UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF: | ) | |
| | ) | |
| LYONS FUEL, INC., | ) | DKT. No. CAA-I-97-1001 |
| | ) | |
| Respondent | ) | |

**ORDER GRANTING COMPLAINANT'S MOTION**

**FOR ACCELERATED DECISION AS TO PENALTY**

**AND INITIAL DECISION**

Complainant has filed a Motion for Accelerated Decision as to Penalty (Motion). To date, Respondent has not filed a response to the Motion. For the reasons discussed below, it is determined that Complainant's Motion will be **GRANTED.**

I. BACKGROUND

This proceeding was initiated on January 6, 1997, pursuant to Sections 205 and 211 of the Clean Air Act (CAA), 42 U.S.C. §§ 7524, 7545. In a previous ruling, Respondent, Lyons Fuel, Inc., was found to have knowingly introduced diesel fuel containing sulfur in excess of 0.05 percent into the fuel tanks of three of its motor vehicles, in violation of Section 211(g)(2) of the CAA, 42 U.S.C. § 7545(g)(2).[(1)] The issue remaining to be determined is the appropriate penalty to be assessed for such violations.

In the Complaint, a penalty of $1,500 was proposed for each of the three violations, resulting in a total proposed penalty of $4,500. In its Motion, Complainant asserts that no genuine issue of material fact exists as to the appropriateness of the proposed penalty and that it is entitled to judgment as a matter of law on that issue.

Respondent, appearing *pro se*, through its representative Sean Lyons, answered the Complaint. The Answer disputed allegations of liability and the appropriateness of the penalty, and raised some issues with respect to the penalty, as discussed below. A Prehearing Order was issued on March 10, 1997 directing the parties to file their prehearing exchanges by dates certain. Complainant timely filed its prehearing exchange. Approximately nine days after the due date of July 1, 1997, Respondent submitted its prehearing exchange, stating merely that "Respondent elects only to conduct cross-examination of Complaint's (sic) witnesses and to forgo the presentation of direct and/or rebuttal evidence."

On December 24, 1997, after the Complainant's Motion for Accelerated Decision as to Liability was granted, and after unsuccessful attempts at settlement of this proceeding, Complainant submitted a Motion for Partial Accelerated Decision as to the Penalty and supporting memorandum.[(2)] The Motion stated that on December 22, 1997, when Complainant's counsel spoke to Sean Lyons by telephone, he indicated that he objected to the granting of the relief sought in the Motion. After numerous unsuccessful attempts, on January 2, 1997, Mr. Lyons was finally contacted by telephone by the Office of Administrative Law Judges. In this conversation, the staff of the Office of Administrative Law Judges confirmed with Mr. Lyons that the Respondent had received the Complainant's Motion, and informed him of the deadline of January 8, 1998 for responding to the Motion, of the consequences of failure to file a response by that date, and of an opportunity, despite the motions cutoff, to file by that date a motion for leave to present evidence at the hearing, if Respondent wished to do so.

## II. PROCEDURAL ISSUES

The procedural rules applicable to this proceeding, 40 C.F.R. Part 22, provide that a "response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is filed for such response." 40 C.F.R. § 22.16(b). Five days are added to that time period to allow for service by mail. 40 C.F.R. § 22.07(c). Because the Motion was served on December 24, 1997, a response was due on January 8, 1998. To date, no response to the Motion has been received from Respondent.[(3)]

The procedural rules provide further, "[i]f no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Thus, on the basis of failure to file a timely written response a motion may be granted. However, because Respondent is appearing *pro se* and because Mr. Lyons indicated by telephone his objection to the relief requested in the Motion, the documents submitted in this proceeding will be carefully reviewed to determine whether the Motion should be granted and whether the proposed penalty is appropriate.

