

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
MUNICIPALITY OF RIO GRANDE,) Docket No. CWA-02-2009-3458
)
Respondent.)

**ORDER ON COMPLAINANT’S RENEWED MOTION FOR REMEDIES
AND MOTION FOR ACCELERATED DECISION**

I. Background

This proceeding was initiated on April 1, 2009 by the United States Environmental Protection Agency, Region 2, Caribbean Environmental Protection Division, filing a Complaint against the Respondent pursuant to Section 309(g)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2). The Complaint alleges that Respondent violated Sections 402 and 308 of the CWA for failure to apply for a National Pollutant Discharge Elimination System (NPDES) permit for discharges of pollutants from the Rio Grande municipal separate storm sewer system (MS4) into waters of the United States. Respondent filed an Answer to the Complaint on June 16, 2009, denying the allegations of violation and requesting a hearing or dismissal of the Complaint. Thereafter, a Prehearing Order was issued, directing the parties to submit prehearing exchanges. After Complainant submitted its Prehearing Exchange and past the due date of September 25th for the submission of Respondent’s prehearing exchange, on October 6, 2009 the undersigned received from Respondent a document erroneously titled “Complainant’s Initial Prehearing Exchange.” The document was not in compliance with the Prehearing Order in that it failed to include a curriculum vita or resume for the identified expert witnesses, failed to respond to the requests in Section 3 of the Prehearing Order, and was not timely filed. The document also violated Rule 22.5(a)(3) of the applicable Rules of Practice, 40 C.F.R. Part 22 (Rules), in that no certificate of service was attached.

On October 9, 2009, Complainant submitted a Motion for Remedies requesting entry of a default order or an order striking Respondent’s evidence on the basis that the its Prehearing Exchange failed to meet the requirements of the Prehearing Order and the Rules. An Order dated October 19, 2009 denied the request and directed that, on or before November 5, 2009, Respondent to submit a supplemental prehearing exchange providing the requisite information omitted from its previous filing. The Order provided that if Respondent failed to fully and timely file its supplemental prehearing exchange, then Complainant was permitted to renew its request for default and that “such default may be granted without further notice to Respondent” (emphasis in original).

Respondent submitted a Supplemental Initial Prehearing Exchange on November 12, 2009. On November 20, 2009, Complainant submitted a Renewed Motion for Remedies and Motion for Accelerated Decision (Motion), requesting that Respondent be held in default at least on the issue of liability for the violation alleged in the Complaint, and that all of Respondent's evidence be stricken and none of its witnesses be permitted to testify, or in the alternative, that accelerated decision as to Respondent's liability be granted in favor of Complainant. Complainant also requests an extension of time to file a rebuttal prehearing exchange, if the request for decision by default and accelerated decision are denied. To date, no response to the Motion has been filed by Respondent.

II. Renewed Motion for Remedies

Complainant requests entry of default finding Respondent liable for the violation alleged in the Complaint, on the basis that Respondent failed to timely comply with the October 19th Order by filing its Supplemental Initial Prehearing Exchange on November 12, 2009, past the November 5th filing deadline set in the Order.

Rule 22.17(a) provides that “[a] party may be found to be in default . . . upon failure to comply with the information exchange requirements if § 22.19(a) or an order of the Presiding Officer” 40 C.F.R. § 22.17(a). Respondent's Supplemental Initial Prehearing Exchange was clearly filed a week late, without providing excuse therefor, but did provide the curriculum vitae and responses to inquiries that were required by the Prehearing Order and October 19th Order of this Tribunal.

As stated in the October 19th Order, default judgment and exclusion of evidence are harsh and disfavored sanctions, reserved for only the most egregious behavior, such as willful violations of court rules, contumacious conduct or intentional delays, and default judgment “is not an appropriate sanction for a marginal failure to comply with the time requirements” *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993). Respondent's untimely filing does not rise to this level. Therefore, a default judgment against Respondent is not warranted, and the Motion is denied with respect to the requests for judgment of default and for exclusion of evidence and testimony.

III. Motion for Accelerated Decision

Complainant requests, in the alternative, entry of accelerated decision in its favor, finding Respondent liable for the violation alleged in the Complaint, on the basis that no genuine issue of material fact exists with respect to Respondent's liability therefor. Complainant “submits that Respondent's admissions, made in its Answer, in pre-litigation documentary submissions to the Agency [EPA], through admissions made in its correspondence and communications with the EPA, combine to demonstrate irrefutably that no genuine issue of material fact exists in this

litigation with regard to Respondent’s liability to the EPA.” Motion ¶ 23.

