

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: )  
)  
ARIZONA ENVIRONMENTAL ) Docket No. EPCRA-09-2007-0028  
CONTAINER CORPORATION, )  
)  
Respondent. )  
)

**ORDER GRANTING MOTION FOR CHANGE OF VENUE,  
GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO  
LIABILITY, AND GRANTING IN PART AND DENYING IN PART  
MOTION TO STRIKE AND MOTION IN LIMINE**

**I. Procedural Background**

On September 27, 2007, the United States Environmental Protection Agency Region IX ("Complainant") filed a one-count Complaint against Arizona Environmental Container Corporation ("Respondent") thereby initiating a civil administrative action for a violation of Section 313 of EPCRA, 42 U.S.C. § 11023, and the implementing regulations at 40 C.F.R. Part 372. Respondent filed a "Response to Civil Complaint EPCRA-09-2007-0028" ("Answer") on October 30, 2007. After the parties filed prehearing exchanges, an Order was issued on May 29, 2008, setting the hearing in this matter to commence on September 23, 2008, in or near Eloy, Arizona, the location of Respondent's facility at issue in the Complaint.

On or about June 18, 2008, Respondent filed a Prehearing Motion to Strike Count I ("Motion to Strike"), Prehearing Motion to Change Venue ("Motion to Change Venue"), Prehearing Motion for Accelerated Decision, and documents listed as Respondent's Exhibits 13 through 17. On June 23, 2008 Complainant filed its Response to Motion to Strike and Motion for Accelerated Decision ("C's Motion") and its Response to Motion to Change Venue. On July 11, 2008, the parties filed a Joint Set of Stipulated Facts in this matter. Respondent filed a Response to Complainant's Motion For Accelerated Decision on July 14, 2008 ("R's Response"). On July 21, 2008, Complainant filed a Reply to Response to Motion for Accelerated Decision (C's Reply).

## **II. Respondent's Motion for Change of Venue**

### **A. Parties' Arguments**

Respondent's Initial Prehearing Exchange contains a request that the hearing in this matter be held in Polk County, Florida. Respondent's Initial Prehearing Exchange ("R's PHE") at Part III. In both its Initial and Rebuttal Prehearing Exchanges, Complainant contends that Phoenix is the more appropriate hearing location because Phoenix is near Eloy, Arizona, where Respondent's facility is located and where the violation occurred. Complainant's Initial Prehearing Exchange ("C's PHE") at 10; Rebuttal Prehearing Exchange ("C's Reb.") at 1-2. Complainant further contends that a proposed key witness listed by both Complainant and Respondent, Ole Solberg, Complainant's witness Mark Rackley, and Respondent's witness Todd Sullivan, all reside and/or work in the Eloy, Arizona area. C's PHE at 1-2.

In its Motion to Change Venue, Respondent contends that the hearing should be held in Polk County, Florida because that is the location of Respondent's corporate headquarters and the corporate office for the business which the hearing concerns, and where all orders pertaining to this proceeding have been served. Respondent states that business records in this matter are kept in Polk County and Respondent's representative Kirk Sullivan and witnesses Todd Sullivan, Tom John, and Michael Braun reside in Florida. Motion to Change Venue at 1.

In its Response to Motion to Change Venue, Complainant asserts that the violation occurred at Respondent's facility in Eloy, which is where "all of the witnesses who actually played a role in the attempted but unsuccessful electronic filing . . . work and/or reside." Complainant's Response to Motion to Change Venue at 1. Complainant again raises concerns about the convenience of witnesses Ole Solberg, Mark Rackley and Todd Sullivan. Complainant also argues that relevant business records that were not included in the prehearing exchange presumably are located in Eloy and that Respondent failed to establish good cause to move the hearing to Polk County Florida.

### **B. Discussion and Conclusion**

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 ("Rules" or "Part 22 Rules") provide that a hearing in an EPCRA administrative proceeding shall be held in the "county where the respondent resides or conducts the business which the hearing concerns," in the city where the relevant EPA Regional office is located, or in Washington, D.C., "unless the Presiding Officer determines that there is good cause to hold it in another location or by telephone." 40 C.F.R. §§ 22.19(d), 22.21(e); *cf.* EPCRA Section 325(c)(4), 42 U.S.C. § 11045(c)(4) (indicating that the appropriate venue in civil actions for EPCRA violations is the federal district in which the "person from whom the penalty is sought resides or in which such person's principal place of business is located."). Obviously, generally setting the hearing location where the Respondent resides or conducts business would primarily benefit the Respondent and as such the Rule suggests that, in setting the location of the

hearing, the charged party's position as to the hearing location it deems most convenient to it, is a significant factor to be considered.

While Eloy, Arizona is the situs of the facility for which the Form R at issue was required to be filed, and thus presumably constitutes the area where Respondent "conducts the business which the hearing concerns," neither party has asserted that Eloy, Arizona is the "county where the respondent resides," and Respondent has not requested that the hearing be held in such location for its convenience.

Further, Complainant's concerns about the procurement of documents are without merit. According to the Rules of Practice, "[e]xcept as provided in § 22.22 (a), document or exhibit that has not been included in prehearing exchange shall not be admitted into evidence . . . ." 40 C.F.R. § 22.19 (a)(1). Furthermore, once the prehearing exchange is completed, either party may move for additional discovery. 40 C.F.R. § 22.19 (e)(1). Where the Presiding Officer has ordered additional discovery and a party fails to provide the requested information that is under its control, the Presiding Judge may draw a negative inference, exclude that information or issue a default order pursuant to 40 C.F.R. § 22.17(c). 40 C.F.R. 22.19(g). Therefore, any documents to be presented at the hearing or requested by Complainant would have been submitted to the opposing counsel prior to the hearing. There is no advantage to conducting the hearing in Arizona for the purpose of proximity to Respondent's business records.

Moreover, the fact that one of Complainant's witnesses and one witness listed by both parties is located in the Eloy area does not weigh heavily in favor of holding the hearing in the Eloy/Phoenix area where three of Respondent's witnesses and its representative all reside in Polk County, Florida. Also, the nature of the alleged violation involving an interstate electronic submission of a document, and the fact that the Form R at issue was submitted to the authorities in the State of Arizona, as discussed below, do not weigh in favor of holding the hearing in the Phoenix area.

