UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COAST WOOD PRESERVING, INC.,	)	**Docket No. EPCRA-9-2000-0001**
	)	
	)	
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION
ORDER DENYING RESPONDENT'S CROSS-MOTION FOR ACCELERATED DECISION
ORDER SCHEDULING HEARING

Introduction

This civil administrative penalty proceeding arises under Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001 *et. seq.*, also known as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). The United States Environmental Protection Agency (the "EPA" or "Complainant"), on September 28, 2000, filed a Complaint against Coast Wood Preserving, Inc. ("CWP" or "Respondent"), charging Respondent with six counts of violating Section 313 of EPCRA, 42 U.S.C. § 11023, and the implementing regulations at 40 C.F.R. Part 372.

The general basis of the Complaint is that Respondent is subject to the reporting requirements of Section 313 of EPCRA and the Toxic Chemical Release Reporting: Community Right-To-Know Rule at 40 C.F.R. Part 372 because Respondent is a "person," as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), who is the owner and operator of a "facility," as defined by Section 329(4) of EPCRA and 40 C.F.R. § 372.3, that is covered for toxic chemical release reporting under Section 313 of EPCRA and 40 C.F.R. § 372.22.[1/]

[1/] The term "Facility" is defined as "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned and operated by the same person (or by any person which controls, is controlled by, or under common control with, such person)." Section 329 of EPCRA, 42 U.S.C. § 11049; 40 C.F.R. § 372.3. "A

(continued...)

The EPA's Complaint specifically alleges that as an owner and operator of a covered facility that manufactured, used, or processed regulated toxic chemicals in quantities exceeding the reporting thresholds prescribed in Section 313(f) of EPCRA and 40 C.F.R. § 372.25, Respondent was required to file timely toxic chemical release forms ("Form R's") to the EPA Administrator and the State of California on a yearly basis. Counts I, II, and III charge that Respondent was required but failed to file Form R's for chromium compounds in a timely manner for the calendar years 1995, 1996, and 1997. Counts IV and V similarly charge that Respondent was required but failed to file timely Form R's for arsenic compounds for the calender years 1996 and 1997. Count VI charges that Respondent was required but failed to file a timely Form R for copper compounds for the calendar year 1997. Pursuant to the EPA's penalty assessment authority under Section 325(c) of EPCRA and in accordance with the EPCRA Section 313 Enforcement Response Policy, the EPA seeks a civil administrative penalty in the amount of $32,500.

On March 12, 2001, the EPA filed a Motion for Accelerated Decision as to CWP's liability in this matter. In response, CWP submitted a Memorandum in Opposition to the EPA's Motion for Accelerated Decision, dated April 2, 2001. In addition, on April 2, 2001, CWP submitted a Cross-Motion for Accelerated Decision. Then, on April 19, 2001, the EPA filed a Response to CWP's Memorandum in Opposition to EPA's Motion for Accelerated Decision. On April 23, 2001, the EPA filed Complainant's Response to CWP's Cross-Motion for Accelerated Decision. On May 8, 2001, CWP filed a Reply to the EPA's Response to CWP's Cross-Motion for Accelerated Decision.

(...continued)
facility may contain more than one establishment." 40 C.F.R. § 372.3

The term "Person" means "any individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political division of a State, or interstate body." Section 329 of EPCRA, 42 U.S.C. § 11049.

The term "Establishment" means "an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed." 40 C.F.R. § 372.3.

A person is subject to the reporting requirements of Section 313 of EPCRA and 40 C.F.R. § 372.22 if its facility has ten (10) or more full-time employees, is in designated Standard Industrial Classifications, and manufactured, processed, or otherwise used a toxic chemical in excess of an applicable threshold quantity. Section 313 of EPCRA, 42 U.S.C. § 11023; 40 C.F.R. § 372.22.

This order will address the EPA's Motion for Accelerated Decision as to liability and CWP's Cross-Motion for Accelerated Decision.[2/] For the reasons discussed below, both the EPA's Motion for Accelerated Decision and CWP's Cross-Motion for Accelerated Decision are denied.

Standard for Accelerated Decision and Decision to Dismiss

Both Complainant and Respondent have filed motions for accelerated decision pursuant to Section 22.20 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. § 22.20. Section 22.20(a) of the Rules of Practice states as follows:

> The Presiding Officer[3/] 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").[4/] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to

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[2/] CWP's May 29, 2001, Motion to Strike the EPA's Rebuttal Prehearing Information Exchange, which is opposed by the EPA, remains pending.

[3/] 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).

[4/] 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).

interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue of any material fact* and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. *See 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).