A. Statutory and Regulatory Background

The statutory authority to issue the Complaint, seeking assessment of penalties, is Section 309(g) of the CWA, which provides in pertinent part:

Whenever on the basis of any information available —
(A) the Administrator finds that any person has violated section . . . 1318 . . . of this title [Section 308 of the CWA], or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State

* * *

the Administrator . . . may . . . assess a . . . class II civil penalty under this subsection.

33 U.S.C. § 1319(g)(1).

Respondent is charged in the Complaint with violating Sections 308 and 402 of the CWA. Section 308(a) provides as follows, in pertinent part:

Whenever required to carry out the objective of this chapter, including but not limited to . . . (4) carrying out sections . . . [33 U.S.C. §] 1342 of this title [Section 402 of the CWA] –

(A) The Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use and maintain such monitoring equipment or methods . . . , (iv) sample such effluents . . . , and (v) provide such other information as he may reasonably require

33 U.S.C. § 1318. Section 402(a) of the CWA provides as follows, in pertinent part:

(1) . . . the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) . . . such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe such conditions for such permits

Section 402(p) of the CWA governs municipal stormwater discharges, and Paragraph 402(p)(6) authorizes EPA to issue regulations and a regulatory program for stormwater discharges that are

not listed under Section 402(p)(2).

EPA promulgated regulations at 40 C.F.R. § 122.26 governing storm water discharges. Section 122.26(a)(9)(i) requires operators to obtain an NPDES permit for certain types of storm water discharges, including “from a small MS4 that is required to be regulated pursuant to § 122.32.” 40 C.F.R. § 122.26(a)(9)(i)(A). A “MS4” or “municipal separate storm sewer” is defined as “a conveyance or system of conveyances . . . [o]wned and operated by a State, city, town, parish, district, association, or other public body [d]esigned or used for collecting or conveying storm water . . . [w]hich is not a combined sewer; and . . . [w]hich is not part of a Publicly Owned Treatment Works . . .” 40 C.F.R. § 122.26(b)(8). Small MS4s are defined as those which are “[n]ot defined as ‘large’ or ‘medium’ municipal separate storm sewer system . . . or designated under paragraph (a)(1)(v) of this section.” 40 C.F.R. § 122.26(b)(16). Section 122.32(a)(1) provides that an operator of a small MS4 is regulated under the NPDES stormwater program if the “small MS4 is located in an urbanized area as determined by the latest Decennial Census . . .” Section 122.26(a)(9)(ii) provides that “[o]perators of small MS4s designated pursuant to paragraphs 122.26(a)(9)(i)(A) . . . of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35.” Section 122.33 provides that an operator of a regulated MS4 must seek coverage under an NPDES permit issued by the permitting authority, by submitting a Notice of Intent (NOI), if the permitting authority has issued a general permit applicable to the discharge. Section 122.26(e)(9) provides that -

For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by: (i) March 10, 2003 if designated under § 122.32(a) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule . . . ; or (ii) Within 180 days of notice

B. Standards for Accelerated Decision

As to accelerated decision, the applicable regulations provide that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, 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).

A motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”) and thus federal court rulings on motions under FRCP 56 provide guidance in ruling on a motion for accelerated decision. *See Mayaguez Reg’l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82, 1993 EPA App. LEXIS 32,

*24-26 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148.

The initial determination is whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting FRCP 56(c). In reviewing the record, the facts must be construed in the light most favorable to the non-moving party. *See, Cone v. Longmont United Hospital Ass’n*, 14 F.3d 526, 528 (10th Cir. 1994) (citing *Boren v. Southwest Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991)). For the EPA to prevail on a motion for accelerated decision on liability, it must present “evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it” [and] “must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense” *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002)(quoting *BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 13 at *38-39, 43 (EAB, April 5, 2000)). “Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion.” *Rogers*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are “reasonably probable.” *Id.* Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.*; *O’Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989). When ruling on a motion for summary judgment it is the court’s function to ascertain whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985).

Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216, *rehearing denied*, 762 F.2d 1004 (5th Cir. 1985); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

C. Discussion

The Complaint alleges that Respondent violated Sections 308 and 402 of the CWA by failing to apply for a NPDES permit. In order to find Respondent in violation of Section 308 of the CWA on a motion for accelerated decision on liability, Complainant must establish that Respondent: (a) is an “owner or operator,” (b) of any “point source,” and (c) that Respondent failed to make a report or provide “other information” required by EPA under Section 308, and that no genuine issue of material fact exists with respect to these elements of liability. An “owner or operator” is defined in the implementing regulations as the “owner or operator of any

‘facility or activity’ subject to regulation under the NPDES program.” 40 C.F.R. § 122.2. “Point source” is defined in Section 502(14) of the CWA as “any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged . . .” 33 U.S.C. § 1362(14). As noted above, a “municipal separate storm sewer” or MS4 is defined as “a conveyance or system of conveyances . . . [o]wned and operated by a State, city, [or] town . . . [d]esigned or used for collecting or conveying storm water . . .” 40 C.F.R. § 122.26(b)(8). The regulations do not specifically define MS4s as “point sources,” but do define an “outfall” as “a point source . . . at the point where a municipal separate storm sewer system discharges to waters of the United States and does not include open conveyances connecting two [MS4s], or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.” 40 C.F.R. § 122.26(b)(9).

Respondent does not concede the elements of liability for a violation of Section 308. In its Answer Respondent denies that it “owns and operates a Small Municipal Separate Storm Sewer System (‘Small MS4’),” does not admit that “[t]he MS4 is a point source pursuant to 502(14) of the Act . . . ,” and denies for lack of knowledge or sufficient information to form a belief, the allegation that “[t]he MS4 discharges into Rio Esperatu Santo and the Atlantic Ocean.” Complaint and Answer ¶¶ 8, 9, 11. The pleadings do not establish that an outfall from the MS4 discharges into waters of the United States. The pleadings also do not establish that Respondent is subject to the requirement to obtain an NPDES permit, as Respondent in its Answer denies that “Respondent’s MS4 is located in an urbanized area of Rio Grande, Puerto Rico.” Complaint and Answer ¶ 10; *see*, 40 C.F.R. § 122.32(a)(1).

Complainant presents in its Prehearing Exchange several exhibits in support of the allegations of Respondent’s liability, including an Administrative Compliance Order, dated February 5, 2008, and cover letter thereof, ordering Respondent to submit, *inter alia*, a Notice of Intent (“NOI”) to seek coverage under the Small MS4 NPDES general permit, and including allegations similar to those in the Complaint. Complainant’s Prehearing Exchange (“C’s PHE”) Exhs. 5, 5a. Complainant also presents a Request for Information letter it sent to Respondent on July 6, 2007, according to the Complaint. C’s PHE Exhs. 6, 6a. This letter summarizes regulatory requirements, cites to the NPDES general permit, and states that the NPDES Storm Water Phase II Final Rule, published in the Federal Register, lists all regulated MS4s, including Respondent, based upon 1990 Census information. Complainant’s Exhibit 7 is a letter from EPA to Respondent, dated February 12, 2003, which states that Respondent must submit a permit application for storm water discharges from the MS4 no later than March 10, 2003, and that --

EPA has determined that the Municipality of Rio Grande owns and operates a storm sewer system, and therefore is required to obtain a permit as described in the . . . (NPDES) regulations for storm water discharges from municipally-owned separate storm sewer systems.

EPA published the “Phase II” storm water regulations on December 9, 1999 (64 FR 68721). As outlined in these regulations, our determination is based on a

review of the U.S. Census Bureau maps of the urbanized areas in the Commonwealth of Puerto Rico, and the assumption that the Municipality of Rio Grande storm sewer system discharges to waters of the United States.

C's PHE Exh. 7. Complainant presents as its Prehearing Exchange Exhibits 8, 8a and 8b a copy of the NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems, issued September 21, 2006 ("General Permit"), the Federal Register Notice, dated November 6, 2006, announcing the availability of the General Permit, and an excerpt from the General Permit, respectively. Exhibit 9 is a copy of the rules at 40 C.F.R. §122.26. Complainant's Prehearing Exchange Exhibit 10 is a map entitled "Puerto Rico's northeast urbanized area, Source: US Census Bureau, 2000 Census," and subtitled "San Juan, PR Urbanized Area - Northeast Portion, Storm Water Entities as Defined by the 2000 Census." Exhibit 10a appears to be an zoomed-in and zoomed-out portion of the map in Exhibit 10, and Exhibit 10b appears to be a zoomed-in portion of the map entitled "The Espiritu Santo River MS4 within Rio Grande's urbanized area. Exhibit 10c is entitled "Aerial Photograph of the Espiritu Santo River and the Atlantic Ocean."

