5/7/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ENSCO, INC.,	)	Docket No. TSCA-VI-532C
	)	
Respondent	)	

ORDERS

This matter, arising under the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq. (TSCA), deals with alleged violations of regulations pertaining to polychlorinated biphenyls (PCBs).

The several motions served by the parties will be treated, insofar as practicable, in the order presented and to the extent they are connected logically. In light of the number of motions involved (five), and in the interest of clarity and completeness, the undersigned Administrative Law Judge (ALJ) will restate the arguments of the parties to the extent he deems necessary.

The ALJ turns first to complainant's Motion to Deem Factual Allegations in the Complaint Admitted (motion or motion for an accelerated decision). The first amended complaint (sometimes complaint or FAC) was served October 9, 1991. Respondent's "Amended Answer to Complaint and First Amended Complaint and Request for Hearing" (first amended answer or FAA) was served October 25, 1991. The motion, supporting memorandum, and documents were served on November 18, 1991, with complainant seeking that

paragraphs 4, 6 through 13, 15 through 20, 30 through 38, and 44 through 47 of its complaint be deemed admitted, thus entitling complainant to an accelerated decision on the issue of liability.[1] Respondent's opposition to the motion was served on January 10, 1992, and a reply to the opposition was served by complainant on January 27, 1992.

Complainant, in support of its motion, relates that in 1986 the U.S. Environmental Protection Agency (EPA) renewed the PCB Disposal Approval (Approval) for the PCB Incinerator (Kiln No. 1) at the respondent's El Dorado, Arkansas facility. The Approval required respondent to report instances of noncompliance with PCB regulations. During 1991, respondent notified Region 6 of EPA, in four written communications, of three instances of improper disposal. Additionally, by a communication in March 1991, respondent notified the Region of two instances of failing to dispose of PCB articles and containers within one year of the date that they were first placed into storage for disposal. Region 6 had also received information from EPA's Region 7 of another violation of the one year storage for disposal regulation by respondent. Before respondent filed its answer to the original complaint, however, complainant served its FAC, correcting two citations and changing the order of some paragraphs. Count I of the complaint charges that respondent committed the three

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[1] In short, an accelerated decision may be issued as to all or part of a proceeding if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20.

violations for improper disposal of PCBs in an unapproved incinerator in violation of 40 C.F.R. § 761.60, and section 15(1)(C) of TSCA. Count II charges respondents with failure to dispose of PCB articles and PCB containers within one year from the date that they were first placed in storage for disposal in violation of 40 C.F.R. § 761.65, and the aforementioned section of the Act. Complaint seeks a proposed penalty of $75,000 for Count I and $2,000 for Count II, plus a 50 percent increase for respondent's alleged history of prior PCB violations, for a total of $115,500.

Complainant argues first that respondent's FAA did not conform with 40 C.F.R. § 22.15(b) by failing to respond properly to the factual allegations in the complaint, and that this neglect is deemed an admission of the allegations under the pertinent section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.15(d). Respondent was at liberty under the Rules to state that it had no knowledge of a particular allegation, and in such a case the allegation is deemed denied. Respondent did not so plead. Section 22.15 of the Rules provides, in significant part, as follows:

> (b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

> (d) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

Complainant asserts also that respondent did not respond truthfully to the complainant's allegations in violation of 40 C.F.R. § 22.05(c)(3) which states:

> (3) The original of any pleading,letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

Complainant cites Landfill, Inc., RCRA (3008) Appeal No. 86-8 at 9 (November 30, 1990), for its contention that any factual allegations which are not "clearly and directly" admitted, denied or explained are deemed to be admitted.

