UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. TSCA-05-2009-0004**
	)	
Kathryn Y. Lewis-Campbell	)	
Springfield, Ohio	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

Table of Contents

I. INTRODUCTION

Pursuant to the Administrator's Rules, specifically, 40 C.F.R. § 22.20, the Administrator's Delegated Complainant has filed in this matter a Motion for Accelerated Decision on Liability and Penalty ("the Motion"). In the Motion, Complainant asks that the Presiding Officer enter an order, finding that there is no genuine issue of material fact requiring an evidentiary hearing, and that, based upon the arguments of the parties, in briefs submitted on the Motion, Respondent is liable for the violations of the Administrator's Lead Disclosure Rules, promulgated at 40 C.F.R. Part 745, and Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, alleged in the Complaint, and that the $43,238.00 penalty amount proposed for the violation is appropriate.

This memorandum is submitted by Complainant in support of the Motion. The memorandum will first address the law applicable to the Motion. Second, it will identify Findings of Fact and demonstrate that, as to each fact, there is no genuine material issue requiring an evidentiary hearing for resolution. Third, it will set out an analysis of the facts in consideration of the applicable law, demonstrating that Respondent is liable for the violations alleged. Finally, a separate Memorandum in Support of Penalty Amount Proposed is submitted with this memorandum which provides an analysis of the evidence, as disclosed in the pleadings and pre-hearing exchanges, in consideration of the applicable statutory criteria, as interpreted in the Administrator's penalty policy. This analysis demonstrates that the penalty amount proposed is appropriate.

II. APPLICABLE LAW

Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), provides that any penalty assessed by the Administrator under TSCA "shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with section 554 of Title 5." Section 554 of Title 5, Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, governs agency decisionmaking.[1] In Section 554(a) of the APA, 5 U.S.C. § 554(a), Congress provides that "[t]his section applies in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," and that agency hearings and determinations shall be "in accordance with sections 556 and 557 of" the APA.

In Section 556(c) of the APA, with exceptions not herein applicable, Congress provides that Administrative Law Judges ("ALJs") may carry out enumerated duties related to hearings

---

[1]"Agency" is defined under the APA as "each authority of the Government of the United States[.]" Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that "'[a]uthority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 9 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, 488 U.S. 204, at 218, (1988) (Scalia, J. concurring). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n. 17 (D.C. Cir. 1974) ("THE ATTORNEY GENERAL'S MANUAL is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). As it is "the Administrator" that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the CAA, "the Administrator" is the "authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

"[s]ubject to the published rules of the agency and within its powers."[2] In Section 557(b) of the APA, Congress has authorized an ALJ only to "initially decide" a case, and "on appeal from or review of the initial decision the agency has all the powers which it would have in making the initial decision," with exceptions not relevant to this discussion.[3] The U.S. Supreme Court has

---

[2]Addressing Section 556(c) of the APA, and citing legislative history, the Attorney General of the United States has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Attorney General's Manual, at 75 (1947). In addition, the Federal Courts consistently have recognized that, on matters of law and policy, the ALJs are subordinate to the agency in which they serve. See Croplife Am. v. U.S. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003) ("[T]he reality of agency operations makes it clear that ALJs *cannot* independently rule on the legality of third-party human studies, because they may not ignore the Administrator's unequivocal statement prohibiting the agency from considering such studies." (emphasis in original)); Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993) ("[i]t is commonly recognized that ALJs 'are entirely subject to the agency on matters of law'"); Mullen v. Bowen, 800 F.2d 535, at 540 n.5 (6th Cir. 1986) ("Administrative law judges therefore remain entirely subject to the agency on matters of law and policy"). See also: D'Amico v. Schweiker, 698 F.2d 903, 904-06 (7th Cir. 1983) (stating that ALJs must comply with "instruction" issued by the Chief Administrative Law Judge of the agency, announcing "new policy," even though the instruction "truncated" ALJs' discretion, and ALJs believed the instruction injured social security claimants); and Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (an ALJ "must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts,'" but "[o]n matters of law and policy, however, ALJs are entirely subject to the agency."). Judge Ruth Bader Ginsburg, writing for the Circuit Court of Appeals for the District of Columbia, has noted that, while an ALJ must "conduct the cases over which he presides with complete objectivity and independence[,]" at the same time "he is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and these precedents include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . ." Iran Air, at 1260, quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin. L. Rev. 9, 12-13 (1973) (emphasis in original).

