UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
AGRONICS, INC., a	)	DOCKET NO. CWA 6-1631-99
New Mexico Corporation	)	
	)	
Respondent.	)	
	)	
NPDES No. NMU000328	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT AND ASSESSMENT OF A CIVIL PENALTY AND RESPONDENT'S MOTION TO DISMISS

ORDER SCHEDULING SUBMISSION OF AN ANSWER

This case arises under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation /Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. The United States Environmental Protection Agency ("Complainant" or "EPA"), by Motion for Default dated September 20, 2002, seeks a default order against Agronics, Inc. ("Respondent") and the assessment of a civil penalty in the amount of $131,445. The Complainant asserts a default order is appropriate because the Respondent did not file an answer to the January 18, 2000, Administrative Complaint ("Complaint"). By Motion to Dismiss dated September 23, 2002, the Respondent contends dismissal of the January 18, 2000, Complaint is appropriate because the Complainant cannot prove the Respondent discharged pollutants into United States waters. Thus, the

Respondent asserts the Complainant lacks jurisdiction and failed to state a CWA claim upon which relief could be granted.[1]

As it concerns the Complainant's Motion for Default, the Respondent failed to comply with the Consolidated Rules of Practice filing requirements for answering complaints. Despite the above, record evidence shows the Complainant did not suffer actual prejudice. In addition, the Complainant failed to demonstrate that the Respondent engaged in bad faith, contumacious conduct, or intentional delay. With respect to the Respondent's Motion to Dismiss, record evidence shows the existence of both a well-plead complaint, and a genuine dispute concerning material facts substantially controverted by the parties. Whether the large arroyo which receives storm water discharges from the Respondent's facility is connected to a stream, is a factual dispute appropriate for hearing before a finder of fact. For the reasons noted above and described further herein, the Complainant's and the Respondent's respective motions are denied.

INTRODUCTION

The EPA Region 6, Division Director for Compliance Assurance and Enforcement commenced this proceeding by filing and serving a January 18, 2000, Complaint. On January 26, 2000, the Respondent accepted service of the Complaint. The Complaint included violations of the CWA, and

[1] Because the Respondent failed to file its September 23, 2002, Motion to Dismiss with the Regional Hearing Clerk, this tribunal was unaware of the Respondent's Motion until December 16, 2002. On December 16, 2002, the Complainant filed a Status Report with the Regional Hearing Clerk. The Status Report included the Respondent's Motion to Dismiss as an attachment. Apparently, the pro se Respondent failed to comply with the filing requirements of both 40 C.F.R. § 22.5, and this tribunal's August 8, 2002, Order to Show Cause. The August 8, 2002, Order to Show Cause required all filings to be filed in accordance with 40 C.F.R. § 22.5.

its implementing regulations codified at 40 C.F.R. Part 122. The Respondent allegedly owned/operated a fertilizer and soil conditioner manufacturing/formulation facility located near Cuba, New Mexico ("Cuba, New Mexico, facility"). Based upon the review of facility information and observations made during a November 24, 1998, inspection, the Respondent allegedly discharged pollutants into waters (i.e., the Rio Puerco and Rio Grande, via an unclassified tributary flowing through the Respondent's facility) of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit.

The Complainant alleged pursuant to 40 C.F.R. § 122.26 and CWA Section 402(p), 33 U.S.C. § 1342(p), the Respondent needed to obtain an NPDES storm water permit, and prepare and implement a Storm Water Pollution Prevention Plan ("SWPPP"). Based upon the Respondent's alleged failure to obtain an NPDES storm water permit, the storm water discharge of pollutants into United States waters, and the failure to prepare and implement a SWPPP, the Complainant sought to impose a civil penalty up to $137,000. By letter dated February 24, 2000, the Respondent served a response to the Complaint.[2] The Respondent asserted the alleged violations contained in the January 18, 2000, Complaint were preempted by State action. Such State action included a March 4, 1999,

[2] Because the Respondent failed to file its February 24, 2000, response to the Complaint with the Regional Hearing Clerk, this tribunal was unaware of the Respondent's response until January 28, 2003. On January 28, 2003, the Complainant filed a Supplement to the Administrative Record in compliance with this tribunal's January 16, 2003, Order. Attachment E of the Complainant's Supplement to the Administrative Record included the Respondent's February 24, 2000, response to the Complaint. Apparently, the pro se Respondent failed to comply with the filing requirements of 40 C.F.R. § 22.5. The above is also true regarding the Respondent's March 22, 2000, response asserting factual and legal defenses to the allegations included in the Complaint.

administrative penalty action taken by the State of New Mexico. The Respondent contended due process considerations shielded it from a double penalty for the same violation.

On August 8, 2002, this tribunal issued an Order to Show Cause. The Order directed the Complainant to file the following as appropriate, within forty-five (45) days: 1) an explanation detailing why it failed to prosecute for more than two years; 2) a motion for default, along with a memorandum inclusive of necessary evidence; or 3) a notice of withdrawal. The same Order directed the Respondent to file as appropriate: 1) an explanation detailing why it should not be held in default for failure to file an answer for more than two years; and 2) a response to any default motion filed by the Complainant within fifteen (15) days of service, along with a memorandum inclusive of necessary evidence consistent with 40 C.F.R. § 22.16(b).