An examination of the FAA shows clearly that respondent does not come to grips with the material allegations of the complaint. For example, paragraph "7" of the complaint states that "On or about March 31, 1991, four drums containing PCBs were incinerated in Kiln No. 2." In response to this factual allegation, respondent merely restates the substance of 40 C.F.R. § 761.65(a). There is no denial, admission or explanation concerning the incineration of the four drums in Kiln No. 2. In paragraph "8" of the FAA, respondent states that "ENSCO denies each material allegation of the Complaint not specifically and affirmatively plead [sic] herein." This smacks of a general denial and does not conform to

the requirements of 40 C.F.R. § 22.15(d), and does not follow the preachments in Landfill, Inc. supra. Implying a certain degree of deviousness on the part of respondent, complainant states that the former did not answer the allegations, as demanded by 40 C.F.R. § 22.15(d)(3), because it chose to "avoid admitting to allegations that it knows are true; because the respondent notified Region 6 of four of the five violations alleged in the complaint;" and that by pleading a general denial respondent also failed to comply with 40 C.F.R. § 22.05(c)(3), by not truthfully responding to the allegations in the complaint. (Motion at 5)

In the letter of April 5, 1991, respondent notified Region 6 that on March 31, 1991, four drums containing the PCB at a concentration of 454 parts per million (ppm) were placed into Kiln No. 2, which kiln complainant states was not authorized to incinerate PCBs. By letter of May 21, 1991, respondent corrected the improper disposal date to March 30, 1991. (Motion at 6, 7; Exhibits 4, 5) This information conforms to the factual allegations in paragraphs 4, 7, 8, 30, 31 and 36 of the complaint. In an April 16, 1991 letter, respondent stated that plastic pails containing PCBs in a concentration of 163 ppm were fed into a MWP-2000 Unit, and that the MWP-2000 Modular Incinerator System was not authorized to incinerate PCB at respondent's El Dorado facility. This information is consonant with paragraphs 6, 9, 10, 11, 32, 33, 37 and 38 of the complaint. In a July 11, 1991 communication, respondent notified Region 6 that 30 gallon fibre drums containing, in part, PCB concentration above 50 ppm were fed into Kiln No. 2.

This parallels the allegations in paragraphs 4, 12, 13, 34, 35 and 36 of the complaint. (Motion at 7)

Regarding failure to dispose of PCB Articles and Containers within one year of the date they were first placed into storage for disposal, a letter from respondent dated March 21, 1991, and attachment, revealed that drum number 18 containing four large PCB capacitors was removed on March 13, 1990, was incinerated on March 14, 1991, beyond the one year time limitation. This alleged violation is shown in paragraphs 18-20, 46 and 47 of the complaint.

The fifth alleged violation is based upon information received from Region 7. The information disclosed that six barrels with capacitors containing PCBs were placed in storage for disposal prior to January 1, 1983, received by respondent on October 14, 1983 and incinerated on March 26, 1984. These allegations are reflected in paragraphs 15-17, 44 and 45. (Motion at 8)

Various extensions of time to respond to this and the other motions were granted by the ALJ. On January 10, 1992, respondent served its response to complainant's motion for the accelerated decision. The same day it served a motion for leave to amend its FAA. Respondent's opposition is a curious submission, indeed. With regard to the paragraphs of the complaint sought to be admitted in complainant's motion, respondent, in what appears to be a flat-out misstatement, relates, in pertinent part, "ENSCO asserts that its First Amended Answer responds to each of these paragraphs along with the remaining allegations in EPA's First Amended Complaint. For purposes of clarity, ENSCO hereby restates its

responses, as set forth in its First Amended Answer, to each one of the paragraphs in EPA's Amended Complaint." (Opposition at 2; emphasis added.) Respondent then proceeds to address each allegation of the complaint in conformity with 40 C.F.R. § 22.15(a), with denials or admissions. However, these responses were not stated in the FAA, but rather as an attachment to respondent's motion for leave to amend its FAA, which motion has not, as yet, been decided by the ALJ.

The issues in complainant's motion for an accelerated decision and respondent's motion to amend its FAA are interrelated. Therefore, before deciding complainant's motion for a partial accelerated decision, it is apposite at this time to address respondent's motion, served January 10, 1992, for leave to amend its FAA. The pertinent section of the Rules, 40 C.F.R. § 22.15(e), provides that a respondent may amend its answer upon motion granted by the ALJ. Attached to its motion, respondent submitted its second amended answer (SAA). In support of its motion, respondent states that the SAA will not cause any delay or prejudice because it is not attempting to add any new affirmative defenses or attempting to put anymore facts in issue; "Rather, ENSCO simply seeks to clarify its position." (Motion at 2) The SAA submitted proceeds to address each allegation of the complaint with denials, admissions or explanations as required by 40 C.F.R. § 22.15(b). The motion to amend is opposed in the submission of January 27, 1992, where, in pertinent part, complainant relates that should the

motion be granted, the accelerated decision against respondent on the issue of liability should be granted.

Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and they traditionally enjoy "wide latitude" in fashioning their own rules of procedure.[2] Although administrative agencies generally are unrestricted by the technical or formal rules of procedure which govern trials before a court, rules such as the Fed. R. Civ. P. often guide decision making in the administrative context. Amendments to pleading are addressed in Fed. R. Civ. P. 15(a). Such amendments should be granted liberally.[3] The decision to grant or not rests, to a large measure, within the informed discretion of the ALJ. Also, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957); Hildebrand v. Honeywell, Inc., 622 F.2d 179, 181 (5th Cir. 1980).

For the above reasons, the ALJ is disinclined to deny respondent's motion to amend its FAA. (The ALJ will return later with more particularity to complainant's motion for an accelerated decision and respondent's motion to amend.)

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[2] See, e.g., In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D. N.Y. 1982); and Silverman v. Commodities Future Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

[3] 3 Moore's Federal Practice ¶ 15.08[2].

The ALJ now turns to respondent's motion for dismissal served November 25, 1991. The nub of the motion is as follows: In paragraph "10" of the FAA, respondent states: "ENSCO moves to dismiss the Complaint in that it fails to state a cause of action;" that 40 C.F.R. § 22.16(b) provides that a party's response to a written motion must be filed within 10 days after service, unless additional time is allowed for the response; that complainant did not move for additional time to respond; that the aforementioned Rule provides that if a party fails to respond within the designated period it is deemed to have waived any objection to the granting of the motion; and that respondent's motion dismissing the complaint should be granted.

In its opposition to the motion to dismiss, served January 10, 1992, complainant relates that the parties agreed that the time to respond would be extended to the aforementioned date. Complainant observes that respondent did not file a separate motion to dismiss; that it was a sentence inserted in the middle of the answer; that the purported motion did not cite any legal authority; and that it was not supported by a legal memorandum as required by 40 C.F.R. § 22.16(a).[4] The opposition is some ten pages in length, but it is not necessary to go beyond the aforementioned Rule to decide the motion. The alleged "motion" not only was buried in the answer,

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[4] The section, in pertinent part, states: "(a) General. All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefore with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon . . . ." (emphasis added).

but it failed to state the grounds for same "with particularity". Nor was it accompanied by "any affidavit, certificate, other evidence, or legal memorandum relied upon." Complainant is of the opinion that the motion to dismiss "is frivolous and without merit, and should be summarily denied." (Response at 2) The ALJ concurs in complainant's assessment.

In another motion, served November 25, 1991, respondent seeks an order to compel complainant to produce certain documents. The motion relates that on October 14, 1991, respondent, in a letter to complainant's counsel, requested "a complete set of all documents relating to [the instant case];" and that it was "particularly interested in receiving the TSCA Penalty Policy worksheets;" that by letter of October 31, 1991,[5] complainant produced part of the documents requested, but withheld other information, with respondent receiving a formal denial on November 7, 1991. The text of this letter, attached to the motion, discloses, in pertinent part, that EPA released 30 pages of documents, and denied the production of other listed material as being exempt under FOIA.[6]

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[5] The letter from complainant's counsel speaks of two requests by respondent. One under the Freedom of Information Act (FOIA), Request No. (6) RIN-3614-91. The other request mentioned in the October 31, 1991 letter refers to request stated in respondent's motion.

[6] The documents denied were: (1) Compliance Evaluation Form prepared by M. A. Kelly (Toxics Section), dated July 21, 1991, with attachments, 24 pages; (2) Briefing Sheet (prepared by M. A. Kelly for Division Director), dated October 1, 1991, 2 pages; (3) Handwritten memo by M.A. Kelly, subject: "Possible Violation," dated February 4, 1990, 1 page; (4) Handwritten notes of Evan Pearson, Assistant Regional Counsel, dated Sept. 10, 1991, 1 page; and (5) Portions of Revised Compliance Evaluation Form by M. A. Kelly, undated, with attachments, 11 pages. (Motion at 2,3)

