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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LAY BROTHERS, INC.,	)	Docket No. EPCRA-IV-97-067
	)	
	)	
RESPONDENT	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO PENALTY

Introduction

This civil administrative penalty proceeding arises under Section 325 of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq., also known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11045. The United States Environmental Protection Agency ("EPA" or "Complainant") has filed a Complaint against Lay Brothers, Inc. ("Respondent"), charging the Respondent with two counts of violating EPCRA. The EPA seeks a civil administrative penalty of $35,000 for these alleged violations.

On January 28, 1999, the EPA filed a Motion for Accelerated Decision in the above cited proceeding. The EPA asserts that the Respondent has admitted facts sufficient to establish the necessary elements of liability for each violation alleged in the Complaint. The EPA also asserts that there are no genuine issues of material fact with respect to liability or penalty and that the EPA is entitled to judgment as a matter of law. The Respondent has responded to the EPA's Motion for Accelerated Decision by challenging the appropriateness of the penalty. For the reasons discussed below, the EPA's motion for accelerated decision as to liability will be granted but the motion for accelerated decision as to penalty will be denied.

Findings of Fact

1. The Complaint in this matter was filed on February 25, 1998, by the Director of the Air, Pesticides and Toxics Management Division for Region 4 of the EPA pursuant to Section 325 of EPCRA, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01-22.32.
2. The Administrator of the EPA has delegated to the Regional Administrator for Region 4 of the EPA the authority to commence and pursue civil administrative actions under Section 325 of EPCRA and the Regional Administrator has redelegated this authority to the Director of the Air, Pesticides, and Toxics Management Division for Region 4 of the EPA.
3. The EPA promulgated the Hazardous Chemical Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 370, pursuant to Sections 311, 312, and 328 of EPCRA, 42 U.S.C. §§ 11021, 11022, 11048.
4. The Complaint alleges one violation of Section 311 of EPCRA for the Respondent's failure to submit material safety data sheets ("MSDS"), or a list including certain information, for the hazardous chemicals ethylene glycol, gasoline, diesel, motor oil, unleaded gas, and aviation gas on or before October 17, 1987, or within three months after the Respondent first became subject to the OSHA's MSDS requirements, to the state emergency response commission ("SERC") and the fire department with jurisdiction over the Respondent's facility (Count I).
5. The Complaint also alleges one violation of Section 312 of EPCRA for the Respondent's failure to submit emergency and hazardous chemical inventory forms ("inventory form") for the hazardous chemicals ethylene glycol, gasoline, diesel, motor oil, unleaded gas, and aviation gas for the calendar year 1995 to the SERC and the fire department with jurisdiction over the Respondent's facility by March 1, 1996 (Count II).
6. In the Compliant, the EPA proposes civil administrative penalties of $10,000 for Count I and $25,000 for Count II. The total proposed administrative penalty is $35,000.
7. The Respondent is Lay Brothers, Inc., which is and was at all times relevant to this matter a corporation incorporated under the laws of the State of Georgia. The Respondent owns and operates a facility located at 775 Winterville Road, Athens, Georgia.
8. The owner or operator of a facility which is required to prepare or have available an MSDS for a hazardous chemical under the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. 651 et seq., and regulations promulgated under that Act, must submit to the appropriate local emergency planning committee ("LEPC"), the SERC, and the fire department with jurisdiction over the facility on or before October 17, 1987, or within three months after the owner or operator first becomes subject to the OSHA's MSDS requirements, an MSDS for each such chemical in amounts that exceed the threshold for reporting set forth in its implementing regulations at 40 C.F.R. Part 370, or to provide the above identified entities with a list including certain information about the hazardous chemical.
9. The owner or operator of a facility which is required to prepare or have available an MSDS for a hazardous chemical under the OSHA, and regulations promulgated under that Act, must submit to the appropriate LEPC, the SERC, and the fire department with jurisdiction over the facility on or before March 1, 1988, and annually thereafter on March 1, for the preceding calendar year, an inventory form for each such chemical in amounts that exceed the threshold for reporting set forth in its implementing regulations at 40 C.F.R. Part 370.
10. Ethylene glycol, gasoline, diesel, motor oil, unleaded gas, and aviation gas are hazardous chemicals as defined under Sections 311(e), 312(c), and 329(5) of EPCRA, 42 U.S.C. § 11049(5), and 40 C.F.R. § 370.2, for which an owner or operator of a facility is required to prepare or have available an MSDS under the OSHA or its regulations.
11. The minimum threshold amount for reporting all hazardous chemicals present at a facility is 10,000 pounds pursuant to Sections 311(b) and 312(b) of EPCRA and 40 C.F.R. § 370.20(b).
12. At all relevant times, including the calendar year 1995, at least 10,000 pounds of each of the six hazardous chemicals listed above were present at the Respondent's facility.
13. The Respondent failed to submit to the SERC and the fire department with jurisdiction over its facility an MSDS, or a list including certain information about the chemicals, for the six above listed hazardous chemicals on or before October 17, 1987, or within three months after the Respondent first became subject to the OSHA's MSDS requirements.
14. The Respondent failed to submit to the SERC and fire department with jurisdiction over its facility inventory forms for each of the six hazardous chemicals listed above on or before March 1, 1996, for calendar year 1995.