Accordingly, Respondent has shown good cause for the hearing to be held in Polk County, Florida, and its Motion to Change Venue is granted. The hearing in this matter is reset to commence in Polk County, Florida on September 23, 2008.

### **III. Timeliness of Respondent's Response to Complainant's Motion for Accelerated Decision**

In its Reply to Response to Motion for Accelerated Decision, Complainant asserts that Respondent filed its Response to Motion for Accelerated Decision 21 days after Complainant filed and served its Response. Complainant notes that 40 C.F.R. § 22.16(b) provides that "a party's response to any written motion must be filed within 15 days after service of such motion and the movant's reply to the written response must be filed within 10 days after service of such response." C's Reply at 1. Complainant argues that Respondent failed to respond to its Motion

for Accelerated Decision and its Response to Respondent's motions within the time frame provided by 40 C.F.R. § 22.16(b) and thereby has waived its right to any objection to the granting of Complainant's motions. *Id.* Complainant writes that, "[r]egardless of whether Respondent's July 14, 2008, Response is considered to be a Reply to Complainant's Response or a Response to Complainant's Motion for Accelerated Decision, it is untimely. *Id.* Complaint further contends that Respondent has not claimed that it filed its Form R by the July 1, 2006 deadline and reiterates its request for accelerated decision on the issue of liability under EPCRA Section 313. C's Reply at 2.

Respondent's Response to Motion For Accelerated Decision was filed on July 14, 2008. Complainant's Response to Motion to Strike and Motion For Accelerated Decision was served on Respondent on June 23, 2008, via first class mail. See, Certificate of Service of Complainant's Response to Motion to Strike and Motion For Accelerated Decision. There is no reason to require a party to file a response to a cross motion for accelerated decision, albeit it also constitutes or includes a reply in support of its motion for accelerated decision, within the time limit for replies to responses. Therefore, the 15 day deadline rather than the 10 day deadline of Rule 22.16(b) applies.

The Rules provide, "[w]hen a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document." 40 C.F.R. § 22.7(c). Because Complainant's Response to Motion to Strike and Motion For Accelerated Decision was served by first class mail, the five day addition of time is applicable. Furthermore, the Rules provide that, "[w]hen a deadline expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day." 40 C.F.R. § 22.7(a). Because the 20 day deadline would have elapsed on Sunday July 13, 2008, the deadline for filing a Response became Monday July 14, 2008. Respondent's Response of July 14, 2008, is therefore timely.<sup>1</sup>

#### **IV. Respondent's Motion to Strike and Cross Motions for Accelerated Decision**

##### **A. Statutory and Regulatory Background**

EPCRA Section 313(a) provides that:

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic

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<sup>1</sup> Complainant is hereby advised to refrain from frivolous assertions of untimeliness, which needlessly waste the limited resources of parties and this Tribunal.

chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

42 U.S.C. § 11023(a).

The correlating regulation provides that:

For each toxic chemical known by the owner or operator to be manufactured (including imported), processed, or otherwise used in excess of an applicable threshold quantity in § 372.25, § 372.27, or § 372.28 at its covered facility described in § 372.22 for a calendar year, the owner or operator must submit to EPA and to the State in which the facility is located a completed EPA Form R (EPA Form 9350-1) . . . .

40 C.F.R. § 372.30(a).

In order to fall under the purview of Section 313 of EPCRA a facility must have ten or more full-time employees, fall with Standard Industrial Classification Codes 20 through 39, have more than the threshold amount of a toxic chemical listed in 40 C.F.R. § 371.65 during the relevant year. EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A). If all of the above requirements are met, the facility must file a toxic chemical release form, or "Form R," for each toxic chemical<sup>2</sup> processed in excess of the threshold amount during the calendar year. EPCRA § 313(a)(42 U.S.C. § 11023(a)); 40 C.F.R. § 372.30.

## **B. Undisputed Facts**

On July 11, 2008, the parties filed a Joint Set of Stipulated Facts ("Stip."). Respondent admits that it is a "person" as defined in Section 329(7) of EPCRA, 42 U.S.C. § 11049(7) and that it is an owner and operator of a "facility" within the meaning of Section 329(4) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3. Answer at 1; Stip. ¶¶ 1, 2. Respondent further admits that its facility had ten or "more full time employees" within the meaning of 40 C.F.R. § 372.3 and that the facility is classified in Standard Industrial Classification code 3089, which falls within the Standard Industrial Classification code 30. Answer at 1; Stip. ¶¶ 3, 4. Respondent also acknowledges that during the calendar year 2005 it processed approximately 731,661 pounds of Styrene which is listed under 40 C.F.R. § 372.65. Answer at 1, Stip. ¶ 5. Furthermore, Respondent admits that during reporting year 2005 the quantity of styrene it processed exceeds the threshold set forth in 40 C.F.R. § 372.25(b), and that it was required to

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<sup>2</sup> Styrene, CAS No. 100-42-5, is listed as a toxic chemical under 40 C.F.R. § 372.65.

submit a Form R for styrene on or before July 1, 2006. Answer at 1; Stip. ¶¶ 6, 7.

In regard thereto, the undisputed evidence shows that on June 20, 2006, 10 days prior to the July 1 filing deadline, on Respondent's behalf, its consultant, Ole Solberg, submitted an electronic Form R for styrene for reporting year 2005 to EPA's contractor, CDX TRIME Admin. Stip. ¶¶ 10, 12. On June 20, Mr. Solberg also sent an email to Respondent's certifying official, Todd Sullivan, telling Mr. Sullivan that he should expect to receive an email from EPA requesting that he electronically certify the submittal. Stip. ¶ 13. Unfortunately, however, Mr. Solberg provided CDX TRIME Admin with an incorrect e-mail address for Mr. Sullivan in the submission, as a result of which Mr. Sullivan did not directly receive an email from CDX TRIME Admin requesting that he certify the electronic Form R. Stip. ¶¶ 14, 15. CDX TRIME Admin sent emails to Mr. Solberg regarding the uncertified Form R submission on July 7, July 21, August 4, August 18, September 1, September 15, September 29, October 13, October 27, November 10, November 24 and December 8, 2006. Stip. ¶ 19. After the filing deadline, on July 19, 2006, Mr. Solberg sent an email to Mr. Sullivan asking him to review a forwarded email from CDX TRIME Admin and certify the electronic Form R, and again on August 8, Mr. Solberg sent another email to Mr. Sullivan again asking him to certify the Form R. Stip. ¶¶ 16, 17. The emails forwarded by Mr. Solberg to Mr. Sullivan from CDX TRIME Admin contained a CDX certification hyperlink and stated that the Certifying Official could use the hyperlink to certify the outstanding submission. Stip. ¶ 18. After 180 days, CDX TRIME Admin cancelled Respondent's Form R on December 18, 2006 for lack of certification. Stip. ¶ 20.