Respondent was advised that it had 30 days to appeal the FOIA decision. Respondent argues that it cannot properly and adequately defend itself in the subject proceeding without access to the requested documents. It also urges that the proposed penalty of $115,500 is unreasonable, and that without the requested documents it will be unable to prove "the error in the assessment of the excessive penalty." (Motion at 3) Respondent relates that complainant did produce the "Civil Penalty Assessment Worksheet," (Worksheet) but the document does not show how the $115,500 came to be; that the Worksheet contained the phrase "see attached,"[7] but no attachment was produced. Respondent seeks an order requiring complainant to produce "all documents used by Complainant in prosecution of this case," and to impose applicable sanctions if documents are not forthcoming. In its response of January 10, 1992, complainant urges that the motion be denied. Complainant observes, quite correctly, that respondent does not claim it needs the documents to defend itself on the liability question involved in the proceeding; rather respondent asserts that the documents are needed for its defense against the proposed penalty.

Respondent's motion is one essentially of discovery, and some threshold thoughts are appropriate here. A large amount of discretion is accorded the ALJ in questions concerning discovery, and the resolutions of issues perforce turn upon the facts of the individual case and the applicable law and regulations. Discovery

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[7] The attachment pertained to "Gravity Based Penalty (GBP) from matrix."

can be salutary. Stated broadly, it may lead to admissible evidence; it may define more precisely and narrow the issues; it may result in a more expedited hearing or the settlement of the matter. Notwithstanding these vaunted virtues, discovery as a litigation art may be put to inapposite uses to the disadvantage of justice. Therefore, let it be emphasized here that neither party will be permitted, under the guise of discovery, to engage in delaying, paper-producing, action-avoiding tactics. Further, discovery in an administrative hearing is different from federal civil proceedings. There is no basic constitutional right to pretrial discovery in administrative hearings. Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977); Klein v. Peterson, 696 F.Supp. 695, 697 (D.D.C. 1988). With this backdrop, the motion is addressed. Under the Rules, the parties are required only to exchange the names of the expert and other witnesses along with a "brief narrative" summary of their testimony, and documents which each party intends to introduce into evidence. 40 C.F.R. § 22.19(b). Beyond this, the parties are not obligated to complete any other discovery. Although voluntary discovery is strongly encouraged, it is not mandatory. After the prehearing exchanges, if the parties are not able to complete discovery voluntarily, then they may motion for further discovery pursuant to 40 C.F.R. § 22.19(f). Following the answer, it is this ALJ's practice to issue a Notice and Order advising the parties that he is assigned to the matter and directing the parties, in part, that prehearing exchanges take place after a specified date

if settlement is not effectuated. However, the sequence of pleadings here is somewhat unusual. Even before the parties were advised of the ALJ designation, a flurry of pleadings ensued. Resulting from the plethora of motions, the matter is procedurally unbalanced. While creating difficulty, this is not fatal, and will not preclude ruling on the motions.

The significant language of section 22.19(f)(1) concerns delay, the obtainability of the information elsewhere and the probative value of the information sought. The extent to which discovery will be granted is determined by laying the motion alongside the aforementioned regulation. In pertinent part, the aforementioned provides:

> (f) Other discovery. (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
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> (i) That such discovery will not in any way unreasonably delay the proceeding;
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> (ii) That the information to be obtained is not otherwise obtainable; and
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> (iii) That such information has significant probative value.

The basis for respondent's motion is to acquire information concerning the penalty sought. However, under the Rules, a motion to compel under 40 C.F.R. § 22.19(f) is to be preceded by the prehearing exchanges. 40 C.F.R. § 22.19(b). In this regard, complainant relates that it will be submitting a prehearing exchange which will provide sufficient information for respondent

to defend itself and that respondent's motion is premature. (Response at 9) If a party is of a mind that the prehearing exchange is insufficient, it may then move to compel further discovery. The prehearing exchange, except to the extent the parties may have engaged in same in a fragmentary manner, has not been completed as yet. Complainant is correct; the motion is premature. This, standing alone, is sufficient for its denial. The motion has additional shortcomings, however. Complainant has already furnished respondent with copies of the Penalty Policy and penalty calculation worksheets. This is sufficient for respondent to comprehend the basis for the proposed penalty, and be able to defend itself against same. The other five specific documents sought by respondent are stated by complainant to be "communications between [complainant's counsel and EPA] evaluating the case for prosecution, staff recommendations to decision makers concerning the prosecution of this case, and work prepared in anticipation of litigation by or at the direction of the attorney." (Response at 5) As such, they are either privileged as attorney work products, the attorney-client privilege or come within the deliberative process privilege. This latter privilege applies to administrative proceedings and "that some, if not all, documents [sought by a respondent] pertaining to the Penalty Policy are protected by this privilege." In the Matter of Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, at 13 (June 24, 1991).

