

extension motion until the day before the response was due. He stated that he would allow Respondent only until September 23, 2009, to file a response to the Motion. He allowed Complainant until October 6, 2009, to file a reply to the response, but urged Complainant to file the reply sooner, given the limited time period prior to the scheduled hearing for him to consider the Motion.

- (b) The Presiding Officer stated that under no circumstances would he continue the hearing date.

While the Presiding Officer has already ruled on Respondent's Motion for Extension of Time during the September 16, 2009, conference call, Complainant goes on record as asserting that she has no objection to Respondent being allowed an extension of time to September 30, 2009, within which to file her Brief.

Complainant would note that Respondent has not been prompt in her filings in this matter, and Complainant does not at all condone her dilatory conduct, here manifested in her filing of her Motion for Extension of Time the day before she was required to file her Brief, by earlier order. Moreover, given her failure to file her Brief on September 15, 2009, Respondent became technically in default. However, the Motion for Accelerated Decision on Liability and Penalty is a dispositive motion on all issues in this matter, and, under the circumstances, Complainant believes that it is in the best interest of both parties in this matter to allow Respondent an additional two weeks to file her Brief.

In her Motion for Extension of Time, counsel for Respondent asserts that she will need two additional weeks to prepare her Brief. In the interest of providing Respondent a sufficient opportunity to respond to Complainant's dispositive motion, granting Respondent an extension to two weeks within which to file her Brief is not unreasonable, or contrary to any interest of

Complainant. Complainant would then have ten days, after service of the Brief, allotted by the Administrator's Rules, 40 C.F.R. § 22.16(b), to file her reply to Respondent's Brief.

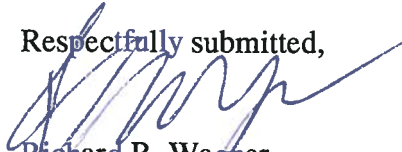
Complainant would further go on record regarding the date for hearing in this matter, now set for October 27, 2009. By law, Complainant is entitled to a considered and timely decision being made on her Motion for Accelerated Decision on Liability and Penalty -- a motion timely filed, on August 7, 2009 -- consistent with the Administrator's Rules and published decisions.¹ Also, by rule of the Administrator, "if the accelerated decision . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted." See 40 C.F.R. § 22.20(b)(2). Motions for accelerated decision are a legitimate vehicle for determining both the liability of those charged with violations of the federal environmental statutes, and the amount of penalty appropriate for those violations. Moreover, summary disposition, if warranted,

¹Citing U.S. Supreme Court precedent on summary judgment under the Federal Rules of Civil Procedure, the Administrator has held in a final decision issued by the Board that, under 40 C.F.R. § 22.20, "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests," and that "the constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute." *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, at 792 (EAB 1997). In *Newell Recycling Co., Inc. v. U.S. EPA*, 231 F.3d 204 (5th Cir. 2000), a penalty order of the Administrator assessing a \$1.345 million penalty for violations of a federal environmental statute was upheld. The Court rejected Newell's Eighth Amendment claim that the penalty amount was excessive, and rejected Newell's "due process" claim that before a penalty could be assessed "an evidentiary hearing was 'required' in [the] matter, and that the absence of one violated Newell's right to due process of law." *Id.* at 210-211. The Court cited two U.S. Supreme Court decisions in adopting the proposition that "if the hearing . . . is to serve any useful purpose, there must be some factual dispute[.]" and the proposition that it is permissible for an agency to "condition an adjudicatory hearing on 'identification of a disputed issue of fact by an interested party,'" and found that there was "no contested issue of fact on penalty in the record" and "decline[d] to set aside the penalty[.]" *Id.*

can conserve public resources that would otherwise be spent on an unnecessary, or unnecessarily lengthy, hearing.²

Consequently, Complainant would support re-scheduling the hearing should time constraints interfere with Complainant's interests, herein identified, regarding the resolution of the Motion for Accelerated Decision on Liability and Penalty.

Respectfully submitted,



Richard R. Wagner
Senior Attorney and Counsel for
the Administrator's Delegated Complainant

²While costs are necessary for any hearing, and the price to be paid for resolving disputes by legal process, the Administrator has clearly crafted her rules addressing complaints and answers, 40 C.F.R. 22.14 and 22.15, and pre-hearing exchanges, 40 C.F.R. 22.19, and accelerated decisions, 40 C.F.R. 22.20, with the intent to eliminate unnecessary hearings, and eliminate the waste of public resources in conducting such hearings. The avoidance of unnecessary trials is widely recognized as a primary, and beneficial, aim of summary judgment. Bland v. Norfolk & S. R.R. Co., 406 F.2d 863, at 866 (4th Cir. 1969); Washington Post Co. v. Keogh, 365 F.2d 965, at 968 (D.C. Cir. 1966), cert. denied 385 U.S. 1011; Bros. Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428, at 432 (5th Cir. 1958).

In Re Kathryn Y. Lewis-Campbell
No. TSCA-05-2009-0004

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CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Complainant's Response to Respondent's Motion for Extension of Time** in the office of the Regional Hearing Clerk (R-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604, with this Certificate of Service.


I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

I further certify that I then caused true and correct copies of the filed document to be sent to the following, by mail:

Cassandra Collier-Williams, Esq.
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September 17, 2009



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