Absent from the Prehearing Exchange are any "pre-litigation documentary submissions to the Agency [EPA]" and "admissions made in its correspondence and communications with the EPA" which "demonstrate that no genuine issue of material fact exists in this litigation with regard to Respondent's liability to the EPA."¹ Motion ¶ 23.

Complainant asserts as an undisputable fact that Respondent owns and operates a Small MS4, citing to allegations in the Complaint, and its Prehearing Exchange Exhibits 9, 10, 10a-c. Motion ¶ 13. Allegations in the Complaint, which Respondent denied, and Exhibit 9, the regulations, do not support this asserted fact. Exhibits 10 and 10a-c show an area labeled as "Rio Grande," and a title to a map merely refers to an MS4 within Rio Grande. Other documents in the Prehearing Exchange include only conclusory allegations that Respondent owns and operates the MS4.

Complainant also asserts as an undisputable fact that Respondent's Small MS4 is a "point source pursuant to Section 502(14) of the Act," merely citing to the Complaint, ¶ 19. Motion at ¶ 14. However, Respondent denied this allegation in the Answer. Complainant further asserts that it is undisputed that the MS4 discharges into the Rio Espiritu Santo and the Atlantic Ocean, citing to the Complaint, ¶¶ 11 and 12, and its Prehearing Exchange Exhibits 10, 10a, 10b and 10c. Motion ¶ 16. Respondent admitted Paragraph 12 of the Complaint, that the Espiritu Santo

¹ Other items in Complainant's Prehearing Exchange are copies of the Complaint and attachments thereto (C's PHE Exhs. 1, 1a-c), Respondent's request for extension of time to file an Answer, Order granting the extension, and Answer (C's PHE Exhs. 2, 2a-c), notification from EPA to the Puerto Rico Environmental Quality Board of issuance of the Complaint (C's PHE Exh. 3), EPA's penalty calculation documents and penalty policies (C's Exhs. 4, 4a-d), and witness' curriculum vitae (C's PHE Exhs. 11-13).

River and Atlantic Ocean are “waters of the United States,” but denied the allegation in Paragraph 11 of the Complaint, that the MS4 discharges into these water bodies. The maps and aerial photograph do not refer to or identify any outfall from the MS4 referenced in the Complaint, and thus do not establish that the MS4 includes an “outfall” within the meaning of 40 C.F.R. § 122.26(b)(9), that is, “a point source . . . at the point where a municipal separate storm sewer system discharges to waters of the United States and [which] does not include open conveyances connecting two [MS4s], or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.” Complainant has not established that the MS4 referenced in the Complaint is a “point source” on the basis of having an outfall which discharges into the Espiritu Santo River and/or the Atlantic Ocean.

Complainant also has not established that the MS4 referenced in the Complaint is a “point source” under the general definition in Section 502(14) of the CWA: “any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged” Although it has been observed that “[s]tormwater runoff is one of the most significant sources of water pollution in the nation,” *Environmental Defense Center v. EPA*, 344 F.3d 832, 840 (10th Cir. 2003), the Complaint does not allege that “pollutants are or may be discharged” from the MS4, and the Prehearing Exchange does not include evidence in support of any such allegation. The correspondence from EPA presented in Complainant’s Prehearing Exchange includes merely conclusory allegations, and the determination that Respondent is required to obtain an NPDES permit was based on merely an “*assumption* that the Municipality of Rio Grande storm sewer system discharges to waters of the United States.” C’s PHE Exh. 7 (emphasis added). Complainant has not provided “evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it” on the “critical elements of [statutory] liability” in Section 308 of the CWA. *Rogers Corporation v. EPA*, 275 F.3d at 1103 (quoting *BWX Technologies, Inc.*, *supra*).