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

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

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

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[5/] Rule 56(f) states:

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

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).

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

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

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the

evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[6/] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. *See Anderson, supra*, at 249.

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

DISCUSSION

I. EPA's Motion for Accelerated Decision is Denied

In the EPA's Motion for Accelerated Decision as to liability, the EPA asserts that Respondent's Answer to the Complaint, dated October 27, 2000, fails to conform to the requirements of Section 22.15 of the Rules of Practice, 40 C.F.R. § 22.15. The EPA alleges that CWP, in answering the Complaint, failed to clearly admit, deny, or explain each factual allegation contained in the Complaint as required under Section 22.15(b). As such, EPA argues that Section 22.15(d) should apply and that the material factual allegations contained in the Complaint should be deemed admitted.

Section 22.15 of the Rules of Practice provides in pertinent part:

[6/] 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.

> (b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the *factual* allegations contained in the complaint with regard to which the respondent has any knowledge (emphasis added). Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.
>
> (d) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

40 C.F.R. §§ 22.15(b),(d).

Specifically, the EPA argues that Article III of its Complaint (entitled "General Allegations") sets forth factual allegations to which Respondent failed to properly respond. According to the EPA, paragraph 8 of the Complaint contains the factual allegation that the named respondent is a "person" and paragraph 9 contains the "allegation that Respondent is an 'owner and operator' of a 'facility' and the location of the facility." Complainant's Memorandum in Support of Motion for Accelerated Decision on Liability ("Motion for Accelerated Decision") at 2. The EPA characterizes paragraphs 10 as containing "a factual allegation with respect to the nature of the facility, that is, '[t]he Facility is comprised of several establishments." *Id*. at 2-3. The EPA characterizes paragraphs 11 and 12 of the General Allegations as containing factual allegations concerning the number of employees at the facility and a comparative analysis of the value added to the product at each establishment in the facility. *Id*. at 3.

In its Answer, Respondent admitted the allegation of paragraph 8. Respondent, in answering paragraph 9, admitted that it owns a business on said location, however, stated "[t]o the extent paragraph 9 of the Complaint alleges legal rather than factual matters, Coast Wood is not required to admit or deny them. ...Except as expressly so admitted, Coast Wood denies the allegations of paragraph 4 [sic]." Respondent's Answer at 1. In response to paragraphs 10, 11, 12, 13, and 14, Respondent provided the identical answers: "To the extent that paragraph [10-14] of the Complaint alleges legal rather than factual matters, Coast Wood is not required to admit or deny them. Answering the other portions

of paragraph [10-14], Coast Wood denies the allegations of those portions." *Id*. at 1-2.

The EPA also maintains that Respondent failed to properly respond to each count lodged against Respondent. Motion for Accelerated Decision at 3-5. Each count sets forth (1) the amount of the regulated chemical allegedly processed at the Facility and that Respondent was required to submit a Form R by a certain date; (2) that Respondent failed to submit a Form R in a timely manner; and (3) that Respondent's failure to submit the Form R constituted a violation of Section 313 of EPCRA and the implementing regulations at 40 C.F.R. Part 372. *Id*.

Respondent answered each count by (1) admitting that certain named compounds are listed under 40 C.F.R. § 372.65 but denying the allegations of the count except as expressly so admitted; (2) declining to comment on any legal rather than factual matters alleged; (3) admitting that it did not submit a timely Form R; and (4) denying that the failure to submit a timely Form R constituted a violation of Section 313 of EPCRA and 40 C.F.R. Part 372.[7/]

[7/] For a representative example, see Count I of the Complaint and accompanying response(re: chromium compounds) reproduced below:

> Count I – Failure to Report Chromium Compounds for 1995
>
> 15. Paragraphs 1 through 14 of this Complaint are hereby incorporated by reference and alleged as if set forth in full herein.
>
> *Answer:* Coast Wood incorporates by reference its admissions, denials, and allegations contained in paragraphs 1 through 14 of this Answer as if fully set forth herein.
>
> 16. During the calender year 1995, approximately 64,550 pounds of chromium compounds, a chemical category listed under 40 C.F.R. § 372.65, were "processed" at the Facility, as that term is defined in 40 C.F.R. § 372.3. This quantity exceeded the established threshold of 25,000 pounds established under Section 313(f) of EPCRA, 42 U.S.C. § 11023(f), and 40 C.F.R. § 372.25. Respondent, therefore, was required to submit a Form R for chromium compounds to the EPA Administrator and to the State of California on or before August 1, 1996.
>
> *Answer:* To the extent that paragraph 16 of the Complaint alleges legal rather than factual matters, Coast Wood is not required to admit or deny them. Coast Wood admits that certain chromium compounds are listed under 40 C.F.R. § 372.65. Except as expressly so admitted, Coast Wood denies the allegations of paragraph 16.
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> 17. Respondent failed to submit a Form R to the EPA Administrator and to the State of California on or before August 1, 1996.

