

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
 Morgan Properties, Inc. ) Docket No. RCRA-UST-4-002  
 )  
 Respondent )

ORDER ON DISCOVERY  
and  
LOCATION OF THE HEARING

The Complainant has filed a motion dated November 7, 1997, requesting discovery and a change in the location of the hearing. The hearing in this matter is scheduled for December 10-12, 1997, in Cullman, Alabama, although a hearing facility has not yet been secured. Morgan has filed a response on November 18, 1997.

Discovery

The Region seeks information concerning Morgan's ability to pay the proposed penalty, which is in excess of \$600,000. The Respondent has already disclosed some of its tax returns and financial statements. The additional information sought would address the terms of some outstanding loans by Morgan, the possible "spin-off" of assets, and the creation of new companies. In its response, Morgan has stated that it has complied or is in the process of supplying the additional information requested. Thus, to at least some extent, it appears that the motion for additional discovery is moot.

In any event, at this juncture, shortly before hearing, I will not get involved in rulings on specific requests for documents relating to Respondent's ability to pay a penalty. In order to satisfy its initial burden of proof on this issue, the Region need only present "some *general* financial information regarding Respondent's financial status which can support the *inference* that the penalty assessment need not be reduced." *In re New*

*Waterbury, Ltd.*, 5 E.A.D. 529, 542 (TSCA Appeal No. 93-2, EAB, October 20, 1994, [italics in original]). The burden then shifts to Respondent to present specific evidence to show it cannot pay the proposed penalty. To the extent that the Respondent fails to support its claim of inability to pay by failing to disclose relevant evidence, adverse inferences could be drawn against Respondent's position. The parties are expected to cooperate in full mutual disclosure before the hearing, as it appears they are doing.

#### Location of the Hearing

The Complainant's request to change the location of the hearing from Cullman or Birmingham, Alabama, is denied. Most of the EPA's possible witnesses listed in its prehearing exchange are actually from Alabama, although I realize that the witness list has probably changed since then due to the rulings on accelerated decision. In any event, the Region has not shown good cause to move the hearing from the area of the Respondent's residence, which is the preferred location in EPA administrative hearings under 40 CFR §22.21(d).

Therefore, the hearing will be held as originally ordered in Cullman, Alabama, or, if a suitable facility cannot be found there, in Birmingham. The Respondent is advised to assist the Regional Hearing Clerk in finding an appropriate facility in Cullman if it wishes to have the hearing there. The Regional Hearing Clerk will notify the parties of the exact location of the hearing as soon as she makes the arrangements.

#### Further Proceedings

The issues in this case have been considerably narrowed by the rulings on the Complainant's motion for accelerated decision. It appears from the instant motion that the Respondent's ability to pay a penalty may be emerging as the most significant issue. The parties' planned presentations of witnesses and evidence should accordingly have been modified. The parties are therefore directed to exchange a brief (one page) updated list of witnesses and major exhibits intended to be offered into evidence at the hearing, no later than December 5, 1997.

I encourage the parties to explore all possible avenues toward settlement of this proceeding. If there is to be a settlement that could avoid the necessity of the hearing, notify my office as soon as possible. Any such settlement in principle must be

communicated to my office no later than 4.P.M., EST on Monday,  
December 8, 1997.

Andrew S. Pearlstein

Administrative Law Judge

Dated: November 19, 1997

Washington, D.C.