In response to the August 8, 2002, Order, the Complainant filed a September 20, 2002, Motion for Default seeking a default order against the Respondent, and the assessment of a civil penalty totaling $131, 445. The Complainant's Motion for Default also included a brief statement addressing the lack of prosecution for more than two years. The Respondent accepted service of the September 20, 2002, Motion for Default on September 23, 2002. Although unknown by this tribunal at the time, the Respondent responded to the Complainant's Motion for Default by forwarding a Motion to Dismiss dated September 23, 2002. While the certificate of service for the Motion to Dismiss certified that the original motion was filed with the Regional Hearing Clerk, the administrative record file reflected otherwise. The EPA Enforcement Officer received the original Motion to Dismiss at mail-code 6EN-WC, on September 27, 2002. The Respondent's original September 23, 2002, Motion to Dismiss was finally brought to the attention of this tribunal by the Complainant's December 16, 2002, Status

Report filed with the Regional Hearing Clerk. The Complainant's Status Report attached the original September 23, 2002, Motion to Dismiss along with a copy of the same.

On November 22, 2002, this tribunal issued a Second Order to Show Cause. The Second Order to Show Cause directed the Complainant to file the following as appropriate, within forty-five (45) days: 1) an explanation, including the underlying factual allegations detailing why it failed to prosecute for more than two years; 2) an explanation, including the underlying factual allegations and documentary evidence concerning the Respondent's ability to pay; and 3) the penalty calculation worksheet used to calculate the civil penalty sought. Because this tribunal had no knowledge concerning the Respondent's response to the Complaint and its Motion to Dismiss at this point, the Second Order to Show Cause directed the Respondent to file, as appropriate: 1) an explanation, including factual and legal argument detailing why it failed to file an answer for more than two years; 2) an explanation, including factual and legal argument detailing why it failed to file a response to the August 8, 2002, Order to Show Cause; and 3) a written explanation concerning factual and legal argument detailing why it failed to respond to the Complainant's September 20, 2002, Motion for Default.

On January 6, 2003, the Complainant submitted a response to the Second Order to Show Cause which detailed the reasons why it failed to prosecute the case for more than two years. In accordance with this tribunal's January 16, 2003, Order to Supplement the Administrative Record, the Complainant filed a January 28, 2003, Supplement to the Administrative Record. The Complainant's Supplement included an affidavit explaining the events surrounding the two-year delay in the formal prosecution of the case; records of communication between the parties; penalty calculation documents;

an inspection report with attached documentation; documentation of meetings; a SWPPP; inability to pay documents; and defense to liability and penalty correspondence.

DISCUSSION

To summarize the two motions before this tribunal, the Complainant seeks a default order and assessment of a civil penalty totaling $131,445, while the Respondent requests dismissal of the January 18, 2000, Complaint seeking a civil penalty. These motions are discussed below in seriatim.

Motion for Default

Indeed, EPA administrative actions seeking civil penalties, including default proceedings, are governed by Section 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17. Section 22.17(a), in pertinent part provides:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. *See* 40 C.F. R. § 22.17(a).

Section 22.17(c), sheds light on the issuance of default orders. In pertinent part, it provides:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order. *See* 40 C.F.R. § 22.17(c).

The above-cited regulatory language ("[a] party may . . . ") found in 40 C.F.R. § 22.17(a), concerning a default finding after submission of a motion and failure to file a timely answer, is clearly expressed in a discretionary fashion. Without question, Presiding Officers, as authorized by 40 C.F.R. § 22.17, enjoy broad discretion in ruling on default motions. *See Gard Products, Inc*., EPA Docket No. FIFRA-98-005 (ALJ, July 2, 1999). Furthermore, the language in 40 C.F.R. § 22.17(c) shows that even when a default has occurred, the Presiding Officer retains discretion to not make a default finding where the record shows good cause. Issuance of a default order is not a matter of right, even where a party is technically in default. *See Lewis v. Lynn*, 236 F.3d 766 (5th Cir. 2001).

A default judgment is a harsh and disfavored sanction, reserved only for the most egregious behavior. *See Lacy v. Sitel Corp*., 227 F. 3d 290 (5th Cir. 2001). For example, a marginal failure to comply with time requirements does not support the imposition of a default judgement. *See Ackra Direct Marketing Corp. v. Fingerhut Corp*., 86 F. 3d 852, 856 (8th Cir. 1996). Moreover, a default judgment is appropriate where the party against whom the judgment is sought engaged in willful violations of court rules, contumacious conduct, or intentional delays. *See Id.* at 856. A default finding is also appropriate where the non-defaulting party suffers actual prejudice, or the defaulting party engages in bad faith and dilatory conduct. *See Gard Products, Inc*., EPA Docket No. FIFRA-98-005 (ALJ, July 2, 1999).

The Complainant specifically requests issuance of a default order against the Respondent due to the Respondent's alleged failure to file a timely answer to the January 18, 2000, Complaint, as required by 40 C.F.R. § 22.15. *See* Complainant's Motion for Default, pp. 1-4. Second, the Complainant argues a default order should be issued because the Respondent's Motion to Dismiss was untimely and

does not constitute an answer. *See* Complainant's Status Report, Attachment - Respondent's Motion to Dismiss. Third, the Complainant argues a default order is warranted because the Respondent's Motion to Dismiss is irrelevant, as it purports to preserve appellate rights to Federal District Court. *See* Complainant's Status Report, Attachment - Respondent's Motion to Dismiss.

With respect to the Respondent's alleged failure to file a timely answer to the Complaint, the totality of record evidence demonstrates no dispute regarding the Respondent's failure to file a timely responsive pleading labeled as an answer. Likewise, no responsive pleading labeled as an answer has been filed to date. The record shows the Respondent accepted service of the complaint on January 26, 2000. Note however, the record also demonstrates that after the January 26, 2000, service of the Complaint, the Respondent prepared a Storm Water Pollution Prevention Plan ("SWPPP"), and submitted the same to EPA by cover letter dated February 21, 2000. *See* Complainant's Supplement to the Administrative Record, Attachment E.

