UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**
	)
General Motors Automotive - North America	**) DOCKET NO. RCRA-05-2004-0001**
	)
Respondent	**)**

ORDER DENYING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION
ORDER DENYING GENERAL MOTORS CORPORATION'S MOTION FOR ACCELERATED DECISION
ORDER SETTING PREHEARING SCHEDULE
ORDER SCHEDULING HEARING

Background

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a).[1/] The United States Environmental Protection Agency (the "EPA" or "Complainant"), on October 17, 2003, filed a Complaint and Compliance Order against General Motors Corporation ("Respondent"), charging Respondent with violating Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the regulations found at 40 C.F.R. §§ 265.1064(b), 265.1085(c)(4), and 270.1(c), and Michigan Part 111 Administrative Rule 299.9601, for storing hazardous waste without an operating license or interim status by failing to meet the conditions for regulatory exemption and failing to comply with the interim status requirements at three of its facilities located in Pontiac, Michigan, Lake Orion, Michigan, and Moraine, Ohio. In the Complaint, Complainant did not specify a civil administrative penalty, but proposes the assessment of a penalty of up to $27,500 per day for each violation of Subtitle C of RCRA occurring or continuing on or after January 31, 1997.

[1/] In its pleadings after the Complaint, Complainant cites to the federal regulations instead of the applicable state regulations. *See In re Pyramid Chem. Co.*, RCRA-HQ-2003-0001, slip. op. at 18, n.19 (EAB, Sept. 16, 2004), 11 E.A.D. ___.

Respondent filed its Answer of General Motors Corporation and Request for Hearing on November 21, 2003. Following Complainant's filing of the Complaint against Respondent, Respondent filed General Motors Corporation's Motion for Stay and Accompanying Memorandum of Law on November 26, 2003, requesting a stay until the United States Court of Appeals for the District of Columbia entered its final decision in the case of *General Motors Corp. v. Envtl. Prot. Agency*, Cause No. 02-1242 (D.C. Cir.), 2004 WL 690500. Complainant opposed the stay in its Reply to Respondent's Motion for Stay. On April 2, 2004, the D.C. Circuit denied General Motors Corporation's petition for review on the ground that it was moot for lack of jurisdiction as the Petitioner was too late to challenge EPA's interpretation in the RCRA Policy Compendium and too early to challenge it through final EPA adjudicatory action of RCRA violations at specific plants. *See id.* at 690507.

Although the D.C. Circuit never reached the merits of the case, the court observed that Subtitle C of RCRA[2/] "establishes a 'cradle to grave' federal regulatory system for the treatment, storage, and disposal of hazardous wastes" which speaks to the threshold legal issue before us. *Id.* at 690501 (citing *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 774 (D.C. Cir. 1996)). The DC Circuit pointed out that the statute defines a "hazardous waste" as "solid waste... [that] may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5). In light of the decision entered by the D.C. Circuit, Respondent's Motion for Stay was deemed moot and was denied on April 14, 2004, and a prehearing information exchange was scheduled.

Pursuant to a telephonic conference on June 3, 2004 with both parties, Respondent filed General Motors Corporation's Motion for Accelerated Decision ("Respondent's Accelerated Decision Motion") on August 23, 2004, and Complainant filed Complainant's Motion for Partial Accelerated Decision and Supporting Brief on Threshold Legal Issue (Complainant's Accelerated Decision Motion") on August 23, 2004 on the issue of the point of "hazardous waste" generation. Both parties represent that there is no genuine dispute as to any material fact on the issues in this case and filed Joint Stipulations of the Parties on July 22, 2004. Subsequently, Respondent filed General Motors Corporation's Response to Complainant's Motion for Partial Accelerated Decision and Supporting Brief on Threshold Legal Issue ("Respondent's Response to Complainant's Motion") on September 23, 2004, and Complainant filed Complainant's Brief in Response to General Motors' Motion for Accelerated Decision ("Complainant's Response to Respondent's Motion") on September 23, 2004 .[3/]

[2/] 42 U.S.C. §§ 6921-6939e.

[3/] The certificate of service shows that General Motors Corporation's Motion to Strike Certain Portions of: (1) Harry Duncan Campbell's Declaration; (2) Barrett E. Benson's Declaration; and (3) "Complainant's Motion for Partial Accelerated Decision and Supporting Brief on Threshold Legal Issue" and General Motors Corporation's Supporting Brief were filed on September 23, 2004.
(continued...)

A telephonic conference with both parties was held on October 14, 2004 to advise the parties that I had found that genuine issues of material fact exist and that an evidentiary hearing will be necessary in this case. The parties agreed upon the hearing date of February 28, 2005.

For the reasons discussed below, both Accelerated Decision Motions are denied.