(continued...)

The Rules of Practice, at Section 22.15(b), require that each factual allegation contained in the complaint be clearly admitted, denied, or explained. The Rules do not require a respondent to reply to legal conclusions. 40 C.F.R. §§ 22.1-22.31; *See BP Chemicals, Inc.,* EPA Docket No. CAA-5-99-027, 2000 EPA ALJ LEXIS 1 (ALJ, Jan. 21, 2000) (quoting *Sheffield Steel Corporation*, EPA Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100 (ALJ, Nov. 21, 1997)).

Here, paragraphs 8, 9, 10, 11, 12, 13, and 14 of the Complaint contain applications of cited law to the alleged facts and Respondent in this case. Therefore, those paragraphs contain factual allegations as well as legal conclusions based on those factual allegations. CWP was not required to respond to the legal conclusions even if the legal conclusions incorporate factual allegations. Similarly, the numbered paragraphs of each Count of the Complaint contain factual allegations as well as legal conclusions to which CWP was not required to respond under the governing Rules of Practice.

Respondent persuasively argues that it sufficiently denied, admitted, or explained each factual allegation contained in the Complaint and made sufficiently clear the issues in dispute in this matter. By stating that all allegations, except those expressly admitted, are denied, Respondent provided an adequate denial of the factual allegations for the purposes of Section 22.15(b)of the Rules of Practice. *See RM Waite, Inc., Richard Waite, President, and Gary Sands*, EPA Docket No. CWA-5-98-015, 2000 EPA ALJ LEXIS 16 (ALJ, Feb. 25, 2000). Respondent sufficiently raised its defenses in the Answer for the purpose of 40 C.F.R. § 22.15(b).

The requirements of an Answer under Section 22.15(b) of the Rules of Practice are elementary. *Id.* at 5. Respondent's Answer is adequate to meet this bar. The Court nevertheless notes that the Answer filed by Respondent may limit its presentation and arguments

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[7/](...continued)

Answer: Answering paragraph 17 of the Complaint, Coast Wood admits it did not submit a Form R to the United States Environmental Protection Agency ("EPA") Administrator and to the State of California on or before August 1, 1996.

18. Respondent's failure to submit a timely Form R as alleged was in violation of Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. Part 372.

Answer: Answering paragraph 18 of the Complaint, Coast Wood denies the allegations of paragraph 18.

at hearing.[8/] Moreover, Respondent's Answer is viewed within the context of a motion for accelerated decision which requires the findings that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Although the EPA essentially seeks to strike Respondent's Answer, it has chosen to challenge the Answer through a motion for accelerated decision submitted more than five months after the Answer was filed and after the EPA filed its prehearing exchange.

On this basis of the motion for accelerated decision propounded by the EPA, the motion fails. Accordingly, Complainant's Motion for Accelerated Decision on liability is **Denied**.

II. CWP's Cross-Motion for Accelerated Decision is Denied

In its Cross-Motion for Accelerated Decision, CWP urges me to enter an accelerated decision in its favor on the ground that the EPA regulation at 40 C.F.R. § 372.22(b), which was promulgated pursuant to Section 313 of EPCRA, is invalid as a matter of law. In particular, CWP argues that 40 C.F.R. § 372.22(b) creates a new standard, inapposite to federal law, for piercing the corporate veil. Therefore, this civil penalty action, which, CWP argues, was made possible by EPA's conflation of the assets and business operations of two separate corporations that are located on the same site and has common shareholders, is based on an invalid regulation.

Other than Respondent's bare assertion that 40 C.F.R. § 372.22 concerning covered facilities for toxic chemical release reporting is invalid as applied to Respondent, Respondent, on motion for accelerated decision, does not contest directly the EPA's jurisdiction over Respondent through 40 C.F.R. § 372.22. In this regard, I note that Respondent does not challenge the jurisdictional elements of being defined as a "facility" other than claiming that the regulation impermissibly pierces the corporate veil. Respondent also does not contest that the regulation as

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[8/] Respondent notes that if its Answer is deemed insufficient, it moves to allow it to amend its Answer in accordance with Section 22.15(e) of the Rules of Practice, 40 C.F.R. § 22.15(e). Respondent's Memorandum in Opposition to EPA's Motion for Accelerated Decision at 1.

written does pierce the corporate veil.[9/] Respondent, instead, questions the validity of 40 C.F.R. § 372.22(b).