The initial question as to whether the Motion should be granted is whether the penalty issue must be decided after an oral evidentiary hearing, or whether it may be summarily determined on the Motion. The Clean Air Act, at Section 205(c)(1), provides that assessment of a civil administrative penalty for violations of Section 211 of the CAA "shall be by an order made on the record after opportunity for a hearing in accordance with sections 554 and 556 of [U.S.C.] Title 5." Respondent requested a hearing in its Answer to the complaint. However, an oral evidentiary hearing is not warranted if there are no facts in dispute. As the Environmental Appeals Board has stated, "a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue." *In re Green Thumb Nursery, Inc.,* FIFRA Appeal No. 95-4a (EAB, Final Order, March 6, 1997), slip op. at 14, *citing*, *Costle v. Pacific Legal Foundation,* 445 U.S. 198, 214 n. 12 (1980) and *Independent Banker's Assn. v. Board of Governors,* 516 F.2d 1206 (D.C. Cir. 1975). A Federal government agency is not required to hold a hearing when the facts are not in dispute. *Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 115 S.Ct. 1096 (1995)("Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case can only be decided one way"); *First Bank & Trust Co. v. Board of Governors of Federal Reserve System*, 605 F. Supp. 555 (E.D. Ky 1984).

The procedural rules, at 40 C.F.R. § 22.20, provide in pertinent part,

> The Presiding Officer, upon motion of any party . . . may at any time render an accelerated decision in favor of the complainant or respondent as to all or any part 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.
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> * * *
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> If an accelerated decision . . . is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer * * * *

Thus, an accelerated decision on the penalty may be granted if there is no genuine issue of material fact exists with respect to the penalty. An accelerated decision under Rule 22.20 is comparable to the summary judgment process under Federal Rule of Civil Procedure 56(c). *In re CWM Chemical Services, Inc., Chemical Waste Management, Inc & Waste Management, Inc.*, TSCA App. No 93-1, 1995 TSCA LEXIS 10 (EAB, May 5, 1995). The initial burden is on the movant for accelerated decision, or summary judgment, to provide the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Complainant has submitted to Respondent, and filed in the record of this case, prehearing documents, a memorandum in support of its Motion, and an affidavit of Molly Magoon, the EPA inspector and Environmental Protection Specialist who conducted the inspection of Respondent's facility which led to the filing of the Complaint. In those documents, Complainant has provided a basis for its Motion and supported, in detail, its position as to the proposed penalty. The documents do not show any material inconsistencies, and thus Complainant has carried its initial burden as to its Motion.

The burden thus shifts to Respondent to show that there is a genuine dispute of material fact. The only document filed in this proceeding with which Respondent has contested the penalty is the Answer to the Complaint. The statements in the Answer which could be taken as relevant to the penalty are as follows:

> Fuel was bought from outside sources.
>
> * * *
>
> . . . how can our drivers know of the hi sulfur level if there was one, when filling at a gas station.
>
> * * *
>
> Lyons disputes the proposed civil penalty and strongly believes if investigated thoroughly, that the EPA would realize that the gravity of the violations is not determinable due to the trucks they accused us of misfueling were not even being used. We also invite the EPA to look at our receipts to prove to them there is no economic benefit or savings to Lyons and we also urge the EPA to examine our past record.

In order to establish that an oral hearing is necessary, or to defeat a motion for accelerated decision, the party must raise an issue that is material, *i.e.*, that it might affect the outcome of the proceeding under governing law, and the party "must demonstrate that this dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence." *In re Green Thumb Nursery, Inc.*, slip op. at 16 (emphasis added) (Penalty assessment affirmed where respondent did not allege what evidence it would have produced at an oral hearing that it could not otherwise have produced, or how that evidence could have changed the result); *see also,* earlier ruling in this proceeding, Order Granting Complainant's Motion for

Accelerated Decision as to Liability, dated October 20, 1997, and cases cited therein.