Moreover, as required by 40 C.F.R. § 22.15(b), the Respondent advanced factual and legal defenses to allegations included in the Complaint, and opposed the Complaint's proposed relief. By letter dated February 24, 2000, the Respondent challenged the January 18, 2000, Complaint with due process, and preemption arguments.[3] *See* Complainant's Supplement to the Administrative Record,

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[3] Although the Respondent's February 24, 2000, letter response to the Complaint included a carbon-copy to P.V. Domenici Jr., Esq., the letter made no reference to the attorney as legal counsel retained by the Respondent. *See* Complainant's Supplement to the Administrative Record, Attachment E. While the Complainant contends the Respondent was represented by legal counsel, the substance of the February 24, 2000, letter response to the Complaint established the Respondent as a pro se litigant. *See* Complainant's Supplement to the Administrative Record, Attachment E and Second Affidavit of Taylor M. Sharpe, p. 2. In fact, record evidence of written, face-to-face, and telephone communications between the parties indicate the Respondent is a pro se litigant. *See* Complainant's

Attachment E. On March 22, 2000, the Respondent responded to the Complainant's March 14, 2000, letter. *See* Complainant's Supplement to the Administrative Record, Attachment E. The Respondent's March 22, 2000, response raised additional factual and legal defenses to the January 18, 2000, Complaint. For example, the Respondent contested the Complainant's factual allegations concerning discharges of pollutants to waters of the United States. Consequently, the Respondent challenged the Complainant's jurisdiction over the facility's discharges which allegedly, did not reach waters of the United States. In the March 22, 2000, response, the Respondent also contested the civil penalty sought, and asserted an inability to pay claim. *See* Complainant's Supplement to the Administrative Record, Attachment E.[4]

It is also noteworthy that from 1999 through 2002, the Respondent's communications with the Complainant's enforcement representative were in a pro se capacity. *See* Complainant's Supplement to the Administrative Record, Attachments D, E, F, H, I, J, and Second Affidavit of Taylor M. Sharpe, pp. 2 - 5. Despite the Respondent's failure to comply with the 40 C.F.R. §§ 22.5 and 22.15(a) filing requirements, the Respondent's extensive communications with the Complainant's enforcement representative, timely service of legal and factual arguments opposing the allegations included in the

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Supplement to the Administrative Record, Attachments A, D, E, F, G, H, I, and J. The communications show the Respondent was represented by the Agronics, Inc. President.

[4] Record evidence shows the pro se Respondent failed to comply with the filing requirements of 40 C.F.R. § 22.5, with respect to the February 24, 2000, and March 22, 2000, responses. The Complainant's Supplement to the Administrative Record shows the Respondent served the above responses to the Complainant. *See* Complainant's Supplement to the Administrative Record, Attachment E. Moreover, service of the February 24, 2000, response to the Complaint appears timely in accordance with 40 C.F.R. §§ 22.7(c) and 22.15(a).

Complaint, service of factual and legal arguments opposing the proposed penalty, and status as a pro se litigant, save the Respondent from the harsh and disfavored sanction of a default judgment. A default judgment is not appropriate as record evidence fails to demonstrate willful violations, contumacious conduct or intentional delay. *See Ackra Direct Marketing Corp. v. Fingerhut Corp*., 86 F. 3d 852, 856 (8th Cir. 1996).

As provided earlier, on August 8, 2002, this tribunal issued an Order to Show Cause. The Order authorized the Complainant to submit a motion for default, if appropriate, under the facts of the case. On September 20, 2002, the Complainant filed a Motion for Default seeking a default order against the Respondent, and the assessment civil penalty totaling $131, 445. The return receipt card included in the administrative record file shows that service of the September 20, 2002, Motion for Default occurred on September 23, 2002. The Respondent responded to the Complainant's Motion for Default by forwarding a Motion to Dismiss dated September 23, 2002. Although the certificate of service certified that the Respondent's original Motion to Dismiss was filed with the Regional Hearing Clerk, the administrative record file showed otherwise. The Complainant's December 16, 2002, Status Report, which attached the Respondent's original Motion to Dismiss and a copy, shows the Respondent served the Complainant's Enforcement Officer the original Motion to Dismiss at mail-code 6EN-WC, on September 27, 2002. As such, the pro se Respondent not only failed to file its February 24, 2000, letter response to the Complaint, but it also failed to file the September 23, 2002, Motion to Dismiss with the Regional Hearing Clerk.

Notwithstanding, such conduct is not deserving of the harsh and disfavored default sanction reserved only for the most egregious behavior. *See Lacy v. Sitel Corp*., 227 F. 3d 290 (5th Cir.

2001). A default finding is inappropriate here for at least a couple of reasons. First, despite the pro se Respondent's failures, record evidence reflects neither bad faith, nor intentional dilatory conduct. *See Ackra Direct Marketing Corp. v. Fingerhut Corp*., 86 F. 3d 852, 856 (8th Cir. 1996). Next, the Complainant neither argued it suffered any prejudice, nor does record evidence show any prejudice suffered by EPA as a result of the Respondent's failure to comply with the Agency's regulatory filing requirements. *See Gard Products, Inc*., EPA Docket No. FIFRA-98-005 (ALJ, July 2, 1999). When the Respondent's failures to comply with the EPA's filing requirements are weighed against compliance with the service requirements, and the lack of actual prejudice to the Complainant, this tribunal finds it inappropriate to issue a discretionary default finding.[5]

The Complainant's argument that a default order is warranted because the Respondent's Motion to Dismiss is irrelevant, and purports to preserve appellate rights to Federal District Court lacks persuasiveness.[6] Upon review of 40 C.F.R. § 22.27(d), it is clear the EPA's Consolidated Rules of