First, I note that 40 C.F.R. § 372.22 is a substantive regulation and the properly adopted product of the EPA's rule-making process. Respondent does not contest the procedural aspects of the rule-making in this matter. Second, the EPA's interpretation of the regulation is fair and reasonable and is consistent with the statutory intent of EPCRA and the implementing regulatory scheme. *See Mobil Oil Corporation*, EPCRA App. No. 94-2, 5 E.A.D. 490, 500-503 (EAB, Sept. 29, 1994). Thus, the substantive regulation at issue is a final Agency regulation that is in conformity with the enabling statute.

The general rule is that regulations defining review authority by an administrative body are to be construed narrowly. The Rules of Practice, under which this civil administrative enforcement action is conducted, are silent on the authority of an administrative law judge to rule invalid a final EPA regulation. 40 C.F.R. Part 22.

The EAB has recognized certain exceptional circumstances in which an Agency regulation may be reviewed and ruled invalid in an administrative enforcement proceeding. *See e.g. Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services,* CAA Appeal No. 94-1, 5 E.A.D. 626, 635 n. 13 (EAB, Dec. 22, 1994); *see also B.J. Carney Industries, Inc.*, CWA App. No. 96-2, 7 E.A.D. 171, 194-5 (EAB, June 9, 1997). Nevertheless, the presumption is an exceptionally strong one of nonreviewability which may only be overcome by the most compelling circumstances. *Woodkiln, Inc.*, CAA Appeal No. 96-2, 7 E.A.D. 254, 269 (EAB, July 17, 1997). An example of such a compelling circumstance includes a showing that the regulation has already been held invalid in an intervening court decision. *Echevarria*, *supra*, at 635 n.13.

In the instant matter, Respondent has not demonstrated sufficient compelling circumstances to warrant a review of the regulation at issue. As Respondent has failed to overcome the presumption against entertaining a challenge to the validity of a regulation, and in the absence of an affirmative grant of authority to review the validity of final Agency regulations, I decline to assume such authority. Therefore, Respondent's motion for an accelerated decision on the ground that the regulation at 40 C.F.R.

[9/] In the EPA's rebuttal to Respondent's Cross-Motion for Accelerated Decision, the EPA argues this is not a case of piercing the corporate veil. Complainant's Response to Coast Wood Preserving, Inc.'s Notice of Cross-Motion and Cross-Motion for Accelerated Decision at 5.

§ 372.22(b) is invalid as a matter of law fails. Accordingly, Respondent's Cross-Motion for Accelerated Decision is **Denied**.

Hearing

The parties have filed their prehearing exchange in this matter pursuant to the undersigned's Prehearing Order entered on December 6, 2000. The file reflects that the parties have engaged in limited settlement negotiations in this matter.

EPA policy, found in the Rules of Practice at Section 22.18(a), 40 C.F.R. § 22.18(a), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding. However, 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 requirements or schedule set forth in this Order. The parties are hereby directed to hold another settlement conference on this matter on or before **July 25, 2001,** to attempt to reach an amicable resolution of this matter. *See* Section 22.4(c)(8) of the Rules of Practice, 40 C.F.R. § 22.4 (c)(8). The Complainant shall file a status report regarding such conference and the status of settlement on or before **August 8, 2001.**

In the event the parties have failed to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for hearing. In connection therewith, on or before **August 22, 2001**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

Both parties are reminded that this proceeding is governed by the Rules of Practice, 40 C.F.R. §§ 22.1-22.32. Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be

admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), allows a 15-day period for responses to motions and Section 22.7(c), 40 C.F.R. § 22.7(c), provides for an additional 5 days to be added thereto when the motion is served by mail. Both parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchanges absent extraordinary circumstances.

ORDER

Complainant's Motion for Accelerated Decision as to liability is Denied.

Respondent's Cross-Motion for Accelerated Decision is Denied.

The Hearing in this matter will be held beginning at 9:30 a.m. on Wednesday, **September 5, 2001**, in San Francisco, California continuing if necessary on **September 6, 2001**. 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.

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

_____
Barbara A. Gunning
Administrative Law Judge

Dated: June 28, 2001
Washington, DC

In the Matter of Coast Wood Preserving, Inc., Respondent
Docket No. EPCRA-9-2000-0001

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion For Accelerated Decision, Order Denying Respondent's Cross-Motion For Accelerated Decision And Order Scheduling Hearing**, dated June 28, 2001, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: June 28, 2001

CERTIFIED MAIL RETURN RECEIPT REQUESTED:

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