As the ALJ sees it, there remains one unaddressed item in the response. This concerns the "attached" related to the Gravity

Based Penalty stated on the copy of the Penalty Worksheet, which did not accompany the document. It does not appear to be dealt with specifically in the response. Depending upon further prehearing submissions, discovery concerning this document may be granted or denied. If the document does not appear in complainant's prehearing submission, and if the document, in the ALJ's opinion, is not privileged, and further if respondent can meet the requirements of 40 C.F.R. § 22.19(f), it is at liberty to make a motion to compel. At this time, for the reasons mentioned above, respondent's motion to compel production of the documents rests upon a soggy legal basis.

The next, and final submission to be met is complainant's motion of January 27, 1992 to strike respondent's affirmative defenses. A response by the latter was served on February 10, 1992, and complainant served a reply to the response on February 24, 1992. Regarding the liability question in this matter, respondent asserts as defenses in its FAA the doctrines of laches, estoppel, waiver and the statute of limitation. (FAA at 2-6, Response at 8, 9) (To be recalled is that in respondent's motion for the SAA there was stated that it is not attempting to add new affirmative defenses.) Additionally, it asserts that the penalty assessment is unjust because approximately 99.95 percent of the drums that entered its facility were disposed of in accordance with the regulations. (FAA at 2-6; Response at 8, 9) Assuming arguendo this to be the case, it concerns a penalty question and

is not within the scope of the motion. It is an issue to be resolved at another time.

A motion to strike under Fed. R. Civ. P. 12(f) constitutes the primary procedure for objecting to an insufficient defense.[8] In that striking a portion of a pleading is a drastic remedy and because it is often considered simply a dilatory tactic of the movant, motions to strike are received generally with disfavor and, according to commentators, granted infrequently. A motion to strike must state with particularity the grounds therefor, and set forth the nature of relief or type of order sought. All well-pleaded facts shall be taken as admitted, but conclusions of law or of fact need not be treated in that fashion.[9]

A motion to strike a defense will be denied if the defense is sufficient as a matter of law or if it fairly presents a question of law or fact which the court ought to hear.[10] Thus, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined at a hearing on the merits.[11]

In a clear, concise and conclusive manner, complainant has set forth with particularity the grounds for its motion and relief

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[8] Wright & Miller, Federal Practice and Procedure: Civil § 1380, at 782 (1969).

[9] Id. at 787.

[10] 2A Moore's Federal Practice ¶12.21[3] at 12-179 (2d ed. 1987); Wright & Miller, supra, note 3 at 801; Lundsford v. United States, 570 F.2d 221 (8th Cir. 1977); Salcer v. Envicon Equities, 744 F.2d 935, 939 (2d Cir. 1984).

[11] Id.

sought. Further, the defenses do not raise factual issues, presenting pure questions of law, and are amenable to being decided now. In so doing, the resolution of this proceeding shall be expedited.

Concerning the affirmative defense of the statute of limitations, this defense, understandably, is asserted frequently by respondents in civil penalty proceedings arising under TSCA and other statutes. This ALJ held In the Matter of Tremco, Inc., Incon Division (TREMCO), Docket No. TSCA-88-H-05, April 7, 1989, that the five-year statute of limitations contained in 28 U.S.C. § 2462, does not apply to administrative proceedings under TSCA for the assessment of a civil penalty. Other ALJs within EPA have held otherwise. However, this monotonous contention of the statute of limitations raised by respondents has been laid to rest finally in a recent decision by the Chief Judicial Officer of EPA in a final decision. In the Matter of 3M Company (Minnesota Mining and Manufacturing), TSCA Appeal No. 90-3, at 25-29 (February 28, 1992). The thoughts expressed in Tremco, and similar holdings by other ALJs, concerning the statute of limitations were confirmed in that final decision. Respondent here, however, urges that if a statute of limitations is not applicable to TSCA, then "some other statute of limitation should be offered to such actions." (Answer at 5, 6) The ALJ does not concur in respondent's thinking, and he declines to be waylaid into creating a statute of limitations where none exists, or adopting a limitation from another federal statute or that which a particular state may prescribe.