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[5] Although some latitude is exercised with pro se litigants, such latitude does not excuse pro se litigants, including the Respondent, from complying with the EPA's Consolidated Rules of Practice. *See In re Jiffy Builders*, 8 E.A.D. 315, 321 (EAB 1999). In fact, this tribunal is dissatisfied with the Respondent's failure to file its responses with the Regional Hearing Clerk, although such responses were served to the EPA's enforcement contact. The Respondent's failure in the future, if any, to comply with the requirement to file pleadings/responses/motions with the Regional Hearing Clerk may result in sanctions, including a default finding. Moreover, because the Respondent timely served the Complainant's Enforcement Officer with responses asserting factual and legal defenses to the Complainant's allegations and proposed penalty, the Complainant had notice of the Respondent's opposition. Instead of prosecuting this case under the Consolidated Rules of Practice prehearing and hearing procedures, the Complainant engaged in extensive settlement efforts and delayed formal prosecution. Accordingly, the record demonstrates no prejudice to the Complainant.

[6] The Complainant correctly notes that the Respondent's Motion to Dismiss does not constitute an answer. Relying on Rules 12 and 15 of the Fed. R. Civ. P. as useful and instructive guidance, a motion to dismiss for failure to state a claim upon which relief can be granted does not constitute a responsive pleading. *See Massachusetts Mutual Life Ins. Co. v. Ambassador*

Practice contemplate the Respondent's participation in this administrative litigation. In fact, the Respondent is required to exhaust its administrative remedies or waive any right to judicial review. Thus, the Respondent's jurisdictional and failure to state a claim arguments included in the Motion to Dismiss, and prior liability and civil penalty arguments are consistent with the Agency's exhaustion of administrative remedies requirement. *See Parisi v. Davidson*, 405 U.S. 34, 37 (1972) (discussing rationale for requiring exhaustion of administrative remedies).

Furthermore, the Respondent's liability arguments included in the Motion to Dismiss are relevant in light of the allegations and relief sought by the Complainant. Relevance is generally accepted to include two distinct requirements. First, the evidence must be probative of the proposition it is offered to prove. Second, the proposition must be one that is of consequence to the determination of the action. *See United States v. Hall*, 653 F2d. 1002, 1005 (5th Cir. 1981). Here, the Respondent's jurisdictional and failure to state a claim arguments were submitted to show the Complainant could not prove the liability allegations expressed in the Complaint. Specifically, the Respondent argued there were no storm water discharges of pollutants from its Cuba, New Mexico, facility into waters of the United States. The above argument is based upon the allegation that due to natural and man-made boundaries ("a large irrigation control dam"), storm water discharges of pollutants from the

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Concessions, Inc., 489 F.2d 282 (5th Cir. 1973). However, the Respondent's Motion to Dismiss was timely served (on September 27, 2002) to the Complainant in response to the Complainant's September 20, 2002, Motion for Default. The Respondent's Motion noted above complied with the service requirements found in 40 C.F.R. § 22.16, and this tribunal's August 8, 2002, Order to Show Cause. *See* Complainant's Supplement to the Administrative Record, Attachments A, B, E, F, G, H, I, J, and Second Affidavit of Taylor M. Sharpe, pp. 2 - 5.

Respondent's facility into a large arroyo are prevented from entering waters (i.e., the Rio Puerco and Rio Grande) of the United States.

To prevail on liability, the Complainant bears the burden of proving by preponderant evidence that the Respondent discharged a pollutant or pollutants from a point source (e.g., a fertilizer manufacturing facility), into navigable waters of the United States without express authorization (e.g., an NPDES permit). *See* 33 U. S. C. §§ 1311, 1342; 40 C.F.R. § 22.24; and *In re Larry Richner/Nancy Sheepbouwer & Richway Farms*, CWA Appeal No. 01-01, slip op. at pp. 5-6, (EAB, July 22, 2002), 10 E.A.D. ____. Consequently, the Respondent would be absolved of CWA liability if the Respondent provided sufficient and reliable, probative evidence that showed natural and man-made boundaries ("a large irrigation control dam") prevented its Cuba, New Mexico, facility's storm water discharges of pollutants from entering into waters of the United States. Accordingly, the Respondent's liability arguments contained in the September 23, 2002, Motion to Dismiss are relevant here.

Motion to Dismiss/Motion for Accelerated Decision

A motion to dismiss an EPA administrative complaint, and a motion for accelerated decision are governed by Section 22.20 of the Consolidated Rules of Practice, 40 C.F.R. § 22.20. Section 22.20(a), in pertinent part provides:

> The Presiding Officer may . . . render an accelerated decision . . . without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material facts exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, 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 the complainant. *See* 40 C.F. R. § 22.20(a).[7]

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[7] The Fed. R. Civ. P. provide useful guidance in applying the Consolidated Rules of practice. *See Oak Tree Farm Dairy v. Block*, 544 F. Supp. 1352, 1356 (E.D. N.Y. 1982). Where matters outside the pleadings are considered for a motion to dismiss, Rule 12(b) of the Fed. R. Civ. P. requires the Court to treat the motion as one for summary judgment and to dispose of it as required by Rule 56. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1283-1284 (5th Cir. 1990). For example, when this tribunal considered the Complainant's Supplement to the Administrative Record and the Respondent's September 23, 2002, sworn statement concerning natural and man-made boundaries preventing the discharge of pollutants into waters of the United States, the Respondent's Motion to Dismiss could be properly treated as a motion for summary judgment under Rule 12(b) of the Fed. R. Civ. P. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1283-1284 (5th Cir. 1990). An accelerated decision under the Consolidated Rules of Practice is similar to the standard of review for a Rule 56 motion for summary judgement. *See In re Clarksburg Casket Company*, 8 E.A.D. 496, 501-502 (EAB 1999). In accordance with 40 C.F.R. § 22.20(a), the Presiding Officer may "render an accelerated decision . . . without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material facts exists and a party is entitled to judgment as a matter of law. . . ." 40 C.F.R. § 22.20(a). Likewise, the summary judgment motion requires a demonstration that no genuine issue of material facts remain. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1286 (5th Cir. 1990).