Conclusions of Law

1. The Respondent was a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), and 40 C.F.R. § 370.2 at all times relevant to this matter.
2. The Respondent was the "owner and operator" of a "facility" as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and 40 C.F.R. § 370.2 at all times relevant to this matter.
3. The Respondent was required to prepare or have available an MSDS for each of the six hazardous chemicals listed above under the OSHA, and regulations promulgated under that Act. Thus, the Respondent was required to submit to the SERC and the fire department with jurisdiction over its facility on or before October 17, 1987, or within three months after the Respondent first became subject to the OSHA's MSDS requirements, an MSDS for each of the six hazardous chemicals listed above, or to provide the above identified entities with a list including certain information about these hazardous chemicals. Section 311 of EPCRA, 42 U.S.C. § 11021.
4. Because the Respondent was required to prepare or have available an MSDS for each of the six hazardous chemicals listed above under the OSHA, and regulations promulgated under that Act, the Respondent was required to

submit to the SERC and the fire department with jurisdiction over its facility on or before March 1, 1996, for the calendar year 1995, an inventory form for each of the six hazardous chemicals listed above. Section 312 of EPCRA, 42 U.S.C. § 11022.

5. The Respondent's failure to submit an MSDS or list for each of the six hazardous chemicals listed above on or before October 17, 1987, or within three months after the Respondent first became subject to the OSHA's MSDS requirements, to the SERC and the fire department with jurisdiction over the Respondent's facility constitutes a violation of Section 311 of EPCRA.
6. The Respondent's failure to submit an inventory form for each of the six hazardous chemicals listed above on or before March 1, 1996, for the calendar year 1995, to the SERC and the fire department with jurisdiction over the Respondent's facility constitutes a violation of Section 312 of EPCRA.

Standard For Accelerated Decision

The Complainant has filed a motion for accelerated decision pursuant to Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20, the regulation governing accelerated decisions. Section 22.20(a) of the Rules of Practice provides, in pertinent part, as follows:

> The Presiding Officer,[(1)] upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the 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, as to all or any part of the proceeding. (emphasis added)[(2)]

40 C.F.R. § 22.20.

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[(3)] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. See In the Matter of CWM Chemical Service, TSCA Appeal 93-1, 6 EAD 1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. Anderson, supra at 248; Adickes, supra, at 158-159. The substantive law identifies which facts are material. Id.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. Id. Further, in Anderson, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. Anderson, supra, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must

make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.[(4)] Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, supra, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra. The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, supra, at 256 (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. Celotex, supra at 322; Adickes, supra. The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, supra, at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or elaborate on the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon any 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." As an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an administrative accelerated decision is quite similar to that in the context of a judicial summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, the standard for that inquiry as enunciated by the Court in Celotex, Anderson, and Adickes is found to be applicable in the administrative accelerated decision context.

Moreover, review by the Environmental Appeals Board ("EAB") in determining whether there is a genuine issue of material fact requiring an oral evidentiary hearing is governed by an "administrative summary judgment" standard which was articulated recently by the EAB in Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, 6 EAD 782, 793 (EAB, Mar. 6, 1997). Under this standard, there must be timely

presentation of a genuine and material factual dispute, similar to judicial summary judgment under FRCP 56, in order to obtain an evidentiary hearing. Otherwise, an accelerated decision based on the documentary record is sufficient. Id. Compare In the Matter of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993) (wherein the EAB adopted the standard for summary judgment articulated by the Court in Anderson to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the CWA).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[(5)] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. See Anderson, supra, at 249.

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

DISCUSSION

In the instant matter, the EPA has filed a motion for accelerated decision on liability and penalty for the two counts in the Complaint. The EPA argues that no genuine issue of material fact exists with respect to liability and penalty and that the EPA is entitled to judgment as a matter of law. The EPA claims that its motion for accelerated decision is based on the Respondent's admissions of fact which are sufficient to establish the necessary elements of liability for each violation alleged in the Complaint. The EPA further argues that no genuine dispute of material fact exists regarding the appropriateness of the penalty.