The parties have also stipulated that the Form R (TRI Form) and Instruction Book (Revised 2005 version) "states in the section pertaining to electronic filing (Section A.2.a) that '[o]nce the TRI submission has been certified [the submitter's] obligation to report to EPA and [the submitter's] state will be satisfied,'" and that neither the forms nor the instruction book provide "information or screens on how the submitter's Certifying Official is to complete the electronic certification process." Stip. ¶¶ 8, 9.

### **C. Respondent's Motion to Strike and for Accelerated Decision**

Respondent denies that it "failed to submit a Form R for Styrene to the EPA Administrator and to the State of Arizona on or before July 1, 2006" and that its failure to do so constitutes a violation of Section 313 of EPCRA, 42 U.S.C. § 11023 and 40 C.F.R. Part 372, as alleged in Paragraphs 11 and 12 of the Complaint. Answer at 1. In its Answer, Respondent states that it electronically filed its Form R with the EPA and that "[it is] confident the EPA received this information" but that "[i]t appears at some point the EPA found this information to be insufficient because of a faulty electronic certification process." Answer at 1. Respondent alleges that it was not made aware of known problems with the electronic certification process and that it was not contacted about the problem with its submission until 340 days after the Form R was due because of a mistyped email address. Answer at 1. Respondent contends that "Arizona Environmental Container Corporation cannot be held liable for the EPA's faulty

certification process.” Answer at 1. Respondent asserts that as soon as it was made aware of the problem it was corrected, that it had never before attempted to file the Form R electronically and that “[u]ntil the EPA makes their electronic filing certification process more user friendly Arizona Environmental Container Corporation will continue to file using traditional methods.” Answer at 2.

In its Motion to Strike, Respondent asserts that it has proven that it timely submitted a Form R to the Arizona Emergency Response Commission on June 20, 2006, and that it timely submitted a Form R to the Arizona Department of Environmental Quality on June 20, 2006. Motion to Strike at 1. Thus, Respondent argues that Paragraph 11 of the Complaint is false and Paragraph 12, which depends on Paragraph 11, is also false, and both should be stricken from the Complaint in their entirety.<sup>3</sup> Motion to Strike at 1-2. Because Paragraphs 11 and 12 form the basis on the sole count of “Failure to File Timely Form R for Styrene for Calendar Year 2005,” Respondent requests that Count I be stricken from the Complaint. Motion to Strike at 2. Additionally, Respondent asserts that with the sole Count stricken from the record there is no genuine issue of material fact and thus, Respondent requests accelerated decision in its favor.

In support of its contentions, Respondent submits the following documents as attachments to its Motion to Strike: (1) a cover letter signed by Todd Sullivan, dated June 20, 2006, sent to Mr. Daniel Roe, Executive Director of the Arizona Emergency Response Commission stating that it encloses a diskette containing Respondent’s toxic chemical release reporting for 2005 for styrene Form R, and certifying the truth and completeness of the information enclosed (Motion to Strike, Exhibit 13);<sup>4</sup> (2) a green return receipt card showing Arizona Emergency Response Commission received Respondent’s submission on June 22, 2006 (Motion to Strike, Exhibit 14); (3) a letter signed by Todd Sullivan dated June 20, 2006 sent to Mr. Bill Quinn, Arizona Department of Environmental Quality, stating that it encloses forms containing Respondent’s toxic chemical release reporting for 2005 for styrene Form R, and certifying the truth and completeness of the information enclosed (Motion to Strike, Exhibit 15); (4) a green return receipt card showing Arizona Department of Environmental Quality received Respondent’s submission on July 23, 2006 (Motion to Strike, Exhibit 16); and (5) Respondent’s completed Form R for styrene for 2005 signed by Todd Sullivan on June 20, 2006 (Motion to Strike, Exhibit 17).

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<sup>3</sup> Paragraph 11 reads: “Respondent failed to submit a timely Form R for Styrene to the EPA Administrator and to the State of Arizona on or before July 1, 2006,” and Paragraph 12 reads “Respondent’s failure to submit a timely Form R for Styrene that Respondent processed at the Facility during calendar year 2005 constitutes a violation of Section 313 of EPCRA, 42 U.S.C. § 11023, and C.F.R. Part 372.” Complaint at 4.

<sup>4</sup> Respondent numbered the exhibits to the Motion to Strike as Exhibits 13 through 17, which are consecutive to Respondent’s exhibits in its Prehearing Exchange (Exhibits 1 through 12).

#### **D. Complainant's Response to Motion to Strike and Motion for Accelerated Decision**

In its "Response to Motion to Strike and Motion for Accelerated Decision," Complainant points out that Section 313(a) of EPCRA and 40 C.F.R. § 372.30(a) require "that the Form R must be timely filed with EPA and the State in which the facility is located." C's Motion at 4. Complainant does not dispute that Respondent filed its Form R with the state, but asserts that Respondent did not file its Form R for 2005 *with EPA* until June 12, 2007, citing to a Toxics Release Inventory printout for Form R Reports for Respondent's facility and a Certified Statement of Tonya J. Richardson, listing the postmark and date signed for the Form R for reporting year 2005 as June 12, 2007. C's Motion Exs. 2, 3; C's PHE Exs. 8, 9. Complainant points out that Respondent never claimed in the Motion to Strike that it timely filed the Form R with EPA. Complainant does not deny that Respondent filed the Form R with the State, but argues that because Respondent did not timely file the Form R with the EPA, Paragraph 11 was "accurately pleaded" and there is no basis to strike it. C's Motion at 4. Therefore, Complainant urges, Respondent's Motion to Strike and Motion for Accelerated Decision should be denied.