[3]The Attorney General of the United States has explained that, under Section 557(b) of the APA, an "initial decision" is "advisory" in nature, and that "[i]n making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself." Attorney General's Manual on the Administrative Procedure Act, at 83 (1947). Federal Courts have held likewise. "Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), clearly authorizes the agency to 'make any findings or conclusions which in its

recognized that Congress intended to make ALJs "semi-independent subordinate hearing officers," and that an ALJ "is a creature of Congressional enactment." Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, at 132-133 (1952).[4]

In Section 16(a) of TSCA, 15 U.S.C. §2615(a), Congress invests exclusive authority to assess civil penalties for violations of the TSCA in the Administrator, and the Administrator has promulgated rules to govern the process by which she assesses penalties under that statutory provision. 40 C.F.R. § 22.1(a)(5). The Administrator has acknowledged that her rules, codified at 40 C.F.R. Part 22, are intended to be:

---

judgment are proper on the record,' notwithstanding a different determination by the Examiner [ALJ]." Fink v. Securities and Exchange Comm'n, 417 F.2d 1058, at 1059 (2d Cir. 1969). "[A]s the Supreme Court made clear in Universal Camera [340 U.S. 474], the agency is free to substitute its judgment for that of the ALJ." Mattes v. United States, 721 F.2d 1125, at 1129 (7th Cir. 1983). ". . . Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law. . . ." Starrett v. Special Counsel, 792 F.2d 1246, at 1252 (4th Cir. 1986). Moreover, in a final decision of the Administrator, issued by his Chief Judicial Officer, the Administrator recognized that:

> The Administrator has the responsibility for making final agency decisions, which comprehends the right to review the entire record and draw his own conclusion from the evidence. See, e.g. Mattes v. United States, 721 F.2d 1125, 1129 (7th Cir. 1983) (The Judicial Officer is free to substitute his judgment for the ALJ's on findings of fact); Container Freight Transp. Co. v. I.C.C., 651 F.2d 668 (9th Cir. 1981) (The Administrative Procedure Act does not relegate the ICC to the role of reviewing court, but rather confers on it the right to draw its own conclusions from the evidence).

In re Martin Elecs., Inc., 2 E.A.D. 381, at 395 (CJO 1987).

[4]The terms "hearing officer" and "trial examiner" and "ALJ" all refer to the same governmental officer. In 1978 amendments to the APA, Congress provided that hearing examiners shall be known as administrative law judges. 95 P.L. 251; 92 Stat. 183 (Mar. 27, 1978). Notwithstanding the name change, no amendment was made to Sections 556 and 557 of the APA, 5 U.S.C. §§ 556 and 557, effecting the authority of this particular governmental officer. For a review of the historical development of this officer, see K. Davis, Administrative Law Treatise, 2d Ed., § 17.11 (1980).

> uniform procedural rules for administrative enforcement proceedings required under various environmental statutes to be held on the record after opportunity for a hearing in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 551 et seq.

63 Fed. Reg. 9,464 (Feb. 25, 1998). In her rules, the Administrator provides that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts 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.

40 C.F.R. § 22.20(a).[5] The Administrator further provides that:

> [i]f an 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. The partial accelerated decision . . . shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

40 C.F.R. § 22.20(b)(2). Final Decisions of the Administrator, issued by the Environmental

---

[5]The Administrator's provision for accelerated, or summary, disposition of his administrative penalty actions conforms with 100 years of American law holding that, in a civil case, no one has an absolute right to an evidentiary hearing. *Ex parte* Peterson, 253 U.S. 300, at 310 (1920) ("[n]o one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined"); Hepner v. United States, 213 U.S. 103, at 115 (1909) ("the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law"). Also, see Matthews v. Eldridge, 424 U.S. 319, at 348-49 (1976) (with regard to the administrative process, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'"); Newell Recycling Co., Inc. v. U.S. EPA, 231 F.3d 204, at 210-11 (5th Cir. 2000) (in upholding the Administrator's assessment of a $1.345 million civil penalty without conducting an evidentiary hearing, the Court said "constitutional due process doctrine requires that the person claiming the benefit of due process protections place some relevant matter into dispute"); and Puerto Rico Aqueduct & Sewer Auth. v. U.S. EPA, 35 F.3d 600, at 606 (1st Cir. 1994) ("[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that on the available evidence, the case only can be decided one way.")

Appeals Board ("the Board"),[6] have addressed the application of this rule.

Citing 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 "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).[7] Furthermore, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment[,]" and "the party must demonstrate that this dispute is 'genuine'

---

[6]By rule, 40 C.F.R. 22.30, the Administrator has delegated her authority to issue final orders assessing civil penalties under the various Federal environmental statutes to the Board. 57 Fed. Reg. 5,320 (Feb. 13, 1992). In the preamble of his latest promulgation of his rules, the Administrator has stated that:

> The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the [Consolidated Rules] gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one presiding officer.

"Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits," 64 Fed. Reg. 40,138, 40,165 (July 23, 1999). Here, the Administrator clearly has stated her intention that there be consistency in rulings in his civil penalty assessment process, enabling her decisionmaking to be lawful under Section 706 of the APA, 5 U.S.C. § 706, and not "arbitary" and "capricious."