The other affirmative defenses relied upon by respondent are those of estoppel, laches and waiver. There is an absence of any "affirmative misconduct" displayed by EPA. Therefore, the defense of estoppel is not available to respondent. Nor, on the facts of this case, are the defenses of laches or waiver available to respondent. Tremco, supra at 12-14. The complainant's motion to strike respondent's affirmative defenses is well taken.

At this time, the ALJ returns to complainant's motion, pursuant to 40 C.F.R. § 22.20, for a partial accelerated decision on the question of respondent's liability. At the outset, the determination of whether or not the subject matter is amenable to an accelerated decision hinges upon the interpretation of section 22.20 of the Rules and applicable law. The Rule provides, in pertinent part, as follows:

> (a) General. The Presiding Officer, upon motion of any party . . . may . . . render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . . (emphasis added).

Oral hearings should be used to resolve issues of material facts. The Rule, in part, exemplifies this.[12] An accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. Minor factual disputes would not preclude an accelerated decision. Disputed issues must involve "material.

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[12] See generally, 3 Davis, Administrative Law Treatise, § 12.2 2d Ed. (1980).

facts" or those which have legal probative force as to the controlling issue. A "material fact" is one that makes a difference in the litigation.[13] Also, a party is not necessarily entitled in all contested cases to an oral hearing. Due process is not a fixed star in the constitutional constellation. It has been enunciated by the Supreme Court that only "some form of hearing" is required where property rights are involved, and that the requiring of an evidentiary judicial-type hearing upon demand in all cases would entail fiscal and administrative burdens out of proportion to any countervailing benefits. "The judicial model of an evidentiary hearing is neither required, nor even the most effective method of decision-making in all circumstances. The essence of due process is that 'a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it.'" Mathews v. Eldridge, 424 U.S. 319, 333, 347-349 (1976).

Notifications by respondent to EPA were required under Conditions A.10, A.11 of the PCB Disposal Approval. Correction of any information submitted is required under Condition A.12. The four written notifications constituted admissions to the alleged violations; they may serve as a basis for respondent's violations of 40 C.F.R. § 761.60 for disposing improperly of PCBs at concentrations of 55 ppm or greater. Count II of the complaint concerned the failure to dispose of PCB Articles and Containers within one year from the date they were first placed into storage for disposal. The allegation is supported by documents attached to

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[13] Words and Phrases, "Material Fact."

complainant's motion. Respondent's failure to dispose within the required time frame constituted violations of 40 C.F.R. § 761.65.

The affirmative defenses (as with the SAA) did not come forward with affidavits or persuasive documentary evidence to show that there exists a genuine issue of material fact concerning liability which would warrant an evidentiary hearing. A review of respondent's opposition to the motion, and its SAA, shows that storage for disposal charge goes essentially unchallenged, and the single factor alleged in the defense to improper disposal in Count 1 is the claim by respondent that Kiln No. 2 was approved for disposal of PCBs. The language of this claim, stated under the rubric of affirmative defenses in the SAA, at paragraph 5, is significantly sufficient to be stated verbatim. It reads:

> 5. Kiln #2 is a component system directly connected to a secondary combustion chamber (the Thermal Oxidation Unit, "TOU"), which is an integral part of an EPA-approved incineration system. In fact, the construction of Kiln #2 was approved by EPA as a modification to that system. Consequently, intermediate processing of PCBs in Kiln #2 prior to their disposal in the TOU does not constitute improper disposal of PCBs since the actual disposal takes place in the secondary combustion chamber where operating conditions assure that the 99.9999% Destruction and Removal Efficiency (DRE) Requirement is achieved.

Respondent has attempted to conjure up an issue of material fact by maintaining that Kiln 2 is actually a component of an EPA-approved incineration system. The EPA letters of January 15, 1987 and March 16, 1989, attached as Exhibits 1 and 2 to the opposition,

are intended to support this claim. (These documents are met in the Burger affidavit, infra.)