Consistent with the motion for summary judgment process, both parties were on notice that this tribunal accepted matters outside the pleadings for consideration. *See Id.* at 1284. On December 16, 2002, this tribunal accepted the Respondent's September 23, Motion to Dismiss, which included the Respondent's sworn statement. The contents of the Complainant's December 16, 2002, Status Report illuminate the Complainant's response to the Respondent's Motion to Dismiss. Thereafter, the Complainant also filed a January 28, 2003, Supplement to the Administrative Record in response to a November 22, 2002, Order from this tribunal. The Respondent also had the opportunity to respond to this tribunal's November 22, 2002, Order, and the Complainant's January 28, 2003, Supplement to the Administrative Record. Since January 28, 2003, neither party has submitted any filings with this tribunal.

Because this tribunal is not bound by the Fed. R. Civ. P., this tribunal declined to review this case under the motion for accelerated decision/summary judgment standard only. Moreover, the Consolidated Rules of Practice do not require this tribunal to convert a motion to this dismiss to a motion for accelerated decision. Note however, this tribunal analyzed the case under the motion to dismiss, substantially uncontroverted material fact standard, and the motion for accelerated decision, no genuine issue of material fact standard. This tribunal holds that material facts remain in controversy

Section 22.20(b)(2), describes relevant decision-making considerations. It also provides the legal consequences which flow from dismissal and accelerated decisions. In pertinent part, Section 22.20(b)(2), provides:

> If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed. *See* 40 C.F. R. § 22.20(b)(2).

The above-cited regulatory language ("[t]he Presiding Officer, . . . , may at any time dismiss a proceeding, . . . ") found at 40 C.F.R. § 22.20(a), concerning a Presiding Officer's authority to dismiss a proceeding is expressed in a discretionary fashion. Without question, Presiding Officers as authorized 40 C.F.R. § 22.20(a), enjoy discretion in ruling on motions to dismiss. Note however, Presiding Officers are required to tailor any decision to dismiss in accordance with the claims alleged in the complaint, and the material facts which appear substantially uncontroverted. *See* 40 C.F.R. § 22.20(a) and (b)(2).[8] Where a claim fails to properly allege a prima facie case, or facts show the complainant has no right to relief, the Presiding Officer may render a decision to dismiss the particular claim. *See* 40 C.F.R. § 22.20(a) and (b)(2).

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consistent with the analysis and findings provided below. This tribunal also holds it is appropriate for a finder of fact to resolve the disputed material facts. As such, the Respondent's Motion to Dismiss, even when treated as a motion for accelerated decision, is denied for the reasons provided herein.

[8] In addition, 40 C.F.R. § 22.20(a) and (b)(2) also demonstrate the Presiding Officer's discretion in granting an accelerated decision. Similar to decisions to dismiss, accelerated decisions are required to be tailored to the counts in a complaint, and the material facts which appear substantially uncontroverted.

Because the Consolidated Rules of Practice provide less than exhaustive direction regarding the appropriateness of a 40 C.F.R. § 22.20 decision to dismiss, this tribunal used Rule 12(b)(6) of the Fed. R. Civ. P. as guidance in assessing the Respondent's motion to dismiss.[9] When reviewing a Rule 12(b)(6) motion to dismiss, the Court must accept the material allegations of the pleading as true, and construe them in the light most favorable to the non-movant. *See Colle v. Brazos County,* 981 F. 2d 237, 243 (5th Cir. 1993). In addition, the movant must show beyond doubt that the non-movant can prove no facts entitling it to relief. *Electronic Data Systems Corp. v. Computer Assoc. International, Inc.,* 802 F. Supp. 1463, 1465 (N. D. Tex. 1992).

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted due to the role of pleadings in civil proceedings, and the Court's liberal policy concerning the amendment of pleadings. *See Id.* at 1465. When a Court grants a motion to dismiss in the first instance, it is likely to dismiss the claim without prejudice. The dismissal without prejudice allows the non-movant to amend its pleading, thereby affording the non-movant the opportunity to state a claim. *See Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F. 2d 42, 48 (2d Cir. 1991). Dismissal with prejudice is reserved for repeated vagueness, or where a specific and well-plead complaint would demonstrate no right to relief for the complainant. *See In re Larry Richner/Nancy Sheepbouwer & Richway Farms,* CWA Appeal No. 01-01, slip op. at p. 15, (EAB, July 22, 2002), 10 E.A.D. ____.[10]

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[9] This tribunal also used Rule 56 of the Fed. R. Civ. P. as guidance to analyze this case under the accelerated decision standard provided in 40 C.F.R. § 22.20(a).

[10] Because this tribunal decided to review and analyze the Respondent's Motion to Dismiss under the Consolidated Rules of Practice motion to dismiss and motion for accelerated decision

In the Respondent's Motion to Dismiss, the Respondent argues dismissal of this action is appropriate due to the Complainant's failure to state a claim upon which relief could be granted.[11] The Respondent seeks dismissal because the Complainant, through its January 18, 2000, Complaint, allegedly failed to assert facts capable of being proved true. According to the Respondent's sworn statement, the Complainant cannot prove storm water discharges of pollutants from the Respondent's Cuba, New Mexico, facility entered into waters of the United States. The Respondent specifically avers that natural and man-made boundaries ("a large irrigation control dam") prevent facility storm water discharges into an unclassified tributary ("a large arroyo") located at its Cuba, New Mexico, facility from being discharged into the Rio Puerco and Rio Grande. *See* Respondent's September 23, 2002, Motion to Dismiss. As such, the Respondent asserts the Complainant lacks jurisdiction over the storm water discharges in question, and the Complaint should be dismissed for failure to state a claim upon which relief could be granted.