In a very recent decision, *Service Oil, Inc. v. United States Environmental Protection Agency*, No. 08-2819, 2009 U.S. App. LEXIS 28384 *15-16, 17 (8th Cir., Dec. 28, 2009), the Eight Circuit broadly concluded that “EPA lacks statutory authority to assess administrative penalties for failure to submit a timely permit application,” and that “a violation of the permit application regulations is not within the purview of [Section 309(g)(1)(a)],” which suggests that even if Complainant carried its burden as to evidence of the elements of liability for a violation of Section 308, Respondent could not be held liable for a penalty under Section 308. The court also ruled more specifically that the failure to apply for an NPDES permit under 40 C.F.R. §§122.21(c)(1) and 122.26(c) cannot be a violation of Section 308 of the CWA because there is no “point source” and no discharge at the time prior to construction activity when those regulatory provisions require the permit application to be submitted. 2009 U.S. App. LEXIS 28384 *13-14. In contrast, for MS4s, the operator of an existing MS4 which is already discharging, is required under the regulations and general permits to apply for coverage under an NPDES permit. *See*, 40 C.F.R. § 122.33 (operator of a regulated MS4 must seek coverage under an NPDES permit); 40 C.F.R. § 122.26(e)(9) (“For any discharge from a regulated small MS4,

the permit application made under § 122.33 must be submitted to the Director by: (i) March 10, 2003”).

The next question is whether Complainant has established liability of Respondent under Section 402 of the CWA for failure to apply for an NPDES permit for its storm water discharges. The Complaint only refers to Paragraph (p)(6) of Section 402, authorizing EPA to issue regulations and regulatory program for certain stormwater discharges. Complaint ¶¶ 13, 14. There is no cause of action under Section 402(p) for failure to apply for an NPDES permit. *Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F. Supp. 2d 803, 826-827 (N.D. Cal. 2007). The Complaint does not refer to any paragraph of Section 402 which sets forth a cause of action for noncompliance with a permit. Complainant’s Motion does not even refer to Section 402. Instead, it merely emphasizes Respondent’s admission in its Answer that it failed to submit an NOI to obtain coverage under the NPDES Permit by the February 18, 2008 deadline set forth in the Administrative Compliance Order. Motion ¶¶ 7, 24. It is observed that the General Permit, Paragraph 2.1.1 states, “If the permittee is automatically designated under 40 CFR § 122.32(a)(1) or designated by the permitting authority in this permit, then the permittee is required to submit an NOI . . . by February 5, 2007.” However, Complainant has not asserted in its Motion any violation of Section 402 based on this permit provision. The mere admission of noncompliance with an Administrative Compliance Order or failure to submit an NOI does not establish a violation of Section 402 of the CWA.

Accordingly, because Complainant has not met its burden to establish critical elements of liability for a violation of Section 308 or 402 of the CWA, the Motion for Accelerated Decision with respect to liability is denied.

IV. Motion for Stay and Request for Extension of Time to File Rebuttal Prehearing Exchange

If the remedies of default or accelerated decision are not granted, Complainant requests that it be granted an extension of time to file its rebuttal prehearing exchange. For good cause, the request is granted.

On December 28, 2009, the parties submitted a Joint Informative Motion, reporting that the parties “made substantial progress in reaching an agreement in principle,” including a proposed Supplemental Environmental Project. The parties therefore request a 45 day period to allow them to file a status report on progress in settlement.

Good cause exists for the granting of a stay in that it is in the interest of the parties and judicial economy for the parties to settle this matter on mutually agreeable terms rather than litigate the matter to conclusion. In that a hearing in this case has not been scheduled, no prejudice will result from a brief delay. However, Complainant will be required to file status reports on the status of settlement during the 45 day period, and if a Consent Agreement and

Consent Order is not filed by the end of the period, this case will proceed to a hearing.

ORDER

1. Complainant's Renewed Motion for Remedies is **DENIED**.
2. Complainant's Motion for Accelerated Decision with respect to liability is **DENIED**.
3. Complainant's Motion for Stay is **GRANTED**. This proceeding is hereby stayed until **March 8, 2010**. The parties shall attempt in good faith to settle this matter. The Complainant shall file a status report on the progress of settlement of this matter **during the weeks of February 2 and February 22, 2010**.
4. Complainant's request for an extension of time to file its rebuttal prehearing exchange is **GRANTED**. In the event the parties are unable to file a Consent Agreement and Consent Order in this matter beforehand, Complainant shall file any rebuttal prehearing exchange on or before **March 8, 2010**.

Susan L. Biro
Chief Administrative Law Judge

Dated: January 13, 2010
Washington, D.C.