Complainant's Reply to Respondent's Opposition to the Motion for an Accelerated Decision is well-documented and persuasive. Stan Burger (Burger) is an employee of EPA. Among his duties are matters relating to hazardous waste and PCB incinerators, including the evaluation of permit applications for same. He is familiar with respondent's PCB Approval for the El Dorado, Arkansas facility. Complainant's reply relies, in part, on the Burger affidavit, which relates, in pertinent part, that EPA approved respondent's Kiln No. 1; that this approval included only the thermal oxidation unit (TOU) and the waste-fired boilers; that the approval did not include Kiln No. 2, nor the MWF-2000 Modular Incineration System (MWF-2000) (a/k/a Kiln No. 3); that respondent's facility has two rotary kilns (Kiln Nos. 1 and 2) connected to a common afterburner (TOU) and the MWP-2000; that Kiln No. 1 is part of the incineration system permitted currently to incinerate hazardous waste; that it was installed in 1978 and replaced in 1982; that prior to the expiration of the PCB Approval for respondent's facility on December 24, 1991, Kiln 1 was also approved to incinerate PCBs; that Kiln No. 2 was constructed in 1988 and has never received approval, pursuant to 40 C.F.R. § 761.70, to incinerate PCBs; and that the July 14, 1987 amended PCB Disposal Approval only applied to Kiln No. 1, the TOU, and the waste-fired boiler; that prior to January 1987, respondent requested information from EPA concerning the requirements to begin

incinerating PCBs in the second rotary kiln -- Kiln No. 2; that respondent was advised that Kiln No. 2 would have to undergo some tests, and if test procedures were followed, satisfactory results obtained, and that if criteria set out in 40 C.F.R. § 761.70(d) were met, EPA would approve Kiln No. 2 for disposal. The affidavit relates further that EPA did not approve the construction of Kiln No. 2 because approval to construct a rotary kiln is not required under 40 C.F.R. § 761.70, but EPA must approve the rotary kiln before it can be used to dispose PCBs because it meets the definition of an incinerator. For the reasons stated in the affidavit, respondent's statement in its letter of October 3, 1989, that "use of the second rotary kiln for PCB disposal will not require modification of any conditions of the ENSCO PCB disposal approval" is incorrect. The Burger affidavit relates further that by letter of February 15, 1990, respondent acknowledged that EPA was withholding approval to perform a PCB test burn in Kiln No. 2; that Kiln No. 2 continues to experience fugitive emissions; that EPA would not allow a PCB trial burn on the equipment until the problem was solved; that a PCB trial burn was never conducted on Kiln No. 2, and the equipment has never been approved to dispose of PCBs, pursuant to 40 C.F.R. § 761.70, and that the respondent's PCB Disposal Approval for its facility was never amended to include Kiln No. 2. Concerning the MWP-2000 system, the affidavit makes reference to respondent's letter. In this communication of April 16, 1991, respondent itself states that "The MWP-2000 Modular

Incinerator System is not included in the TSCA authorization for the El Dorado facility."

One is led ineluctably to conclude that there exists no genuine issue of material fact concerning liability in this matter. Additionally, respondent has not set forth any affirmative defenses which will shield it from liability in this proceeding. It is further concluded that respondent has committed three violations of section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C) by disposing of PCBs in an unapproved incinerator, in violation of 40 C.F.R. § 761.60. It is also concluded that respondent has committed two violations of the aforementioned section of TSCA by failing to dispose of PCB Containers and Articles by January 1, 1984, and by failing to dispose of like items within one year from the date PCB Articles were first placed in storage, as required by 40 C.F.R. § 761.65. Respondent, however, is afforded a hearing on the issue of the amount of civil penalty to be assessed in this matter.

Based upon the reasons stated above, **IT IS ORDERED** that:

1. Complainant's motion for an accelerated decision, on the issue of liability, be **GRANTED**.

2. Respondent's motion for dismissal be **DENIED**.

3. Respondent's motion for leave to amend its answer be **GRANTED**.

4. Respondent's motion to compel production of documents be **DENIED**.

5. Complainant's motion to strike affirmative defenses be **GRANTED**.

6. The parties shall engage in good faith settlement negotiations to resolve the penalty question in this matter.

IT IS FURTHER ORDERED that:

1. A party filing a motion for extension of time, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection. Motions for extensions of time shall be made orally to the Office of Administrative Law Judges, and shall be ruled upon orally.