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standards, the motion for accelerated decision standard of review is explained below. The Consolidated Rules of Practice provide that an accelerated decision is appropriate "if no genuine issue of material facts exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). This standard is similar to the Rule 56 motion for summary judgment standard, and the salient features include: 1) a factual dispute is material where, under governing law, the factual dispute might affect the outcome of the proceeding; and 2) a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. Under the above scenario, the issue must be resolved by a finder of fact. If, on the other hand, the evidence is such that no reasonable decision-maker could find for the non-moving party, summary judgment is appropriate. Review of the evidence must be viewed in a light most favorable to the non-moving party. *See In re Green Thumb Nursery, Inc*., 6 E.A.D. 782, 793 (EAB 1997).

[11] The Respondent's President, Leland T. Taylor, made the factual allegations included in the Motion to Dismiss under oath. Cecil R. Irvin, Notary Public, State of New Mexico, certified the Respondent's sworn statement on September 24, 2002.

The January 18, 2000, Complaint includes allegations concerning the material issue in dispute here; that is, whether storm water discharges from the Respondent's facility resulted in the discharge of pollutants into waters of the United States. Paragraph three of the Complaint specifically alleges the Respondent's facility discharged pollutants to:

> "the receiving waters of an unclassified tributary, thence to the Rio Puerco (East), thence to the Rio Grande in Segment 2105 of the Rio Grande Basin, which are waters of the United States . . ." *See* Complainant's January 18, 2000, Complaint.

Moreover, the Respondent concedes the Complaint includes the above allegation. The body of the Respondent's September 23, 2002, Motion to Dismiss includes the following restatement of the allegation noted above:

> "[W]ith its storm water discharges to the receiving waters of an unclassified tributary, thence to the Rio Puerco (east), thence to the Rio Grande in Segment 2105 of the Rio Grande Basin, which are waters of the United States within the meaning of Section 502 of the Act, 33 U.S.C. § 1362 and 40 C.F.R. § 122.2." *See* Respondent's Motion to Dismiss.

In view of the above-cited record information, this tribunal holds the January 18, 2000, Complaint is well-plead and legally sufficient. The allegations included in the Complaint and the restatement of such allegations in the Respondent's Motion to Dismiss, both demonstrate the Complainant pled a prima facie case. Consistent with a prima facie case under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), the Complainant alleged the Respondent, by way of storm water discharges originating from its Cuba, New Mexico, facility, discharged pollutants into waters of the United States without authorization. *See* Complainant's January 18, 2000, Complaint. As such, this tribunal accepts the above well-plead, material allegations in the Complaint as true, and construes them

in the light most favorable to the non-movant Complainant. *See Colle v. Brazos County*, 981 F. 2d 237, 243 (5th Cir. 1993). Despite the above, there is another crucial question remaining; namely, whether the Respondent, through record evidence, proved beyond doubt that the Complainant can prove no facts entitling it to relief. *See Electronic Data Systems Corp. v. Computer Assoc. International, Inc.*, 802 F. Supp. 1463, 1465 (N. D. Tex. 1992).

The Consolidated Rules of Practice motion to dismiss standard is similar to the beyond doubt standard expressed in Rule 12(b)(6) of the Fed. R. Civ. P. *See Id.* at 1465. The Consolidated Rules of Practice require a record showing of substantially uncontroverted, material facts demonstrative of the complainant's lack of entitlement to any relief. *See* 40 C.F.R. § 22.20(a) and (b).[12] Through its Motion to Dismiss, the Respondent attempts to satisfy the preceding standard. The Respondent avers the Complainant cannot prove a discharge of pollutants from the Respondent's Cuba, New Mexico, facility into waters of the United States. In support of such assertion, the Respondent, through a sworn statement, contends that due to natural and man-made boundaries ("a large irrigation control dam"), it is impossible for the facility's storm water discharges to discharge pollutants into waters of the United States. Based upon this alleged impossibility, the Respondent attacks the jurisdictional status of the large arroyo ("unnamed, unclassified tributary") running through the Respondent's Cuba, New Mexico, facility.

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[12] Again, under the 40 C.F.R. § 22.20(a) motion for accelerated decision, no genuine issue of material fact standard, a factual dispute is material where under governing law, it might affect the outcome of a proceeding. A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997).

Due to the controlling statute in question, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), the Respondent's assertions are material because they bear significant consequences on the final determination of the case. *See United States v. Hall*, 653 F. 2d 1002, 1005 (5th Cir. 1981). Indeed, if the Respondent's assertions are accepted as true, the Complainant's liability case would lack an essential element of proof required (i.e., a discharge of pollutants into United States waters) under the CWA. In order to plead and prove a prima facie case under CWA Section 301(a), the Complainant must provide preponderant evidence that the owner/operator Respondent: (1) discharged a pollutant;[13] (2) from a point source;[14] (3) into a navigable water;[15] (4) without an NPDES permit or other authorization under the Act. *See In re Larry Richner/Nancy Sheepbouwer & Richway Farms*, CWA Appeal No. 01-01, slip op. at pp. 5-6, (EAB, July 22, 2002), 10 E.A.D. ____.

Based upon record evidence discussed below, the Respondent failed to prove beyond doubt that it is impossible for its Cuba, New Mexico, facility's storm water discharges to discharge pollutants into waters of the United States.[16] The administrative record file includes information which

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[13] Under CWA Section 502, 33 U.S.C. § 1362(12), the discharge of a pollutant means any addition of any pollutant to navigable waters from any point source.