Despite more than ample opportunities to produce documents to support its position, Respondent has failed to do so. Respondent also has not pointed to any documents presented by Complainant in support of its case. With regard to Respondent's allegations that it bought fuel at outside sources, that its drivers did not know of the sulfur content, and that its trucks were not being used, Respondent has not referred to or produced any proposed witnesses or documents in support of those allegations. Respondent's Answer indicates an intent to present its receipts for fuel, but mere intent to produce receipts, without specifying more, does not amount to referencing evidence in the record or producing probative evidence. Mere promises to produce admissible evidence at trial will not defeat a properly supported motion for summary judgment. *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 49 (1st Cir. 1990). As stated in the Motion (at 12), Complainant has not added into the penalty calculated any sum for economic benefit or savings, and therefore no genuine dispute arises from Respondent's defense that there was no such benefit or savings. As to Respondent's past record, there is no genuine issue of fact, as Complainant concedes that Respondent has no known history of prior violations. (Motion at 14).

Therefore, it is concluded that there are no genuine issues of material fact with regard to the penalty. The next question is whether the proposed penalty of $4,500 is appropriate in the circumstances of this case, under relevant statutory and agency penalty guidelines.

III. THE PENALTY

The Clean Air Act provides at Section 211(d)(1), 42 U.S.C. § 7545(d), that "[a]ny person who violates subsection . . . (g) . . . of this section . . . shall be liable to the United States for a civil penalty of not more than the sum of $25,000 for every day of such violation and the amount of economic benefit, or savings resulting from the violation. . . . Civil penalties shall be assessed in accordance with subsections (b) and (c) of section 7524 of this title." Section 205(c)(2) of the CAA, 42 U.S.C. § 7524(c)(2), provides as follows with respect to administrative assessment of penalties,

In determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account the gravity of the violations, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require.

EPA has issued a penalty policy which applies these statutory factors, entitled "Interim Diesel Civil Penalty Policy," dated February 8, 1994 (Penalty Policy) (Complainant's Prehearing Exchange, Exhibit 12). The statutory factors, and EPA's Penalty Policy, are considered in the assessment of a penalty as discussed below.

In general, according to Complainant, the use in motor vehicles of diesel fuel which contains high levels of sulfur causes more emissions into the air of small particulate matter than diesel fuel with lower levels of sulfur. Increases in small particulate matter in the air affects human health by increasing lung problems and susceptibility to respiratory infection, such as pneumonia, aggravation of acute and chronic bronchitis, and asthma, and affects the environment by impairing visibility (Motion, Attachment 2, Affidavit of Molly Magoon, dated December 24, 1997, at 4).

According to the Penalty Policy, the gravity of the violation is generally associated with the economic benefit or savings from the violation, which depends upon the number of gallons of diesel fuel at issue (Penalty Policy at 2, 5). Where the number of gallons is very small, however, Table 3 in the Penalty Policy is used to calculate a "gravity-based" penalty (Id.) Complainant computed the proposed penalty using Table 3, because the amount of diesel fuel in the three trucks was not sufficient to result in a significant economic benefit or savings to Respondent

over using fuel in compliance with the statute (Motion at 12).

Table 3 in the Penalty Policy provides a table of penalties reflecting the following statutory factors: the level of sulfur content in the fuel at issue, the number of prior violations, and the size of the respondent's business (Penalty Policy at 6, Table 3).

The diesel fuel in Respondent's trucks was found to contain two to five times over the 0.05 standard, specifically 0.0931, 0.2603, and 0.1028 percent of sulfur. Affidavit of Molly Magoon, ¶ 6; Complainant's Prehearing Exchange, Exhibits 3, 4. As noted above, Respondent has no known prior violations (Affidavit of Molly Magoon at 3).

The Penalty Policy considers the size of a business according to the gross income for the prior fiscal year. A Dunn and Bradstreet report dated August 31, 1996 shows that Respondent's gross sales were $4,446,240. Complainant's Prehearing Exchange, Exhibit 11; Affidavit of Molly Magoon ¶ 8. Table 3 of the Penalty Policy provides that businesses with gross income between $1,000,001 to $10,000,000 are in Category II.