[7]The Board noted that the "principle that one must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing is at the heart of all procedures for summary disposition," and noted that accelerated decision under the Administrator's Rules, 40 C.F. R. § 22.20, is "similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." Id. at 793.

by referencing probative evidence in the record, or by producing such evidence." Id. at 793. "Summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up[,]" and "the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." Id. at 793 n.24.

The Administrator, through the Board, has ruled on a respondent's challenge to an initial decision in which an ALJ found, in an accelerated decision, that a civil penalty of $1.345 million was appropriate for the respondent's violations of TSCA. Before the Board, Respondent argued that it was "*per se* impermissible for the Presiding Officer to assess a penalty against it without first conducting an evidentiary hearing." In re Newell Recycling Co., Inc., 8 E.A.D. 598, at 625 (EAB 1999). In her final decision, issued by the Board, the Administrator held that "Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing." Id.

On judicial review, the Fifth Circuit Court of Appeals upheld the Administrator's final decision in Newell Recycling. Newell Recycling Co., Inc. v. U.S. EPA, 231 F.3d 204 (5th Cir. 2000). As the Court "[could not] say that [the Board's] determination was arbitrary, capricious, an abuse or discretion or otherwise not in accordance with law," it upheld that part of the final decision finding Newell liable for the violations alleged in the complaint. Newell, 231 F.3d at 208. The Court also upheld the Administrator's assessment of the full $1.345 million penalty proposed by his delegated complainant, rejecting Newell's Eighth Amendment claim that the penalty amount was excessive, and rejecting 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.[8]

Governing precedent in this matter includes: Section 16(a) of TSCA, 15 U.S.C. § 2615(a); Sections 554, 556(c) and 557(b) of the APA; and the Administrator's Rules, specifically 40 C.F.R § 22.20, and published decisions of the Administrator addressing that rule by adopting historical principles governing the law of summary judgment. See Iran Air, 996 F.2d at 1260 ("applicable and controlling precedents" governing administrative proceedings include "applicable statutes and agency regulations, the agency's policies as laid down in its published decisions, and applicable

---

[8]While in each of these cases no evidentiary hearing was held, as it was found that there was no genuine issue of material fact, in each case the respondent penalized was first provided "notice of the case against him and opportunity to meet it," recognized by the U.S. Supreme Court to be the "essence of due process" in decision-making procedures adopted by administrative agencies. More fully, the Court has stated:

> We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude the wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.' F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

Matthews v. Eldridge, 424 U.S., at 348.

court decisions"). Consequently, the Motion must be presented, responded to, and decided, on the criteria set forth in the Administrator's rule, as interpreted in the Administrator's final decisions.

The U.S. Supreme Court long has recognized that:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> > 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' United States v. Lee, 106 U.S. 196, 220, 27 L. Ed. 171, 1 S. Ct. 240 (1882).
>
> See also Marbury v Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); Scheuer v. Rhodes, 416 U.S. 232 at 239-240 (1974).

Butz v. Economu, 438 U.S. 478, at 506 (1978). And, "[i]t is axiomatic that an agency must act in accordance with applicable statutes and its regulations." Paralyzed Veterans of Am. v. West, 138 F.3d 1434, at 1436 (Fed. Cir. 1998), citing Berkovitz v. United States, 486 U.S. 531, at 544 (1988). Moreover, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode[,]" Botany Worsted Mills v. United States, 278 U.S. 282, at 288 (1928), and this canon of statutory construction also applies to the interpretation of the Administrator's rules and regulations. Rucker v. Wabash R.R. Co., 418 F.2d 146, at 149 (7th Cir. 1969). Though there may be other possible ways in which a particular issue, such as accelerated decision, can be addressed, the resolution of such issues in proceedings on complaints proposing that the Administrator assess civil penalties for violation of the federal environmental statutes must be addressed in consideration of the rule that the Administrator has chosen to be applicable to the issue.

Finally, federal reviewing courts have recognized the need for the consistent application

of legal rules in the administrative process:

> 'Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as lawless, arbitrary, or the like, even though the case assignment is random.'

Santise v. Schweiker, 676 F.2d 925, at 930 (3d Cir. 1982), citing J. Mashaw et al., Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System 19 (1978).

Consequently, the Motion is to be granted if, on the disclosure of the evidence that the parties intend to introduce at any hearing, it is found that "no genuine issue of material fact exists and a party is entitled to judgement as a matter of law[,]" 40 C.F.R. 22.20(a), as the Administrator has done in his prior final decisions assessing civil penalties against Respondents without conducting an evidentiary hearing. See In re Spitzer Great Lakes, Ltd., 9 E.A.D. 302 (EAB 2000) (in an accelerated decision, the Administrator assessed civil penalty of $165,000); Newell Recycling Co., 8 E.A.D. at 598; Green Thumb Nursery, Inc., 6 E.A.D. at 782.