Complainant asserts that it has established a prima facie case for a violation of Section 313 of EPCRA, as all of the facts necessary to find liability under Section 313 of EPCRA have been admitted or are undisputed by Respondent. C's Motion at 5. Thus, Complainant requests accelerated decision pursuant to 40 C.F.R. § 22.20(a) on the issue of Respondent's liability under Section 313 of EPCRA. *Id.*<sup>5</sup>

#### **E. Respondent's Response**

In its Response to Complainant's Motion for Accelerated Decision, Respondent contends that there are genuine issues of material fact. Respondent asserts that "Todd Sullivan certified the submission to the EPA in the *summer of 2006*," and that it believed the submission was certified until EPA contacted Respondent's president in June 2007. R's Response at 1 (italics added). In support, Respondent presents an Affidavit of Todd Sullivan, sworn on July 11, 2008, stating:

6. During the summer of 2006, I received and opened this email from Ole Solberg [forwarding email from CDX TRIME Admin]. I moved the mouse and clicked on the hyperlink to certify the submission.
7. The hyperlink sent the certification and I went back to work.
8. I do not recognize Complainant's Ex. 6 Screens that appear after pressing CDX

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<sup>5</sup> Complainant's Reply, dated July 21, 2008 only argues that Respondent's Response was untimely, which issue was addressed above, and points out the stipulations that were filed.



Certification Hyperlink in EPACDX TRIME Admin emails to Ole Solberg. I have never seen these screens before.

Todd Sullivan further iterates that he is the certifying official and that Mark Rackley was never the certifying official for Arizona Environmental Container Corporation.

## **F. Discussion**

### **1. Motion to Strike**

The Rules do not have express provisions for motions to strike, but it is well settled that the FRCP provide guidance on ruling on motions where the Part 22 Rules are silent. *See, e.g., Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 523-25, 1993 EPA App. LEXIS 6, \*25-30 (EAB 1993) (upholding an ALJ's authority to consider and deny a motion to strike).

Motions to strike are generally disfavored and reserved for those situations where the moving party can show the claim or defense is clearly legally insufficient. "[M]otions to strike are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Dearborn Refining Co.*, EPA Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, \*7 (ALJ, Jan. 2, 2003), *aff'd on other grounds*, EPCRA Appeal No. 03-04 (EAB 2004). *See, Environmental Prot. Servs., Inc.*, EPA Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 13, \*1 (ALJ, Feb. 28, 2003)(Order Denying Complainant's Motion to Strike Respondent's defense of selective prosecution), *aff'd on other grounds*, 13 E.A.D. \_\_\_\_ (EAB, Feb. 15, 2008); *Franklin and Leonhardt Excavating Co.*, EPA Docket No. CAA-98-011, 1998 EPA ALJ LEXIS 126, \*10 (ALJ, Dec. 7, 1998) (Order Denying Complainant's Motion to Strike Affirmative Defenses). Pleadings are treated liberally and motions to strike are only appropriate "in narrow circumstances such as redundant or impertinent pleadings and insufficient legal defenses." *Frank Acierno*, EPA Docket No. CWA-03-2005-0376, 2007 EPA ALJ LEXIS 9, \*39 (citing *General Motors Auto. North America*, EPA Docket No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 31, \*5 (ALJ, June 8, 2005).

Respondent's Motion to Strike may be considered a motion to dismiss the Complaint. The Rules provide that the Presiding Judge may upon motion of the respondent "dismiss a proceeding without further hearing . . . 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." A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also, May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir. 1985); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). In reviewing the sufficiency of a complaint, "the allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *May v. Commissioner of Internal Revenue, supra*. Moreover, the threshold that a complaint must

meet to survive a motion to dismiss for failure to state a claim is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation omitted).

Complainant has produced documents showing that Respondent did not submit a Form R to EPA by the deadline. Thus, Respondent has not shown that the Paragraph 11 or 12, or the claim in Count I, is clearly legally insufficient, redundant or impertinent. Assuming as true and construing in Complainant's favor the allegation in the Complaint that Respondent did not submit the Form R to the EPA Administrator by the deadline, Respondent has not shown that Complainant has no right to relief on Count I. Accordingly, Respondent's Motion to Strike Paragraphs 11 and 12 from the Complaint is denied.

However, Complainant has not disputed that Respondent timely filed its Form R with the State of Arizona. *See*, C's Motion at 3. In order to better clarify the issues for hearing, the language "and to the State of Arizona" is hereby stricken from Paragraph 11 of the Complaint.

## 2. Accelerated Decision

### a. Standards for Accelerated Decision

Section 22.20(a) of the Rules states 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.

A motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and thus federal court rulings on motions under FRCP 56 provide guidance in ruling on a motion for accelerated decision. *See Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781-82, 1993 EPA App. LEXIS 32, \*24-26 (EAB 1993). 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." FRCP 56(c). Summary judgment is decided on the basis of "pleadings, depositions, answers to interrogatories, . . . admissions on file, together with the affidavits" and any other material that would be admissible at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993)(quoting FRCP 56(c); additional citations omitted).

The moving party has the burden of showing there is no genuine issue of material fact. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (overruled in part on other grounds). Thus, in reviewing the record, the facts must be construed in the light most favorable to the non-moving party. *See Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526, 528 (10th Cir. 1994) (citing *Boren v. Southwest Bell Tel. Co.*, 933 F.2d 891, 892 (10<sup>th</sup> Cir. 1991)). The finder of fact

may draw “reasonably probable” inferences from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (citations omitted). Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.*; *O’Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989). When ruling on a motion for summary judgment it is the court’s function to ascertain whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985).

Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216, *rehearing denied*, 762 F.2d 1004 (5th Cir. 1985); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

b. Analysis and Conclusions on Respondent’s Motion for Accelerated Decision

Respondent’s request for accelerated decision appears to be based on its argument that it filed a certified Form R for 2005 with the State of Arizona. The question presented is whether Respondent’s submission of the certified Form R to the State constitutes compliance with the applicable requirements. Section 313(a) of EPCRA, 42 U.S.C. § 11023(a) provides that the Form R “shall be submitted to the [EPA] Administrator *and* to an official or officials of the State . . . .” (emphasis added). The implementing regulation at 40 C.F.R. § 372.30(a) requires a Form R to be submitted “to the EPA *and* to the State in which the facility is located” (emphasis added). Thus, to comply with these provisions, a Form R must be timely submitted to *both* the EPA and the relevant State. Filing with the State alone is insufficient to establish compliance. *See, Robert K. Tebay, Jr.*, EPA Docket No. EPCRA-III-236, 2000 EPA ALJ LEXIS 95, \*9 n.10 (ALJ, Nov. 28, 2000) (fact that respondent filed a Material Safety Data Sheet with a local emergency planning committee and local fire department was not determinative of liability under Section 311(a)(1) of EPCRA, 42 U.S.C. § 11021, where respondent failed to file with the state emergency response commission as required). Failure to file a required form is not excused by filing another form with the same information. *See, Green Thumb Nursery, Inc.*, 6 E.A.D. 789, 798-99, 1997 EPA App. LEXIS 4, \*40-41 (EAB 1997)(respondent would not have met FIFRA pesticide product registration requirements even if the establishment registration papers that it filed contained all of the same information)(citing *Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198, 203-206 (9th Cir. 1989)). Accordingly, a respondent may be held in violation of EPCRA Section 313 where it files the Form R with the State but not with EPA. To hold otherwise would contradict the plain language of the regulations and could result in lack of the public disclosure envisioned by EPCRA. Accordingly, Respondent’s request for accelerated decision in its favor is denied.

c. Analysis and Conclusions on Complainant’s Motion for Accelerated Decision

The elements of a violation of Section 313 of EPCRA are: (1) that a “person” as defined

by Section 329(7) of EPCRA; (2) who is an owner or operator of a “facility” as defined in Section 329(4) of EPCRA; (3) with ten or more full-time employees; (4) within certain Standard Industrial Codes; (5) manufactured, processed or otherwise used in excess of the applicable threshold amounts a toxic chemical listed in 40 C.F.R § 372.65; and (6) failed to file a Form R with EPA for each such chemical by July 1 of the succeeding year. It is undisputed that the first five elements are established. The issues are whether Complainant has shown prime facie evidence in support of the sixth element and whether there are no genuine issues of material fact with respect to that element.

As noted above, Complainant presents several documents in support of its position that Respondent did not file its Form R for 2005 with EPA until June 12, 2007. C’s Motion Exs. 2, 3; C’s PHE Exs. 8, 9; C’s PHE Ex. 13 (letter dated August 16, 2007 from Ken Butler, Director of Engineering, San Juan Pools, to Russ Frazer, EPA Region IX, stating “The submittal [of the 2005 Form R] to EPA was complete and accurate, however it was never certified.”). Complainant also presents several emails dated from July through December 2006 from CDX TRIME Admin to Mr. Solberg, titled “re: FYI! You still have a pending TRI submission,” and emails dated July 19, 2006 and August 8, 2006 from Mr. Solberg to Mark Rackley and Todd Sullivan regarding the necessity of certifying the Form R. C’s PHE Exs. 4, 17. The question is whether Respondent has raised an issue of material fact as to liability for failure to file the Form R for 2005 with EPA by the deadline.

Respondent does not present any document showing that it filed a *certified* Form R with EPA on or before the July 1, 2006 deadline. The statement by Todd Sullivan that “[d]uring the summer of 2006” he “clicked on the hyperlink *to certify* the submission” and “[t]he hyperlink *sent the certification*” does not indicate that he clicked on the hyperlink on or before July 1, 2006, the applicable deadline, or that certification was received by EPA by the deadline. It is not reasonable to infer from Mr. Sullivan’s statement or any other documents in the case file that the certification was received by EPA by the due date. Therefore, Respondent has not raised any genuine issue of fact material to whether it submitted a *certified* Form R to EPA by the July 1 deadline.

The next question is whether the undisputed fact that Mr. Solberg submitted an electronic *uncertified* Form R to EPA’s contractor on June 20, 2006, before the due date (Stip. 12) is material to liability. The regulations require the Form R to be submitted with its certification. The regulations state in relevant part that –

For each toxic chemical . . . the owner or operator must submit to EPA and to the State . . . a completed EPA Form R . . . in accordance with the instructions referred to in Subpart E of this part.

40 C.F.R. § 372.30. In turn, Subpart E lists the elements of the Form R, providing that –

Information elements reportable on EPA Form R or equivalent magnetic media

format include the following:

\* \* \*

(2) Signature of a senior management official certifying the following “I hereby certify that I have reviewed the attached documents and, to the best of my knowledge and belief, the submitted information is true and complete . . . .”

40 C.F.R. § 372.85(b)(2). The electronic Form R was not completed in accordance with the instruction in Subpart E that it include a certification of the certifying official, and therefore was not submitted to EPA in accordance with 40 C.F.R. § 372.30.

The question is whether an uncertified electronic Form R submittal to EPA’s contractor nevertheless should be deemed to constitute compliance with the requirement of EPCRA 313 to file a Form R with EPA. It is noted that Respondent’s 2005 Form R submitted to the State contains the required certification. R’s PHE Exs. 13, 15, 17. Therefore, there is no reason to suspect that the information in the electronic submission to EPA’s contractor contained false or inaccurate information, or that Respondent’s certifying official refused or was unwilling to certify it.

However, while the certified information did reach State authorities by the deadline, nothing in the record indicates that it was evaluated by the EPA or placed on the TRI Database where the public might be given access to it. At some point, EPA’s contractor determined that the Form R submission was not certified by Respondent’s certifying official, and after Respondent’s submission was held for 180 days without certification, EPA’s contractor cancelled the submission. Stip. ¶ 20.