The Respondent opposes the motion for accelerated decision. The Respondent recognizes that EPCRA imposes strict liability for failure to file the proper reporting forms with the appropriate agencies, but argues that the penalty may be decreased based upon a number of considerations. The Respondent submits that it has raised numerous factual issues concerning the applicability and effect of mitigating factors which must be resolved in an evidentiary hearing.

Accelerated Decision as to Liability

The Complaint alleges two counts of violations of EPCRA. Specifically, Count I charges the Respondent with failure to timely submit MSDS's for six specified hazardous chemicals at the Respondent's facility or a list of such chemicals with certain information about those chemicals to the SERC or fire department with jurisdiction over the Respondent's facility in violation of Section 311 of EPCRA. Count II charges the Respondent with failure to timely submit inventory forms for the six specified hazardous chemicals at the Respondent's facility to the SERC or fire department with jurisdiction over the Respondent's facility in violation of

Section 312 of EPCRA.

For the purpose of providing some background, it is noted that EPCRA is intended "to provide the public with important information on the hazardous chemicals in their communities and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281, reprinted in 1986 U.S.C.C.A.N. 3374. Similarly, the stated purpose of its implementing regulations at 40 C.F.R. Part 370 is to "establish reporting requirements which provide the public with important information on the hazardous chemicals in their communities for the purpose of enhancing community awareness of chemical hazards and facilitating development of State and local emergency response plans." 42 C.F.R. § 370.1.

Pursuant to these goals, Sections 311 and 312 of EPCRA impose requirements on owners and operators of facilities with hazardous chemicals at specified threshold levels to notify local and state committees, as well as the fire department, to enable these groups to prepare for and, if necessary, to respond to emergencies. These notification requirements serve an important public safety and health purpose in addition to meeting the public's right and need to know the reported information and the emergency response plans.

Returning to the case at hand, the EPA contends that the material facts for establishing liability are admitted or undisputed by the Respondent in its Answer to the Complaint and liability, therefore, should be determined by accelerated decision. I agree. In its Answer to the Complaint, the Respondent does not deny the facts alleged in the Complaint to support liability. The EPA has established the essential elements to make a prima facie showing of liability.

Specifically, the undisputed facts establish that the Respondent is a "person" and that it owns and operates a "facility" that must prepare or have available an MSDS for the hazardous chemicals ethylene glycol, gasoline, diesel, motor oil, unleaded gas, and aviation gas under the OSHA and its regulations. At all relevant times, these hazardous chemicals cited above were present at the Respondent's facility in amounts exceeding the minimum reporting threshold of 10,000 pounds. Further, the undisputed facts establish that the Respondent failed to submit an MSDS or list for each of the six hazardous chemicals listed above on or before October 17, 1987, or within three months after the Respondent first became subject to the OSHA's MSDS requirements, to the SERC and the fire department with jurisdiction over the Respondent's facility. In addition, the Respondent failed to submit an inventory form for each of the six hazardous chemicals listed above on or before March 1, 1996, for the calendar year 1995, to the SERC and the fire department with jurisdiction over the Respondent's facility.

Moreover, in the Respondent's response to the EPA's motion for accelerated decision, the Respondent does not dispute liability but it does contest the appropriateness of the proposed penalty. Specifically, the Respondent recognizes that the statutory reporting provisions contained in EPCRA impose strict liability.

Nonetheless, the EPA has addressed the several defenses raised by the Respondent in its Answer to the Complaint. In its Answer, the Respondent claimed that it has been in the business of handling hazardous materials for many years, has maintained an exemplary environmental record, has consistently attempted in good faith to comply with all state and federal environmental regulations and reporting requirements, and has maintained records containing all the information required to be maintained under all environmental laws and regulations of which it had knowledge, including the MSDS required by the OSHA. The Respondent submitted that it came into full compliance with the regulations and reporting requirements *sub judice* immediately upon learning of their existence and that it previously reported the exact information required under the EPA's reporting regulations to other regulators. Also, in its Answer, the Respondent maintained that any reporting or notification omission had been completely inadvertent, with no intent to withhold or conceal any information, and without knowledge of the requirements of the subject regulations. Finally, the Respondent contended that the implementation and enforcement of the regulations has been arbitrary and capricious.