Complainant contends that there is no genuine issue of material fact on the record of this case, and that, as a matter of law, a finding is warranted that Respondent violated TSCA as alleged in the Complaint. Complainant further contends that the penalty amount proposed is appropriate, in that the penalty amount proposed is supported by an accurate analysis of the evidence cited in consideration of the statutory penalty criteria of Section 16(a) of TSCA, 15 U.S.C. § 2651(a), as interpreted in the policies and calculation methodologies adopted by the Administrator, the federal official exclusively charged by Congress to "take into account" those statutory criteria in determining the amount of penalty he will assess for specific violations.

Section 409 of TSCA, 15 U.S.C. § 2689.[9]

III. FINDINGS OF FACT

There is no genuine issue material to any of the following findings of fact which would precluding the entry the following findings of fact:

1. By lawful delegation, Complainant, the Director, Land and Chemicals Division, Region 5, U.S. EPA, is authorized to issue this Complaint. (Complaint, Paragraph 2)

Attachment A.

2. That in September 2006, Respondent entered into a Real Estate Purchase Agreement (the "Agreement") with Donald Freeman, Jr., agreeing to sell to Donald Freeman, Jr., certain real property located in Springfield, Ohio 45505, at 137 East Southern Avenue, and further described in the Agreement. (Complaint, Paragraph 18)

Respondent admits, Attachment B, at 1. Also, see Attachments C and D, Paragraph 2.

---

[9]Regarding "accelerated decisions," note must also be made that to conduct such a hearing in this matter, an Administrative Law Judge must travel to Ohio from Washington, D.C.; the Administrator's enforcement staff must travel from Chicago to the same location; a room must be secured for some period of time, and a court reporter retained. At a hearing, a record must be taken by the reporter, and, copies be made and paid for; briefs must then be prepared, copied and filed. Travel, hotels and meals must be paid for. While these are necessary costs of 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).

3. That the property subject to the Agreement included a house ('the House").

(Complaint, Paragraph 19)

Respondent admits, Attachment B, at 1. Also, see Attachment D, Paragraph 4.

4. That the House was constructed prior to 1978. (Complaint, Paragraph 20)

Attachment E. Official records of the Auditor of Clark County reveal that the same house that is currently on lot at 137 East Southern was also on the lot in 1965, thereby establishing that the house was built prior to 1978. Attachment E.

5. That at the signing of the Agreement, Respondent failed to provide to Donald Freeman, Jr., an EPA-approved lead hazard information pamphlet. (Compliant, Paragraph 27)

Attachment D, Paragraph 5. Also, see Attachments F and G, the TSCA subpoena issued by the Administrator's enforcement staff, and the answer of Respondent to that subpoena. When given an opportunity to acknowledge she provided Donald Freeman, Jr., with the information required, she failed do so.

6. That Respondent failed to include as an attachment to the Agreement any Lead Warning Statement. (Complaint, Paragraph 32)

Attachment D, Paragraph 6. Also, see Attachments F and G, the TSCA subpoena issued by the Administrator's enforcement staff, and the answer of Respondent to that subpoena. When given an opportunity to acknowledge she provided Donald Freeman, Jr., with the information required, she failed do so.

7. That Respondent failed to include as an attachment to the Agreement a statement disclosing the presence of lead-based paint and/or lead-based paint hazards in the House, or indicating that it had no knowledge of the presence of lead-based paint and/or lead-based paint hazards in the House. (Complaint, Paragraph 36)

Attachment D, Paragraph 7. Also, see Attachments F and G, the TSCA subpoena issued by the Administrator's enforcement staff, and the answer of Respondent to that subpoena. When given an opportunity to acknowledge she provided Donald Freeman, Jr., with the information required, she failed do so.

8. That Respondent failed to include as an attachment to the Agreement a list of any records or reports it had available, and provided to Donald Freeman, Jr., pertaining to lead-based paint hazards in the House, or a statement that she had no such records or reports available. (Complaint, Paragraph 40)

Attachment D, Paragraph 8. Also, see Attachments F and G, the TSCA subpoena issued by the Administrator's enforcement staff, and the answer of Respondent to that subpoena. When given an opportunity to acknowledge she provided Donald Freeman, Jr., with the information required, she failed do so.

9. That Respondent failed to include as an attachment to the Agreement a statement by Donald Freeman, Jr., affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (a)(3), and of the lead hazard information pamphlet required under 15 U.S.C. § 2696. (Complaint, Paragraph 44)

Attachment C. The Agreement, on its face, does not contain any statement of Donald Freeman, Jr., affirming receipt of the subject information. Also, see Attachments F and G, the TSCA subpoena issued by the Administrator's enforcement staff, and the answer of Respondent to that subpoena. When given an opportunity to acknowledge she provided Donald Freeman, Jr., with the information required, she failed do so, nor did she claim, or provide documentation of, any statement affirming receipt by Donald Freemen, Jr., of any information she was required to provide.