Public disclosure of information is an essential part of EPCRA’s purpose. Section 313(h) of EPCRA, 42 U.S.C. § 11023(h), provides that the release forms are “intended to provide information to the *Federal*, State, and local governments and the public, including citizens of the communities surrounding covered facilities.” (emphasis added). The purpose of EPCRA’s Section 313 reporting requirements and the implementing regulations is “to inform the general public and the communities surrounding covered facilities about releases of toxic chemicals, to assist research, to aid in development of regulations, guidelines, and standards, and for other purposes.” 40 C.F.R. § 372.1. In order to serve the goals of EPCRA it is mandatory that a Form R be submitted to the EPA. Once EPA receives the Form R, EPA places it on the Toxic Release Inventory Database (“TRI Database”) and makes it available to the public via the internet. *See*, U.S. Environmental Protection Agency: TRI Explorer, <http://www.epa.gov/triexplorer/> (last visited Jul. 2, 2008).<sup>6</sup> “[F]ailure to comply with the reporting provisions of Section 313(a)

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<sup>6</sup> EPCRA Section 313(j) provides:

The Administrator shall establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this

(continued...)

seriously impairs the public's right-to-know, as well as the Federal and state governments' ability to respond to releases of toxic chemicals." *TRA Indus. Inc.*, EPA Docket No. EPCRA 1093-11-05-325, 1996 EPA ALJ LEXIS 82, \*6 (ALJ Oct. 11, 1996)(citing *Huls America, Inc. v. Browner*, 83 F.3d 445, 446-47 (D.C. Cir. 1996)). Therefore, Respondent's electronic submission of the uncertified Form R information did not accomplish the goals that EPCRA was enacted to address.

Respondent's argument regarding its successful submissions to the State authorities and intent and efforts to file the Form R electronically amounts to an argument of "substantial compliance." However, substantial compliance with the requirements of EPCRA does not alleviate Respondent of liability in this matter.<sup>7</sup> See, *Public Interest Research Group v. Yates Indus.*, 757 F. Supp. 438, 450 (D.N.J. 1991)(denying summary judgment in favor of defendant where it only presented unsigned versions of a Discharge Monitoring Report). There is no grounds for a defense of substantial compliance "absent any language in the statute or its regulations supporting a defense of 'substantial compliance' with the purpose of the statute." *Smith v. Coldwell Banker Real Estate Servs.*, 122 F. Supp. 2d 267, 272-73 (N.D. Conn. 2000) (declining to recognize a "substantial compliance" defense to a violation of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d); see, *Virgin Petroleum-Princess, Inc.*, EPA Docket No. RCRA-02-2002-7501, 2003 EPA ALJ LEXIS 65, \*28-29 (ALJ Sept. 10, 2003)(declining to find a "substantial compliance" defense for a violation of Section 9006 of the Solid Waste Disposal Act.); *Four Seasons Cooperative*, EPA Docket No. FIFRA-08-2006-0001, 2008 EPA ALJ LEXIS 3, \*20-21 (ALJ Jan. 25, 2008)(declining to find a "substantial compliance" defense in a proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1361(a)(1)); *University of Hawaii*, EPA Docket No. TSCA-09-92-0014, 1998 EPA ALJ LEXIS 40, \*10 n.15 (ALJ June 29, 1998)(no defense of "substantial compliance" for a violation of 40 C.F.R. § 761.30(a)(1)(iv)(A) promulgated under Section 15(1)(C) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614 (1)(C)).

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<sup>6</sup>(...continued)

section. The Administrator shall make these data accessible by computer telecommunication and other means to any person . . . .

<sup>7</sup> However, it is noted that issues of substantial compliance have been considered in determining penalties for violations of EPCRA. See, *F.C. Haab Co.*, EPA Docket No. EPCRA-III-154, 1998 EPA ALJ LEXIS 46, \*29-30, (ALJ June 30, 1998)(considering substantial compliance in evaluating the penalty amount for violations of Sections 311 and 312 of EPCRA, 42 U.S.C §§ 11021 and 11022); *Great Lakes Div. of Nat'l Steel Corp.*, EPA Docket No. EPCRA-007-1991, 1993 EPA ALJ LEXIS 364, \*59 (ALJ July 13, 1993)(considering substantial compliance in mitigating the penalty for a violation of Section 304 of EPCRA, 42 U.S.C. §§ 11004), *aff'd without relevant discussion*, 5 E.A.D. 355 (EAB 1994).

As to Respondent's assertions in its Answer that it "cannot be held liable for the EPA's faulty certification process" and that it was not contacted about the problem with its submission until 340 days after the Form R was due because of a mistyped email address, it is noted that a violation of EPCRA Section 313 is a strict liability offense. *Steeltech, Ltd.*, 8 E.A.D. 577, 586, 1999 EPA App. LEXIS 25, \*23 (EAB 1999)("EPCRA is a strict liability statute"). Respondent can not escape liability by blaming its contractor for the mistyped email address. *Pyramid Chem. Co.*, 11 E.A.D. 657, 677, 2004 EPA App. LEXIS 32, \*54-55 (EAB 2004); *Green Thumb Nursery, Inc.*, 6 E.A.D. 789, 796, 1997 EPA App. LEXIS 4, \*35, \*36 n. 29 (EAB 1997)("The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result," and "under federal law mandatory duties to achieve certain results may not be avoided by failure to retain control over the situation."). What is relevant to a liability determination here is not Respondent's intent to comply and/or the efforts it took to certify, but the ultimate effect of that intent and those efforts - whether they resulted in EPA having a certified Form R before the deadline. In support of its argument about the faulty certification process, Respondent presents a letter and proposed expert testimony of Michael Braun regarding the hyperlink in the email and standard procedures for emailed directions when developing web based applications, and the parties stipulated that the Inventory Reporting Forms and Instructions for Section 313 of EPCRA does not include any information on certifying a Form R electronically (Stip. ¶ 9). This proposed testimony and evidence does not show that Respondent took all steps to timely comply with the Form R reporting requirement for 2005, and that, *but for* a faulty hyperlink or technical malfunction on EPA's certification system, the Form R would have been timely certified and filed. Therefore, it is not material to liability.