Standard for Accelerated Decision

Complainant and Respondent filed their motions for accelerated decision pursuant to Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20. Section 22.20(a) of the Rules of Practice states as follows:

> The Presiding Officer[4/] 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 (emphasis added). The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional 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.

40 C.F.R. § 22.20(a).

Motions for accelerated decision and dismissal 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").[5/] 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

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[3/] (...continued)
I incorrectly stated during the telephonic conference call on October 14, 2004, that my office had not received this pleading. Nonetheless, at this time, these motions are deemed moot. Any objections raised in these motions may be renewed when appropriate at the hearing.

[4/] 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. §§ 22.3(a), 22.21(a).

[5/] The FRCP 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); *Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, Feb. 24, 1993).

analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 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). Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. V. EPA*, 275 F.3d 1096 (D.C. Cir. 2002); *Londrigan v. FBI*, 670 F.2d 1164,1171 n.37 (D.C. Cir. 1981).

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.[6/] Rule 56(e) states: "When a

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[6/] 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

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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, other evidence, or legal memorandum relied upon." 40 C.F.R. § 22.16(b).

[6/] (...continued)
order as is just.

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.[7/]

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 by the EAB in *Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, 6 E.A.D. 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 Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, 4 E.A.D. 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 Clean Water Act).

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.[8/] 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

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[7/] An accelerated decision, as a summary judgment, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56(c) FRCP; 40 C.F.R. § 22.20(a).

[8/] 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. §§ 22.4(c), 22.20, 22.26.

proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

Discussion

The Complaint alleges that Respondent violated Section 3005(a) of RCRA and the regulations found at 40 C.F.R. Parts 264 and 265, Subparts J, BB and CC, or the corresponding authorized state regulations at the Pontiac East Assembly Plant, Orion Assembly Plant, and Moraine Assembly Plant.

Both Complainant and Respondent maintain that each has met its burden of establishing that there is no genuine issue as to any material fact on the threshold legal issue of when a "hazardous waste" pursuant to RCRA is generated at the above-cited automotive assembly plants, and that each party is entitled to judgment as to liability as a matter of law.

Specifically, Complainant argues that it has factually demonstrated that the Purge Mixture is a "spent" material pursuant to the regulations because it is a material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing. *See* Complainant's Accelerated Decision Motion, p. 18. As a "spent" material, Complainant argues that it is "discarded" and, therefore, is a "solid waste" subject to RCRA regulation. Complainant asserts that Respondent has generated a "hazardous waste" as soon as the Purge Mixture exists the manifolds and associated applicators and that the Purge Mixture tanks and the conveyance system downstream of the manifolds and associated applicators are waste management systems that are managing "hazardous waste" and are not part of the production process. *See* Complainant's Accelerated Decision Motion, p. 26, 29.

Complainant has provided the declarations of Harry Duncan Campbell, Jr. and Barrett E. Benson, as well as the RCRA Inspection Reports and corresponding diagrams, the deposition transcript of Margaret Winkler, and other materials in support of its position that the Purge Mixture[9/] fits squarely within the definition of "hazardous waste." *See* Complainant's Accelerated Decision Motion, Attachments 2-22. Mr. Campbell attests that as a RCRA inspector for the EPA, he is very familiar with the facilities at issue and that Respondent "does not assemble automobiles downstream of the manifolds and associated applicators at any of the three facilities." *See* Complainant's Accelerated Decision Motion, Attachment 5; Complainant's Response to Respondent's Motion, Attachment 22.

In addition, Mr. Benson declares that the operations at each plant are actually two distinct operations. *See* Complainant's Accelerated Decision Motion, Attachment 11. According to Mr. Benson, the first operation is the manufacturing process of painting the automobiles which ends

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[9/] The "Purge Mixture" consists of purge solvent and residual paint. *See* Complainant's Accelerated Decision Motion, p. 18; *see also* Joint Stipulations of the Parties, ¶ 25b.

when the paint is sprayed on the vehicle. *See id.* The second operation "is a waste management activity in which the Purge Mixture, a waste generated during the manufacturing process, is conveyed to waste storage in accumulation tanks prior to off-site shipment for treatment, storage or disposal." *Id.* at p. 3. Mr. Benson opines that the Purge Mixture is neither a product or a co-product of a manufacturing process, but is a spent waste material generated from the cleaning of painting equipment used in the production process. *See id.* He also opines that the Purge Mixture is not used to clean drums, containers, tanks, or any other equipment on site, and that the Purge Mixture is simply collected in storage tanks prior to shipment off-site for treatment or disposal. *See id.*

In Respondent's Accelerated Decision Motion, Respondent has a contrasting view of both the facts and the law. Respondent argues that the Purge Mixture "continues to be used downstream of the paint applicators in GM's ongoing, continuous industrial process to serve several beneficial functions including keeping paint solids flowing and in suspension, and cleaning the lines so they do not become clogged and interfere with the painting process." Respondent's Accelerated Decision Motion, p. 2. Moreover, Respondent contends that the Purge Mixture is simply allowed to accumulate in the storage tanks until it is sent off-site to a reclaimer, where the solvent is reclaimed and recovered so it can be beneficially reused by Respondent at its plants as new purge solvent. Respondent maintains that the Purge Mixture is not a "solid waste" because it is not a "spent material" that is "accumulated prior to being recycled." Respondent's Accelerated Decision Motion, p. 3.