[14] CWA Section 502, 33 U.S.C. § 1362(14), defines point source as any discernible, confined and discrete conveyance such as any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants can be discharged.

[15] Navigable waters means waters of the United States, including the territorial seas. *See* 33 U.S.C. § 1362(7). In addition, note that EPA has construed waters of the United States to include tributaries and intermittent streams. *See* 40 C.F.R. § 122.2.

[16] Furthermore, the same record evidence discussed herein shows the non-moving Complainant produced sufficient and probative evidence to demonstrate the existence of a material and genuine factual dispute. Under motion for accelerated decision precepts, a non-moving party must

unquestionably controverts the Respondent's assertion that due to natural and man-made boundaries ("a large irrigation control dam"), it is impossible for storm water discharges originating from its facility to discharge pollutants into United States waters. In particular, note the language of a January 22, 1999, NPDES Compliance Inspection Report which, in part, provides:

> Storm water runoff from this industrial facility discharges to an unclassified tributary (a large arroyo runs directly through this facility); thence to the Rio Puerco (East); thence to the Rio Grande in Segment 2105 of the Rio Grande Basin. This report is based on review of files maintained by both the facility and NMED, on-site observation by NMED personnel and verbal information provided by the facility's representatives, Mr. Tom Taylor, President and Mr. Ernest Yazie, Foreman. *See* Complainant's Supplement to the Administrative Record, Attachment C.

The same report also provides in pertinent part:

> As stated above, an unnamed arroyo (which is a water of the United States) flows through this site. Adjacent to the maintenance shop area, this arroyo is impounded and some of the site drainage is directed into this stock tank. Discharges from this impoundment, and runoff from a majority of the site drains into the arroyo below the impounding structure. The arroyo [also referred to as an unnamed, unclassified tributary] then flows approximately ½ mile to the west, where it is again impounded. This downstream impoundment, which is also used for stock watering and is accessible to wildlife, is equipped with a spillway structure. *See* Complainant's Supplement to the Administrative Record, Attachment C.

When the Respondent's sworn statement asserting the impossibility of storm water discharges of pollutants into waters of the United States is balanced against the contents of the January 22, 1999, NPDES Compliance Inspection Report, the illumination from substantially controverted material facts is

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raise an issue of material fact and demonstrate the issue is genuine by referencing or producing probative record evidence. *See In re Green Thumb, Nursery, Inc*., 6 E.A.D. 782, 793 (EAB 1997).

glaringly bright. Under governing law, Courts have held that dry creeks and arroyos connected to streams during intense rainfall are waters of the United States. *See Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (emphasis added). Whether the large arroyo flowing through the Respondent's facility is connected to a stream, and thus, qualifies as a water of the United States is a material fact substantially controverted by the parties. In addition, if the Complainant's material allegations are proved to be true, then the Complainant is entitled to a legal remedy under Section 309(g) of the CWA, 33 U.S.C. § 1319(g). Since the Respondent failed to demonstrate beyond doubt, the existence of substantially uncontroverted material facts which show no right to relief on the part of the Complainant, this tribunal refuses to exercise its discretionary authority to dismiss this case. *See Electronic Data Systems Corp. v. Computer Assoc. International, Inc.*, 802 F. Supp. 1463, 1465 (N. D. Tex. 1992); and 40 C.F.R. § 22.20(a) and (b)(2).

Likewise, under the motion for accelerated decision, no genuine issue of material fact standard, whether the large arroyo in question is connected to a stream, and thus, qualifies as a water of the United States is a material fact genuinely disputed by the parties. Again, in order to constitute a prima facie case under CWA Section 301(a), any discharge of pollutants must be to waters of the United States. *See In re Larry Richner/Nancy Sheepbouwer & Richway Farms,* CWA Appeal No. 01-01, slip op. at pp. 5-6, (EAB, July 22, 2002), 10 E.A.D. ____. Under this governing statute, the factual dispute (i.e., connection of the large arroyo to a stream) bears significantly on the final determination of the case. *See United States v. Hall,* 653 F. 2d 1002, 1005 (5th Cir. 1981). If a reasonable finder of fact received and reviewed sufficiently probative evidence provided by the Respondent concerning this

factual dispute, then the Respondent might prevail in this matter. The same is true with respect to the Complainant. As such, the factual dispute (i.e., connection of the large arroyo to a stream) is material.

In determining whether the factual dispute is genuine, this tribunal drew inferences from the underlying facts in a light most favorable to the Complainant, the non-moving party. *See In re Clarksburg Casket Company*, 8 E.A.D. 496, 507 (EAB 1999). Here, the inferences promoted by the Respondent are supported by the Respondent's sworn statement. The sworn testimony provides that due to natural and man-made boundaries ("a large irrigation control dam"), it is impossible for facility storm water discharges of pollutants into the large arroyo to enter into waters of the United States. As such, the Respondent infers that due to the boundaries noted above, the large arroyo flowing through the Respondent's facility is not connected to a stream (i.e., the Rio Puerco and/or the Rio Grande). Accordingly, the Respondent contends the large arroyo is not a water of the United States, and the Complainant lacks jurisdiction to regulate the storm water discharges of pollutants from the Respondent's facility into the large arroyo. Before inferences are permissible, they must be reasonable. Reasonable inferences must be examined in light of competing inferences to the contrary. *See In re Clarksburg Casket Company*, 8 E.A.D. 496, 507 (EAB 1999). In this tribunal's view, the inferences advanced by the Respondent do not overwhelm competing inferences contained in the administrative record file. *See Id.* at 507.