In conclusion, there is no genuine issue of material fact as to Respondent's liability, and Complainant is entitled to judgment as a matter of law as to Respondent's liability for violating Section 313 of EPCRA by failing to submit a Form R for 2005 to EPA by the due date.<sup>8</sup>

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<sup>8</sup> However, that said, the fact that Respondent's Form R was filed with EPA's contractor before the deadline, but that despite its efforts and intent was not in fact also certified promptly thereafter, and that certified Form Rs were filed timely with the State, suggests that the violation at issue here may in fact be merely a technical violation, that is, one of minimal magnitude. In that regard, it is noted that EPA's "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act" lists "[s]ubmission of § 313 . . . data on an invalid form," "[i]ncomplete reporting," and "[m]agnetic media submissions which cannot be processed" as infractions deserving of a notice of noncompliance ("NON") rather than an administrative complaint. C's PHE Ex. 12 at 3. In addition, Respondent's contentions regarding its good faith efforts to electronically file its Form R may be considered when calculating any penalty to be assessed. C's PHE Ex. 12 at 18.

## V. Motion in Limine

### A. Arguments of the Parties

In its Motion in Limine, Complainant seeks to exclude the testimony of Respondent's proposed expert witness Michael Braun and a letter from Mr. Braun to Mr. Kirk Sullivan marked as Exhibit 1 in Respondent's Prehearing Exchange. Respondent states that Mr. Braun will testify as an expert regarding "standard procedures for emailed directions when developing web applications." R's PHE. In his letter to Mr. Sullivan, Mr. Braun explains standard procedures for emailed instructions and sizes for hyperlinks and his opinion as to how the failed attempt at certification came about. Complainant contends that the testimony and Exhibit 1 should be excluded because Respondent has not provided any information to qualify Mr. Braun as an expert witness, because the testimony is "irrelevant to any material issue or fact in this case," and because Exhibit 1 "does not provide sufficient information to establish the basis for his expressed opinion." Motion in Limine at 2, 3.

Respondent's Prehearing Exchange lists Tom John as a fact witness and states that he will testify that "he has worked with [Respondent] for at least ten years, and in his experience [Respondent has] made every attempt to conform to all relevant environmental regulations." R's PHE at 2. Complainant seeks to exclude the testimony of Mr. John on the grounds that it is irrelevant to liability and to the proposed penalty, since the penalty is based neither on prior violation nor on whether Respondent knowingly or intentionally violated the law in this case. Motion in Limine at 2.

Respondent's Exhibits 3, 4, 5 and 6 consist of emails from Respondent to EPA contractors requesting tutorials on the Certifying Data section of the TRI-ME program, an email showing the email address allegedly supplied by the EPA is invalid, and a response from the EPA Help Desk with directions on creating a CDX account and electronic signature agreement form. Complainant seeks to exclude these exhibits on the grounds they are irrelevant to any material issue or fact presented in this case." Motion in Limine at 3.

On the same basis, Complainant also seeks to exclude Respondent's Exhibit 7, a graph allegedly showing the aggregate releases of TRI Chemicals to the air for Respondent's nearest competitor; Respondent's Exhibit 8, a TRI Explorer Releases Trend Graph showing Respondent's Total Releases for Styrene reported between 2001 and 2006; Respondent's Exhibit 10, a press release about a settlement with Koch Foods Inc. for its failure to meet Ohio EPA's Toxic Release Inventory reporting requirements; and Respondent's Exhibit 11, company profile of Koch Foods Inc. showing its revenue and number of employees. In support of its Motion, Complainant argues that decisions or settlements in other cases have no bearing on the appropriateness of a proposed penalty in the case at hand, citing *Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-627, 1991 EPA App. LEXIS 48, \*20-21 (CJO 1991).

Respondent opposes the Motion in Limine, presenting a document entitled "Michael



Braun's History" as Respondent's Exhibit 20 and refuting Complainant's assertion in its Motion in Limine that Mr. Braun and Mr. John are co-owners. Respondent asserts that its Exhibits 3 through 6 "show the difficulty of getting help regarding how to certify" and that electronic submission did not reduce the amount of paper or burden to the individual certifying the Form R. Response to Motion in Limine at 1-2. Respondent argues that its Exhibits 10 and 11 are relevant in that they show that a corporation 250 times larger than Respondent was "fined less than half of the proposed penalty for neglecting to file a TRI form for two consecutive years." Response to Motion in Limine at 2. Respondent asserts that *Chautauqua Hardware Corp.* is not relevant because Respondent is not accused of polluting the environment.

Respondent questions on several points the reliability of Complainant's Prehearing Exchange Exhibit 1, entitled EPA Region IX TRI Enforcement Database Review Sheet for Arizona Environmental Container Corp.

#### B. Standard for Motion in Limine

The Rules provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). The Rules do not specifically address the issue of motions in limine and therefore federal court practice, the Federal Rules of Civil Procedure and the Federal Rules of Evidence may be of guidance. See *Carroll Oil Co.*, 10 E.A.D. 635, 649, 2002 EPA App. LEXIS 14, \*35 (EAB 2002); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10, 1993 EPA App. LEXIS 6, \*26-27 n.10 (EAB 1993); *Solutia Inc.*, 10 E.A.D. 193, 211 n. 22, 2001 EPA App. LEXIS 19, \*47 n.22 (EAB 2001).

In federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 200). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Where admissibility is unclear, evidentiary rulings must be deferred until trial where questions of foundation, relevancy, and prejudice may be resolved. *Id.* at 1401. Thus, denial of a motion in limine does not necessarily mean that the evidence contemplated by the motion will be admitted at trial. Denial of the motion in limine means only that without the context of the trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7<sup>th</sup> Cir. 1989).

#### C. Discussion and Conclusions

Generally, evidence offered on the issue of appropriateness of a proposed penalty must be relevant and have probative value on at least one of the statutory criteria for determining a penalty. EPCRA, however, does not specify factors for determining penalties for violations of

Section 313 of EPCRA. *See*, EPCRA § 325(c)(1), 42 U.S.C. 11045(c)(1). A penalty for a violation of EPCRA § 313 is determined in accordance with the “Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act”(“ERP”), which includes the following factors for determining a penalty: extent, circumstances and duration of the violation, voluntary disclosure, and respondent’s history of violations, attitude and ability to pay, and “other factors as justice may require.” C’s PHE Ex. 12. The ERP states that the penalty may be reduced “in consideration of the facility’s good faith efforts to comply with EPCRA . . . .” C’s PHE Ex. 12 at 18; *see also*, *Steeltech, Ltd.*, 8 E.A.D. 577, 586-87, 1999 EPA App. LEXIS 25, \* 313-14 (EAB 1999); *Catalina Yachts, Inc.*, 8 E.A.D. 199, 214 (EAB 1999).