In support of its contentions, Respondent has provided the affidavits of John Wozniak, Jonathan Warren, Margaret M. Winkler, and Thomas R. Chaput, as well as other materials, that describe the engineering design of Respondent's painting operations and the role solvents play in that design. Respondent's Accelerated Decision Motion, Exhibits 2-14. Mr. Wozniak explains that the plants at issue were engineered specifically to capture and save the Purge Mixture so the solvent in the mixture can be sent off-site to go through the reclamation process for later beneficial use. *See* Respondent's Accelerated Decision Motion, Exhibit 3. Additionally, he states that Respondent's painting operation is "one continuous manufacturing process starting in the paint mix rooms and continuing through the paint booths all the way to the Purge Mixture tanks." *Id.* at p. 34.

At this juncture, I find that both parties have raised genuine issues of material fact that only can be properly adjudicated following a full evidentiary hearing. Under the standard for adjudicating motions for accelerated decisions, discussed above, the evidentiary material proffered by the moving party must be viewed in the light most favorable to the opposing party and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmoving party. *See Rogers Corp. v. EPA, supra*. 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 genuine issues of material fact are present and that this case requires an evidentiary hearing. Respondent and Complainant clearly do not agree on a number of factual issues fundamental to the charges before me. For instance, there is a distinct difference in opinion between the Respondent and Complainant as to whether the Purge Mixture is reclaimed

and beneficially reused and whether it simply falls under the definition of "solid waste" pursuant to 40 C.F.R. § 261.2. Further, there is not a consensus about the purpose of the recirculation loops as well as the nature of the manufacturing process.

In view of the foregoing determination that there exist genuine issues of material fact and that neither party has established that it is entitled to judgment as a matter of law, Complainant's Accelerated Motion and Respondent's Accelerated Motion must be denied. *See* 40 C.F.R. § 22.20(a).

ORDER

Complainant's Accelerated Decision Motion is Denied and Respondent's Accelerated Decision Motion is Denied.

ORDER SETTING PREHEARING SCHEDULE

The parties shall strictly comply with the requirements of this Order and prepare for a hearing. The parties are advised that extensions of time will not be granted absent a showing of good cause. *See* Section 22.7(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.7(b). The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the prehearing requirements or to meet the schedule set forth in this Order. Of course, the parties are encouraged to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange.

The following requirements of this Order concerning prehearing information exchange are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party shall submit:

   (a) the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called; and

   (b) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or

"Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (*e.g.*, "Complainant's Exhibit 1"); and

(c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

See Sections 22.19(a),(b),(d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a),(b),(d); *see also* Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. This proceeding is for the assessment of a penalty and Complainant has not specified a proposed penalty.[10/] Accordingly, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty.

3. Within fifteen (15) days after Respondent files its prehearing information exchange, Complainant shall file a document specifying a proposed penalty and explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.

4. If Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.

5. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

See Section 22.19(a)(4) of the Rules of Practice, 40 C.F.R. § 22.19(a)(4).

The prehearing exchanges delineated above shall be filed *in seriatim* manner, according to the following schedule:

December 17, 2004	-	Complainant's Initial Prehearing Exchange
January 21, 2005	-	Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence

[10/] The Complaint states that Complainant demands a penalty in an amount not greater than $27,500 per day of violation for each of the three counts alleged. *See* Complaint at 31.

February 4, 2005	-	Complainant's Rebuttal Prehearing Exchange (if necessary)
February 18, 2005	-	Any additional Joint Stipulations

In its Answer to the Complaint, Respondent exercised its right to request a hearing pursuant to Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondent has the right to defend itself against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defense. If Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including the Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. *See* Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all other parties. The parties are advised that E-mail correspondence with the Administrative Law Judge is not authorized. *See* Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a). The prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001
Telephone: 202-564-6281

ORDER SCHEDULING HEARING

The Hearing in this matter will be held beginning at 9:30 a.m. on Monday, **February 28, 2005**, in Detroit, Michigan, continuing if necessary on March 1, 2, 3, and 4, 2005. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete. Individuals requiring special accommodation at this hearing, including wheelchair access, should contact the Regional Hearing Clerk at least five business days prior to the hearing so that appropriate arrangements can be made.

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Barbara A. Gunning
Administrative Law Judge

Dated: October 27, 2004
Washington, DC