10. That Respondent failed to include as an attachment to the Agreement a statement by Donald Freeman, Jr., stating that he had either: (i) received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a); or waived the opportunity. (Complaint, Paragraph 48)

Attachment D, Paragraph 9. Also, see Attachments F and G, the TSCA subpoena issued by the Administrator's enforcement staff, and the answer of Respondent to that subpoena. When given an opportunity to acknowledge she provided Donald Freeman, Jr., with the information required, she failed do so.

11. That Respondent, or her agent, prepared and submitted the Agreement for the signature of the parties and the Notary Public.

Attachment D.

12. That Kathryn Lewis-Campbell and Donald Freeman, Jr., signed the agreement on September 7, 2006, before a Notary Republic.

Attachment C, at 3.

13. That under the terms of the Agreement, Respondent was required to deliver possession of the property to Donald Freeman, Jr., once the first payment is received, and this agreement signed.

Attachment C, Paragraph 9.

14. That the Agreement provided that there are no agreements, promises, or understandings between the parties except as specifically set forth in this contract.

Attachment C, Paragraph 12(a).

15. That from the time Donald Freeman, Jr., moved in to the House, until February 7, 2007, living with him in the House were four children, as follows:
a 15 year old, an 11 year old and 4 year old twins.

Attachment D, Paragraph 11.

16. That on June 6 and July 5, 2007, the Clark County (Ohio) Combined Health District conducted a public health lead risk assessment at the House, which revealed substantial lead-based paint hazards throughout the House.

Attachment J.

IV. ARGUMENT ON LIABILITY

The record in this case reveals that an evidentiary hearing is not required to address any issue raised by Respondent to challenge the Administrator's assessment of a civil penalty for her violations of TSCA, as alleged in the Complaint. See Matthews, 424 U.S., at 348. The only issues raise by Respondent address the effective coverage of law and regulations alleged violated by Respondent, and those matters are appropriately addressed by legal argument, not witness testimony.

A. Issues Raised in Respondent's Amended Answer

While Respondent, in her Amended Answer, denied every allegation made in the Compliant, at this stage of the proceeding there can be no doubt that each of the findings of fact herein proposed can be entered as they are supported by credible evidence that is not at issue, as has been demonstrated therein.

As we have seen, in answering a motion for accelerated decision, filed under 40 C.F.R. § 22.20 of the Administrator's Rules, "[n]ot only must a party . . . raise an issue of material fact, but that party must demonstrate that this dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence. [Citations omitted.]" Green Thumb Nursery,, 6 E.A.D. at 793. Moreover, "[s]ummary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceeding may turn something up." Id. at 793 n.24. Consequently, if Respondent has any issue to raise, or evidence she intends to present at a future hearing, she is required to disclose that issue and evidence in response to the Motion.

In her Answer, Respondent does "affirmatively state" as follows:

- that the Complaint fails to state violations upon which relief may be granted, Amended Answer, at 8;
- that the Complaint fails to state a cause of action upon which relief may be granted, Id. at 9;
- that Ohio Revised Code § 5302 does not give rise to a cause of action, Id.;
- that the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. § 3545) does not subject Respondent to civil money penalties, Id.;
- that Complainant's damages, if any, were caused or contributed to by the conduct of a third party over whom the answering Respondent has not control, Id.

Further, Respondent reserved its right to make additional defenses. Id. at 10.

Whether the Complaint is insufficient is not determined by the presentation of evidence, but, rather by a review of the Complaint in consideration of applicable law. Complainant anticipates argument from Respondent to support her claim that the Complaint is insufficient in her response to the Motion. The Ohio Revised Code § 5302 and the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. § 3545) are irrelevant to this action, as the Complaint is not brought under either of those laws, nor is either law cited in the Complaint. The Complaint alleges violations of the Residential Lead-Based Paint Hazard Reduction Act of 1992, and TSCA. Respondent completely misconstrues this statutory action when she characterizes it as one for "damages," as it is not an action for damages. This is an action for civil penalties, based upon Respondent's failure to comply with a law passed by Congress, intended to protect the environment and public health. In upholding the constitutionality of the assessment of civil penalties under a remedial statute passed by Congress to regulate safety in the workplace, the Fifth Circuit Court of Appeals recognized the remedial nature of the statute, and recognized that, by the use of administratively imposed civil penalties "[b]usiness is encouraged to comply with the law

not only because that is what the law exacts but because failing to do so will bring down on the activity or purse noncriminal consequences." Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1009 (5th Cir. 1975). The action initiated by the Complaint does not seek to make Mr. Freeman whole for any "damages" he may have incurred as a consequence of buying the property Respondent sold him. It is brought to assess a penalty against Respondent for failing to comply with a statute passed by Congress, intended to protect children from the ravishes of lead-based paint likely to be present in housing constructed prior to 1978, thereby "encouraging" Respondent, and others who sell or lease residential housing, to "comply with the law."[10]

---

[10]Congress itself has entered findings that:

> (1) low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under age 6, with minority and low-income communities disproportionately affected;
>
> (2) at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduce attention span, hyperactivity, and behavior problems; . . .
>
> (4) the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children[.]