With that background as to penalty assessment, the merits of the Motion in Limine is addressed. The testimony of Mr. Braun and Mr. John, as well as Respondent’s Exhibit 1, may be relevant to Respondent’s argument as to its good faith efforts to submit and certify its electronic Form R, but that its efforts were thwarted due to poor directions or a faulty emailed hyperlink sent by the EPA. The Respondent’s failure to include a resume or curriculum vitae for Mr. Braun in its Prehearing Exchange does not support a motion in limine. A party can supplement its prehearing exchange with a resume or curriculum vitae by filing a motion to supplement the prehearing exchange. Here, Respondent submitted a very simple and informal description of Mr. Braun’s professional background, and it was submitted as an attachment to its Response to the Motion in Limine. The minor procedural irregularities and omissions are excused by the fact that Respondent is appearing *pro se*. Therefore, the Motion in Limine is denied with respect to Mr. Braun’s testimony and Respondent’s Exhibit 1.

Respondent’s Exhibits 3, 4, 5 and 6 are apparently presented to show that despite its efforts it continues to have difficulties in communicating with the EPA regarding electronic certification of the Form Rs, which could have some bearing on Respondent’s good faith efforts to comply.

It may be inferred from Respondent’s Exhibit 7, a graph showing the aggregate releases to the air of TRI chemicals by Respondent’s nearest competitor, and Respondent’s Exhibit 8, a graph showing Respondent’s releases of styrene, that Respondent is attempting to show that its level of air pollution is less than its competitor. While the level of Respondent’s air releases may be considered in regard to the nature, circumstances and/or gravity of the violation, the releases of another company have no bearing on the determination of a penalty under EPCRA. Accordingly, Complainant’s Motion in Limine is granted with respect to Respondent’s Exhibit 7 and denied with respect to Respondent’s Exhibit 8.

Respondent’s Exhibits 10 and 11, which concern Koch Foods Inc., and which Respondent proposes as a precedent for the size of fines, does not have any effect on the assessment of a penalty. The EAB has consistently held that “penalty assessments are sufficiently fact-and circumstance-dependant that the resolution of one case cannot determine the fate of another.” *Newell Recycling Co.*, 8 E.A.D. 598, 642, 1999 EPA App. LEXIS 28, \*100

(EAB 1999), *aff'd* 231 F.3d 204 (5<sup>th</sup> Cir. 2000). The “generic penalty factors naturally become unique to [the] case on the basis of evidence and testimony.” *ChemLab Prods, Inc.*, 10 E.A.D. 711, 728, 2002 EPA App. LEXIS 17, \*48-49 (EAB 2002). Comparisons between penalties would necessitate an in depth analysis of the record of case not before the court, violating the principle of judicial economy and 40 C.F.R. § 22.4(a)(2), (c)(10) which requires an “efficient fair and impartial adjudication of issues.” *Id.* at \* 56-57. Furthermore the agency is vested with enforcement discretion and unequal treatment alone is not a basis for challenging an agency law enforcement proceeding. *Id.* at \* 50-51 (citing *Spang & Co.*, 6 E.A.D. 226, 242, 1995 EPA App. LEXIS 33, \*40 (EAB 1995)(citations omitted). Furthermore, given the significant costs of preparing for hearing, the penalty in a case that is settled has no bearing on the penalty in a similar case that is litigated. *See Briggs & Stratton Corp.*, 1 E.A.D. 653, 666, 1981 EPA App. LEXIS 2, \*27 (CJO 1981) (citations omitted). Complainant’s Motion in Limine is granted with respect to Respondent’s Exhibits 10 and 11.

Even assuming that Respondent’s concerns regarding the reliability of Complainant’s Exhibit 1 constitute a motion, it is premature to consider them at this point in the proceeding. Such issues cannot be determined prior to a foundation being presented at the hearing.

**ORDER**

1. Respondent's Motion for Change of Venue is **GRANTED**. The hearing in this matter will be held beginning promptly at 9:30 a.m. on Tuesday, **September 23, 2008** in Polk County, Florida, continuing, if necessary, on September 24-26, 2008.
2. Respondent's Motion to Strike is **GRANTED in part**. The language "submit to the state" is hereby stricken from Count 1 of the Complaint. The Motion to Strike is denied with respect to the request to strike Paragraphs 11 and 12 from the Complaint.
3. Respondent's Motion for Accelerated Decision is **DENIED**.
4. Complainant's Cross Motion for Accelerated Decision as to Liability is **GRANTED**.
5. Complainant's Motion in Limine is **DENIED** with respect to the testimony of Michael Braun and Tom John, and with respect to Respondent's Exhibits 1, 3, 4, 6 and 8.
6. Complainant's Motion in Limine is **GRANTED** with respect to Respondent's Exhibits 7, 10 and 11.

  
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Susan L. Biro  
Chief Administrative Law Judge

Dated: August 12, 2008  
Washington, D.C.

In the Matter of Arizona Environmental Container Corp., Respondent  
Docket No. EPCRA-09-2007-0028

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Order Granting Motion for Change of Venue, Granting Complainant's Motion for Accelerated Decision as to Liability, and Granting in Part and Denying in Part Motion to Strike and Motion in Limine**, dated August 12, 2008, was sent this day in the following manner to the addressees listed below:

Original and One Copy by Pouch Mail to:

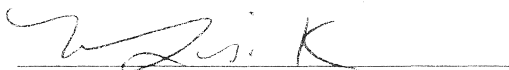
Danielle Carr  
Regional Hearing Clerk  
U.S. EPA - Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Copy by pouch mail to:

Carol Bussey, Esquire  
Assistant Regional Counsel  
U.S. EPA - Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Copy by regular mail to:

Kirk Sullivan, President & CEO  
American Environmental Container Corp.  
2302 Lasso Lane  
Lakeland, FL 33801



M. Lisa Knight  
Senior Staff Attorney

Dated: August 12, 2008