The Respondent's sworn statement asserting the impossibility of storm water discharges of pollutants into waters of the United States, due to natural and man-made boundaries ("a large irrigation control dam") is challenged with contrary, competing inferences resonating from the administrative record file. For example, the contents of the January 22, 1999, NPDES Compliance Inspection

Report describe the facility's storm water runoff and discharges into the large arroyo. In particular, the report documented the storm water discharges from the facility into a large arroyo running directly through the facility; thence to the Rio Puerco (East); thence to the Rio Grande in Segment 2105 of the Rio Grande Basin. The inspection report was compiled after the review of files maintained by both the facility and the New Mexico Environment Department (NMED); on-site observation by NMED personnel; and verbal information provided by the facility's representatives, Mr. Tom Taylor, President and Mr. Ernest Yazie, Foreman. *See* Complainant's Supplement to the Administrative Record, Attachment C. Based upon the findings and observations documented in the inspection report, the Complainant infers the large arroyo is a water of the United States because it is connected to the Rio Puerco and the Rio Grande.

With the Complainant's contrary, competing record evidence and inferences in tow, the Respondent's September 23, 2002, sworn testimony and inferences, are sufficiently grounded. The Respondent's testimony, when balanced against competing record evidence, fails to constitute the kind of evidence such that no reasonable decision-maker could decide in the non-moving party's (i.e., the Complainant) favor. Simply put, a reasonable fact finder could return a verdict in either the Respondent's or the Complainant's favor. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997). Indeed, an accelerated decision is not appropriate based upon such record evidence. *See Id.* at 793.

As stated previously, dry creeks and arroyos connected to streams during intense rainfall are waters of the United States. *See Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (emphasis added). In addition, waters of the United States include tributaries and intermittent streams.

See 40 C.F.R. § 122.2 and 33 U.S.C. § 1362(7). Based upon the controlling laws and regulations, and sufficiently probative record evidence, including the Complainant's January 22, 1999, NPDES Compliance Inspection Report, the Complainant established a genuine factual issue. Whether the arroyo in question is connected to a stream, and thus, qualifies as a water of the United States is a material fact that must be resolved by a finder of fact. *See In re Green Thumb Nursery, Inc*., 6 E.A.D. 782, 793 (EAB 1997). Consequently, the Respondent's Motion to Dismiss, even when treated as a motion for accelerated decision, is unconvincing.

CONCLUSION AND ORDER

Conclusion

After consideration of record evidence found in the administrative record file, the Complainant's Motion for Default and the Respondent's Motion to Dismiss/Motion for Accelerated Decision are both denied. This tribunal denied the above motions after consideration of all factual and legal arguments supported by the parties. All factual and legal arguments were examined with appropriate laws, regulations, and record evidence in mind. Because this tribunal finds the disputed factual issues discussed herein need further adjudication, the parties shall comply with the following Order.

Order Requiring Submission of an Answer and Request for Hearing

The filing of a Rule 12(b)(6) motion to dismiss for failure to state a claim, or a Rule 56 motion for summary judgment prior to the filing of an answer extends the answer deadline to ten (10) days after

the Court rules on the motion.[17] *See* Fed. R. Civ. P. 12(a)(4)(A). Moreover, the Consolidated Rules of Practice provide that Regional Judicial Officers shall rule on motions filed or made before answers to Class II complaints are filed. *See* 40 C.F.R. § 22.16(c). The Consolidated Rules of Practice also authorize Presiding Officers (a Regional Judicial Officer in this case) to take all necessary action to promote the fair and efficient adjudication of disputed issues. *See* 40 C.F.R. § 22.4(c). In view of this tribunal's vested authority, and ruling on both motions, the Respondent shall submit an answer and request for hearing consistent with the following procedures:

1) The Respondent shall cause an original answer and request for hearing and one copy to be filed with the Regional Hearing Clerk (Regional Hearing Clerk, Office of Regional Counsel [6RC], U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733), *and* shall serve a copy of the answer and request for hearing upon the Complainant's legal representative (Ms. Yerusha Beaver, Esq., U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733), within *ten (10)* days of receipt of this Order;

2) The Respondent shall comply with the filing and service requirements found in 40 C.F.R. §§ 22.5 and 22.15(a), except the answer and request for hearing must be filed and served within *ten (10)* days of receipt of this Order; and

3) The Respondent shall comply with the answer and request for hearing substantive requirements listed in 40 C.F.R. § 22.15(a), (b), (c) and (d).

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[17] As noted previously, the Fed. R. Civ. P. provide useful guidance in applying the Consolidated Rules of practice. *See Oak Tree Farm Dairy v. Block*, 544 F. Supp. 1352, 1356 (E.D. N.Y. 1982).

Once again, all filings required by this Order shall be filed ***and*** served in accordance with 40 C.F.R. § 22.5. Failure to comply with the terms of this Order without leave (written permission) from this tribunal, may result in the issuance of a default order under 40 C.F.R. § 22.17(a).[18] The parties are encouraged to settle this matter and forgo the time and expense associated with administrative litigation. Such settlement, if any, shall be filed with the Regional Hearing Clerk as required by 40 C.F.R. § 22.5.

SO ORDERED this 7th day of May 2003.

/S/
GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

[18] By forgiving the Respondent's failure to comply with the Consolidated Rules of Practice filing requirements, this tribunal gave due consideration to the Respondent's pro se status. Once again, any additional act of noncompliance with the Consolidated Rules of Practice and/or an Order from this tribunal will not be taken lightly. In view of this admonition, the Respondent is encouraged to comply with this Order. Any questions regarding compliance with this Order may be directed to the Regional Hearing Clerk, Lorena S. Vaughn, at 214-665-8021.