22.21(c). Respondent's Motion fails to show good cause for postponing the hearing.

38. Respondent's Motion alleges that it will need additional time to garner certain evidentiary items. Respondent's Motion, however, fails to show such information was not obtained and presented during its Prehearing exchange, as required by the Rules of Practice.

39. Complainant respectfully requests that Respondent's Motion for Rescheduling of Hearing be denied, as it is wholly inappropriate at this stage of the proceedings. Respondent's Motion fails to show good cause as to why Your Honor should be inconvenienced with such a belated request for rescheduling.

For all of the foregoing reasons, Complainant requests that this Honorable Court grant its Motion *in Limine* and Motion to Strike and deny Respondent's Request for Discovery and Rescheduling of Hearing.

Respectfully submitted, in San Juan, Puerto Rico, on March 11, 2010.

Lourdes del Carmen Rodríguez
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CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Response to Respondent's Opposition to EPA's Motion *in Limine* and Motion to Strike, and Request for Discovery and Rescheduling of Hearing,** dated March 4, 2010, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

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

Karen Maples
Regional Hearing Clerk
Region 2
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007-1866.

Copy by **Federal Express** to:

Attorney for Respondent:
Armando Llorens, Esq.
FURGANG & ADWAR
1325 Avenue of the Americas, 28th Floor
New York, New York 10019
[Phone: (212) 725-1818

Copy by **Federal Express** to:

The Honorable William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Building
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
[Phone: (202) 564-6255 Att: Knolyn R. Jones, Legal Staff Assistant]

3/11/2010
Date