The EPA argues that none of the Respondent's contentions raise a material issue of fact concerning liability and that the contentions are irrelevant and/or immaterial to the issue of the Respondent's liability for the two Counts in the Complaint. The EPA points out that EPCRA is a strict liability statute and that the Respondent's knowledge and intent are not relevant to the issue of liability. See In the Matter of Steeltech, Limited, Docket No. EPCRA-037-94 (May 29, 1998), p. 17. I agree, but note that some of the "defenses" raised by the Respondent may be more appropriately considered in the determination of the appropriateness of the proposed penalty.

With respect to the Respondent's allegation of estoppel, the EPA asserts that it is a well settled matter of law that the equitable doctrine of estoppel may be applied against the Government only in the rarest circumstances. See United States v. California, 332 U.S. 19, 39-40 (1947). Even if I were to assume that estoppel may be invoked against the Government, the allegations set forth by the Respondent do not approach the requisite "affirmative misconduct" on the part of the EPA or other government entities to support the application of estoppel.

In summary, I find that there are no genuine issues of material fact concerning liability and that the EPA is entitled to judgment on liability as a matter of law. The undisputed facts establish the Respondent's liability for the two counts alleged in the Complaint.

Accelerated Decision as to Penalty

The EPA argues that there is no genuine dispute of material fact with regard to the penalty and that the record reflects that the proposed penalty of $35,000 is appropriate. The EPA argues, therefore, that an evidentiary is not required. In the Matter of Lyons Fuel, Inc., Docket No. CAA-I-97-100 (Jan. 21, 1998), p. 5.; see Green Thumb Nursery, supra.

The Respondent counters that factual issues concerning the penalty have been raised by the pleadings and the accompanying affidavit of G. Timothy Daniel which must be resolved in an evidentiary hearing. Specifically, the Respondent contends that there must be resolution of the following: whether the Respondent is a "small business" entitled to favorable consideration under Executive Memorandum on Regulatory Reform, 60 Fed. Reg. 20621 (April 26, 1995); whether "justice requires" that the Respondent be entitled to favorable consideration as a "responsible environmental citizen", whether the Respondent has made all reasonable efforts to come into compliance; whether the Respondent knew or should have known of the filing requirements; whether the Respondent technically filed with the agencies; whether the penalty levels assigned are appropriate; whether the circumstances indicate that there was a potential risk; and whether the Respondent is entitled to favorable consideration because it acquired no economic benefit, it has a good history of compliance with environmental laws, it substantially complied with the regulations, it has incurred environmentally beneficial expenditures, and it has voluntarily established and implemented a Spill Prevention and Countermeasure Plan.

Based on the February 26, 1999, affidavit from Mr. Daniel, the President of Lay Brothers, Inc., I find that the Respondent has sufficiently raised a genuine issue of material fact concerning the appropriateness of the proposed penalty so as to warrant an evidentiary hearing. In particular, it is noted that Mr. Daniel disputes the EPA's assessment of the circumstances of the violations as made by the EPA based on the report of Lieutenant Charles Gulley. Mr. Daniel alleges that Mr. Gulley never provided him with the relevant forms as requested.

I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter but have simply determined that the Respondent has raised a genuine issue of material fact for evidentiary hearing. Also, this determination does not mean that all the issues raised by the Respondent

in its response to the motion for accelerated decision are proper factors in assessing an appropriate penalty. Further, I emphasize to the Respondent that its liability in this matter has been adjudicated and that testimony and/or argument concerning liability will not be entertained at the hearing.

In view of the foregoing determination that the Respondent has sufficiently raised a genuine issue of material fact, the EPA's motion for accelerated decision as to penalty must be denied. See Section 22.20(a) of the Rules of Practice.

ORDER

The EPA's Motion for Accelerated Decision as to Liability on both counts in the Complaint is Granted.

The EPA's Motion for Accelerated Decision as to Penalty is Denied.

Inasmuch as the appropriate penalty remains in issue, the hearing previously scheduled to commence on **April 20, 1999**, in Athens, Georgia, continuing if necessary on April 21, 1999, will be held for the determination of the appropriate penalty.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Original signed by undersigned

_____
Barbara A. Gunning
Administrative Law Judge

Dated: 3-12-99
Washington, DC

1. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

2. 40 C.F.R. § 22.20(a) further provides: "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited 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."

3. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

4. Rule 56(f) states:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

5. Under the governing Rules of Practice, an Administrative Law Judge serves as the

decisionmaker as well as the fact finder. See 40 C.F.R. §§ 22.04(c), 22.20, 22.26.