Section 1002 of the Act, 42 U.S.C. § 4851. In promulgating the Lead Disclosure Rule, the Secretary and the Administrator noted that "[s]tudies suggest that lead exposure from deteriorated residential lead-based paint contaminated soil, and lead in dust are among the major existing sources of lead exposure among children in the United States." 61 Fed. Reg. 9,064, at 9,064 (Mar. 6, 1996). Human beings can come into contact with, and ingest, lead in exterior paint which "can flake off or leach into the soil around the outside of a home," contaminating children's playing areas; dust caused "during normal lead-based paint wear (especially around windows and doors) can create a hard-to-see film over surfaces" in a house; "cleaning and renovation activities can increase the threat of lead-based paint exposure by dispersing fine lead dust particles in the air and over accessible household surfaces"; and if managed improperly, "both adults and children can receive hazardous exposures by inhaling the fine dust or by ingesting paint dust during hand-to-mouth activities." Id. at 9,066.

As a matter of law, none of the "defenses" raised in Respondent's Amended Answer raise any issue of fact requiring that witnesses testify at a hearing, all can be summarily disposed of for the reasons just given.

B. Issues Raised in Respondent's Pre-hearing Information Exchange

In Respondent's Prehearing Information Exchange, Respondent states that she will testify that:

> she sold a condemned house to Donald Freeman, Jr. in 2006; that said house was uninhabitable at the time it was sold to Mr. Freeman; that Mr. Freeman had actual knowledge that the house was uninhabitable; that Mr. Freeman had indicated to Respondent before the sale that he intended to repair the house after he bought it before either selling it or moving into it; and that, contrary to what he told Respondent, he began living in the house without making any repairs to it beforehand.

Attachment B, at 1-2. Respondent concludes by stating that she will also testify "that she was not required to disclose a presence of lead-based paint and/or lead-based paint hazards in the property because the property was condemned and not residential at the time it was sold." Id.

Respondent has provided no documentation to support her claim that the house she sold Mr. Freeman was condemned. Nor does she cite in her Prehearing Information Exchange any standard of "habitability" or evidence to support a claim that the house was "uninhabitable." While Respondent asserts that Mr. Freeman "had indicated to the Respondent before the sale that he intended to repair the house after he bought it, before either selling it or moving into it," Attachment B, at 1, the Agreement itself -- generated and provided by Respondent, PFOF No. 11 -- specifically states that "[t]here are no agreements, promises, or understandings between the parties except as specifically set forth in this contract." Attachment C, Paragraph 12(a).

However, there is no issue of material fact regarding the condition of the house she sold to Mr. Freeman. Complainant's own investigation has disclosed that the City of Springfield, Ohio, on October 10, 2006, had issued to Respondent a "Notice of Violations and Orders to Repair or Demolish" the house at 137 E. Southern Avenue, in Springfield, Ohio. Attachment H. Respondent signed for that notice on October 14, 2006. The description of the house contained in that notice is quite clear as to the extremely deteriorated condition of the house, and it is difficult to imagine that anyone with the means to live elsewhere would move into the house at 137 East Southern Avenue, in Springfield, Ohio.

The condition of the house is not at issue, nor are any statements of Mr. Freeman at issue. The real issue raise by Respondent is whether the run-down and dilapidated condition of the house removed it from regulation under the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 *et seq.*, and 40 C.F.R. Part 745. And, again, this is a legal issue of statutory and regulatory interpretation.

The Act defines target housing broadly to be "any housing constructed prior to 1978" with explicit exceptions. 42 U.S.C. § 4851b(27). The Administrator's Rules provide the same definition. 40 C.F.R. § 745.103. The exceptions are limited to (1) housing for the elderly or persons with disabilities, unless a child under the age of six resides or is expected to reside in such housing, and (2) "0-bedroom dwellings," which the Administrator defines to include efficiencies, studios, dormitories, military barracks, and rentals of individual rooms within residential dwellings. Id. Also, the Administrator excludes from the scope of the Lead Disclosure Rule certain leases of housing not applicable to the Lewis-Campbell house and "sales of target housing at foreclosure." 40 C.F.R. § 745.101(a). The foreclosure exception exists because "the

circumstances surrounding foreclosure transactions make pre-sale disclosure and evaluation unworkable and impractical." 61 Fed. Reg. 9,064, 9,067 (Mar. 6, 1996); see also 59 Fed. Reg. 54,984, 54,986 (Nov. 2, 1994).