Table 3 of the Penalty Policy provides a gravity-based penalty of $1,500 for a violation for which the violator has no prior violations, the sulfur amount is between 0.0550 and 0.0999, and the business size is Category II. Because Respondent introduced high-sulfur fuel into three motor vehicles, there are three violations of Section 211(g) of the Clean Air Act.

The gravity-based penalty may be adjusted to account for the other statutory factors, according to the Penalty Policy. EPA inspector Molly Magoon stated in her Affidavit (at 2) that at the end of the inspection, she informed Respondent of the violations and suggested immediate remedial action such as removing and replacing the high sulfur diesel fuel from the trucks. Respondent has not asserted or presented any evidence that it has taken any remedial actions, such as removing the high-sulfur fuel from the trucks. Respondent also has not asserted any inability to continue in business as a result of being assessed a penalty of $4,500. Facts relevant to those factors would be particularly within the control of the Respondent. Where Complainant has shown that it considered those factors, and Respondent has not raised those factors in its Answer or prehearing exchange documents, it may be concluded that any objection to the penalty based upon those factors has been waived. *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 EAD 529, 542 (EAB, Remand Order, October 20, 1994). Moreover, the Dunn and Bradstreet Report showing Respondent's gross sales of over $4.4 million is a sharp contrast with a penalty of $4,500. Therefore, no adjustment will be made to the penalty on the basis of those factors.

As to "other factors as justice may require," Complainant in its Motion stated that Respondent verbally asserted to Ms. Magoon and Counsel for Complainant that tax agencies have already fined Respondent for tax liabilities involving the same diesel fuel cited in the Complaint. Motion at 17. However, despite repeated requests by Complainant, Respondent has not substantiated the payment of such tax fines. Id. Even assuming *arguendo* that Respondent has paid such fines, I do not find such payments to warrant the decreasing of the gravity-based penalty on the basis of "other factors as justice may require."

Accordingly, it is concluded that a penalty of $1,500 for each of three violations of Section 211(g) of the CAA, for a total penalty of $4,500, is appropriate in the circumstances of this case. Complainant is entitled to judgment as a matter of law as to the penalty assessment for the three violations of Section 211(g) of the Clean Air Act. Because there are no remaining issues in this proceeding, this Order constitutes the Initial Decision in this matter.

**ORDER**

1. Complainant's Motion for Accelerated Decision as to Penalty is **GRANTED** and Respondent is hereby assessed a civil penalty of $4,500 for the three violations found in this case.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this Order by submitting a certified or cashier's check in the amount of $4,500, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 1
P.O. Box 360197M
Pittsburgh, PA 15251

3. A transmittal letter identifying the case name and the EPA docket number, as well as Respondent's name and address must accompany the check. In addition, a copy of the check and the transmittal letter shall be delivered or mailed to the Regional Hearing Clerk at the following address:

U.S. Environmental Protection Agency
Region I Hearing Clerk
Mailcode RCH
J.F. Kennedy Federal Building
Boston, MA 02203

4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of the Order, interest on the penalty may be assessed.

5. **Pursuant to 40 C.F.R. § 22.30, Respondent may appeal this initial decision to the Environmental Appeals Board (EAB). An appeal must be filed within twenty (20) days of service of this decision, as provided in 40 C.F.R. § 22.30. An initial decision becomes the final order of the EAB forty-five (45) days after service of the decision unless it is appealed to or reviewed by the EAB *sua sponte*.**

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Susan L. Biro

Chief Administrative Law Judge

Dated: January 21, 1998
Washington D.C.

1. Order Granting Complainant's Motion for Accelerated Decision as to Liability, dated October 20, 1997.

2. The previously set deadline of October 31, 1997 for pre-trial motions was waived by telephonic discussion with each of the parties.

3. No motion for leave to present evidence has been received either.