2. All future pleadings to be double spaced with pica-like (large, 10-pitch) type, in the style of this order.

3. To the extent not done already, the parties shall furnish their respective fax numbers in their first written communication to the office of the undersigned.

4. Counsel for complainant serve a status report, no later than **July 1, 1992**, concerning whether or not this matter has been settled. If the case is not settled[14] by this date, compliance by the parties to paragraphs "6," "7," and "8" below shall be made no later than **August 1, 1992**. The original of the responses, and all other documents, shall be sent to the Regional Hearing Clerk and copies, with any attachments, shall be sent to the opposing party and the undersigned. In this regard see 40 C.F.R. § 22.05. Upon receipt of the responses, the parties will be advised by subsequent

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[14] Even if the matter is settled, and unless and until a consent agreement and order are executed in final form, **the parties are still obligated to submit their prehearing exchanges unless an extension is granted by the undersigned for submission of same.**

orders including, but not limited to, marking this matter for a prehearing conference.

5. The parties shall take precautions in any settlement negotiations to insulate and shield the undersigned, and his staff, from any knowledge concerning money amounts mentioned therein. This can best be accomplished by being certain the undersigned or his staff do not receive a copy of any communications reflecting settlement amounts.

6. In accordance with §§ 22.19(b)(d) and 22.21(d) of the Rules, the following prehearing exchange shall take place, on the penalty issue, between both parties: To the extent not done already, each party shall make available to the other (a) the names of the expert or other witnesses intended to be called, together with a brief narrative summary of their expected testimony; (b) copies of all documents and exhibits which each party intends to introduce into evidence; (c) that these documents and exhibits shall be identified as "Complainant's," "Respondent's" or "Joint" exhibits, as appropriate, numbered with Arabic numerals. For example, "CX 1," "RX 1," or "JX 1"; and (d) the views of each party concerning the desired location of the hearing-in-chief.

7. Complainant, to the extent not done already: (a) Submit a copy of the inspection report, and all other documentary evidence to support penalty sought in the complaint; (b) Show the rationale concerning how the proposed civil penalty in the complaint was calculated and how it conforms to any applicable Civil Penalty or Enforcement Policies of the U.S. Environmental Protection Agency;

and (c) Furnish its views, with some particularity, concerning the gravity of the alleged violations of the Act including the actual or potential harm to man and the environment resulting from respondent's purported illegal conduct. Also to be included is the history, if any, of respondent's compliance with the Act.

8. Respondent, to the extent not already done, state whether or not it is contesting the appropriateness of the civil penalty proposed in the complaint if it is found to have violated the Act as charged. If one of the reasons is respondent's alleged inability to pay same, it shall furnish current financial data or other acceptable documentation in support of its position.

9. Beginning one month following **August 1, 1992**, complainant shall submit monthly status reports until this matter is either settled or a hearing date is set.

10. Following the prehearing exchanges, any further discovery between the parties shall be carried out in a voluntary manner with a minimum of intervention by the undersigned. To illustrate, should a request for discovery be made, and such request be declined, the requesting party then, and only then, may turn to the undersigned with a motion to compel in accordance with 40 C.F.R. § 22.19(f), with particular reference to its subsections.

11. Any motions must be served within sufficient time which, in the opinion of the undersigned, will not cause delay in, or interfere with, the scheduled hearing date. Failure to observe this may result in such motions being denied.

Frank W. Vanderheyden
Administrative Law Judge

Dated: May 7, 1992

IN THE MATTER OF ENSCO, INC., Respondent,
Docket No. TSCA-VI-532C

Certificate of Service

I certify that the foregoing Orders, dated 5/7/92, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Lorena Vaughn
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Regular Mail to:

Attorney for Complainant:

Evan L. Pearson, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Attorneys for Respondent:

Kirk Sniff, Esquire
David Jimenez, Esquire
STRASBURGER & PRICE
901 Main Street
Suite 4300
Dallas, TX 75202

Marion I. Walzel
Secretary

Dated: May 7, 1992