The legislative history of the Act describes the Congressional intent behind the disclosure requirement. See S. R. Rep. No. 102-332 (1992). "The [Housing] Subcommittee attempted to craft a provision which would provide homeowners and renters with adequate information to enable them to make informed decisions. . . . Accurate information widely disbursed through the private real estate market will greatly increase awareness of lead hazards. The Committee expects parents will exercise greater precautions to limit exposures to existing hazards, and that they will implement interim controls and abatements in order to protect the health of their children." Id. at 122. The Committee also stated that it believed the additional burden of lead disclosure was relatively light, and "its imposition is justified in view of the long term individual and societal costs of lead poisoning." Id. at 119-20.

There are no published decisions of the Administrator that directly address whether the condition of a house can be determinative on whether a house falls within the definition of "target housing" under 42 U.S.C. § 4851b(27) and 40 C.F.R. § 745.103. In neither the definition of Congress, nor that of the Administrator, is the particular condition of any house made a criteria for inclusion or exclusion. While Congress did specifically exempt certain types of residences from the definition of "target housing," it did not exempt from the definition houses in poor or deteriorated condition.

Under the Administrator's Rules, the respondent has the burden of presentation and persuasion for any affirmative defenses. See 40 C.F.R. § 22.24(a); In re City of Salisbury, 10

E.A.D. 263, 289 (EAB 2002). Moreover, in a published decision of the Administrator issued by her Chief Judicial Officer, the Administrator held that "a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production upon the party that seeks to invoke the exception." In re Standard Scrap Metal Co., 3 E.A.D. 267, 272 (CJO 1990). To this point in this proceeding, Respondent has failed to make any demonstration that she has met her burden to persuade that the definition of "target housing" adopted by Congress excludes housing in poor or deteriorated condition. Presumably, she will attempt to make that demonstration in response to this motion, as required by law. See Green Thumb Nursery, Inc., 6 E.A.D., at 792-93.

Given that the intent of Congress in passing the Lead Disclosure Act was to "provide homeowners and renters with adequate information to enable them to make informed decisions" and "increase awareness of lead hazards" to allow parents to "exercise greater precautions to limit exposures to existing hazards" and "implement interim controls and abatements in order to protect the health of their children[,]" S. R. Rep. No. 102-332, at 122, it is inconceivable that Congress intended to exclude from coverage of its law houses built well before 1978 that are in poor or deteriorated condition. If anything, in contrast to adequately maintained houses, deteriorated houses present a greater threat of lead-based paints hazard to children, as deteriorated housing components are more likely than sound housing components to result in the flaking of lead-based paint from surface areas of the components, and the release of lead-based paint dust. The sale of the house at 137 E. Southern Avenue in Springfield, Ohio, was precisely the type of transaction in which Congress considered that the lead-based paint disclosure was necessary to inform buyers of the potential hazards.

V. ARGUMENT ON APPROPRIATE PENALTY

Complainant separately is providing a Memorandum in Support of the Penalty Amount Proposed, which incorporates an analysis of the evidence in this matter, in consideration of the Administrator's Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy (December 2007) interpreting the TSCA statutory penalty criteria, to support the $43,238 penalty amount proposed for Respondent's violations. That Memorandum is herein incorporated by reference.

Complainant would note that in determining an appropriate amount of penalty in an accelerated decision, on motion of a delegated complainant of the Administrator, the Presiding Officer is not restricted to finding appropriate the amount of penalty proposed. As is clear from the Administrator's final decision in Green Thumb Nursery, the motion may be granted and a penalty amount assessed in an accelerated decision different in amount from that proposed. Green Thumb Nursery., 6 E.A.D., at 788 and 803 (penalty amount proposed, $4,000, penalty amount assessed, $3,000). However, should the Presiding Officer find appropriate a different amount of penalty than that proposed, the Administrator requires that "the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

VI. CONCLUSION

In the civil penalty assessment action against Newell Recycling Company, earlier cited, Newell argued that it was "*per se* impermissible" for a penalty to be assessed against it, under the environmental statute alleged violated, "without first conducting an evidentiary hearing." Newell Recycling Co., 8 E.A.D., at 625. In his published decision, issued by the Board, the Administrator rejected Newell's position, holding that "Newell's penalty arguments failed to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing." Id. On judicial review of this decision, the Fifth Circuit Court of Appeals upheld the Administrator's decision assessing a $1.345 million penalty against Newell, as proposed by the Administrator's Delegated Complainant, citing decisions of the U.S. Supreme Court which upheld the Administrator "condition[ing] an adjudicatory hearing 'on identification of a disputed issue of fact by an interested party[,]'" and further noted that "[i]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute[.]" Newell Recycling Co., 231 F.3d at 210-211. Consequently, both the rule of the Administrator, 40 C.F.R. § 22.20, and his final published decision in Newell Recycling Co., are applicable and controlling precedents on this proceeding. See Iran Air, 996 F.2d, at 1260 ("applicable and controlling precedents" on a matter before an ALJ include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . .").

As demonstrated by Complainant in this memorandum, Respondent, in her Answer to Complaint and Compliance Order, and her pre-hearing exchanges, has failed to raise any genuine issue which would preclude the entry of an order entering as finding of fact each of the proposed findings of fact, set out herein. Respondent has thus far in the proceeding identified no evidence

which she will present at hearing to put at issue any Finding of Fact proposed by the Administrator's Delegated Complainant. Unless in response to this Motion Respondent identifies evidence she will present at a hearing to challenge any proposed finding of fact or that she will will submit at hearing to challenge the penalty amount proposed, liability and appropriate penalty amount can be decided in this action consistent with Green Thumb Nursery, Inc, Newell Recycling Co., and Spitzer Great Lakes.[11] While Respondent asserts that she should not be held liable for the violations alleged in the Complaint and that no penalties should be assessed, as herein demonstrated, the grounds she has cited to support her assertions are legal arguments relating to an interpretation of a statute.

In addressing the dynamic of summary disposition, and the appropriate circumstances for the entry of such a judgment, the Circuit Court of Appeals for the District of Columbia has stated:

---

[11]Complainant recognizes that, on April 22, 2009, Respondent filed a Motion for Leave to File Amended Answer, Instanter, and an Amended Answer, adding a claim that she is unable to pay the penalty amount proposed. On April 27, Complainant filed a response stating that she had no objection to Respondent's Answer being amended. On April 28, 2009, Complainant requested by letter that Respondent provide Complainant her income tax returns and schedules, as well as complete and return a "Statement of Financial Affairs-Individual" which Complainant provided with the letter. Attachment I. Though, in response, Respondent provided her income tax returns, she did not provide Complainant with the information identified in the statement until July 27, 2009. Complainant sent Respondent's tax returns and the financial statement to a financial analyst retained by the Administrator for the purpose of doing "ability to pay" evaluations, on July 30, 2009, and that information will be evaluated by an analyst, and a opinion rendered on Respondent's "ability to pay" the $43,238 penalty amount proposed. Given the outcome of that evaluation, Complainant may be amending the Complaint to revise the penalty amount proposed, in consideration of the "ability to pay" penalty criteria. As the Motion is required, by order, to be filed no later than August 7, the Motion cannot yet address the issue of "ability to pay." However, all issues other than "ability to pay" can be determined by the Motion, and depending on the results of the evaluation, this matter may be settled, or the Motion can be supplemented, as appropriate.

> There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them. . . . But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute. . . . Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile.

Cody v. Aktiebolaget Flymo, 452 F.2d 1274, at 1281 (D.C. Cir. 1971), citing Fox v. Johnson & Wimsatt, Inc., 127 F.2d 729, at 736-37 (D.C. Cir. 1942). Such are the circumstances regarding Respondent. If, in response to the Motion, Respondent identifies or submits all information she will tender at hearing to support any evidentiary fact she has asserts, the Presiding Office will have before him "all the fact which a formal trail [will] produce" and "[g]oing through the motions trial [will be] futile." Federal reviewing courts have recognized that "[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way." Puerto Rico Aqueduct & Sewer Auth., 35 F.3d at 605-06 [citations omitted].

Based upon the proposed findings of fact, Respondent must be found liable for the violations alleged in the Complaint.[12] Based upon the facts cited, and conclusions and legal and policy arguments made in Complainant's Memorandum in Support of Penalty Amount Proposed, the proposed penalty amount of $43,238 is appropriate. While Respondent may disagree with the conclusions drawn and arguments made by Complainant, attacks on the validity of Complainant's

---

[12]Complainant would note that, under 40 C.F.R. § 22.20(b)(2), if an accelerated decision "is rendered on less than all issues or claims in the proceeding," the Administrator requires that "the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted[,]" and the decision of the Presiding Officer "shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed."

conclusions and arguments can be made by Respondent's tender of its own arguments and conclusions in opposition to the Motion. The Presiding Officer is then in the position of determining which of the parties' arguments and conclusions are persuasive, and what amount of amount of penalty is appropriate. Consistent with long-standing principals of law cited in this memorandum, this exercise of decisionmaking does not require an evidentiary hearing.

Respectfully submitted,

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

C:\EPAWork\Documents\Lewis-Campbell-MotAccDecMemo-Liability.wpd

Table of Authorities

Supreme Court Cases

Other Federal Cases

Administrative Adjudications

Federal Statutes

Federal Regulations

Federal Register Notices