UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Arizona Environmental Container Corporation,	)	**Docket No. EPCRA-09-2007-0028**
	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION ON NOTICE OF NONCOMPLIANCE AND PENALTY

I. Procedural Background

On September 27, 2007, the United States Environmental Protection Agency Region IX ("Complainant") filed a one-count Complaint seeking a $21,100 penalty against Arizona Environmental Container Corporation ("Respondent") for violating Section 313 of the Emergency Response and Community Right-to-Know Act ("EPCRA" or "the Act"), 42 U.S.C. § 11023, and the implementing regulations at 40 C.F.R. Part 372. Specifically, the Complaint charges Respondent with failure to timely submit to EPA and the State of Arizona a toxic chemical release form, a "Form R," reporting the styrene that it processed in the year 2005. Respondent filed an Answer on October 30, 2007, admitting that it processed styrene in excess of the reporting threshold of 25,000 pounds in 2005, but denying that it failed to timely submit a Form R. The parties then engaged in Alternative Dispute Resolution, but were not successful in settling this matter. Subsequently, the parties filed prehearing exchanges.

After cross motions for accelerated decision and other motions were filed by the parties, an Order was issued on August 12, 2008, granting Respondent's Motion for Change of Venue, denying Respondent's Motion for Accelerated Decision, granting Complainant's Motion for Accelerated Decision as to Liability, and granting in part and denying in part Respondent's Motion to Strike and Complainant's Motion in Limine. The issue remaining in this proceeding is the amount of penalty to assess for the violation.

On August 29, 2008, Respondent filed a Motion for Accelerated Decision on Notice of Non-Compliance and Penalty ("Motion"). Respondent filed an Addendum to Prehearing Exchange on September 10, 2008.[1] Complainant filed a Response to Respondent's Motion on

[1] Respondent's Addendum to Prehearing Exchange was not accompanied by a motion to supplement the prehearing exchange, but Respondent states in the introductory paragraph that the evidence was "recently uncovered," and thus, considering also that Respondent is appearing *pro*

(continued...)

September 18, 2008, and Addendum thereto on September 22. On October 2, 2008, Respondent submitted a Reply to the Response.

II. Statutory Background

EPCRA Section 313(a) provides that:

> The owner or operator of a facility subject to the requirements of this section[2] shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) . . . that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) . . . 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 in pertinent part 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) . . . in accordance with the instructions referred to in subpart E of this part.

40 C.F.R. § 372.30(a).

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[1](...continued)
se, suffices as a reasonable basis for submitting the supplemental documents. Accordingly, the Addendum to Prehearing Exchange is hereby accepted as a supplement to Respondent's Prehearing Exchange.

[2] In order to fall under the purview of Section 313 of EPCRA, a facility must have ten or more full-time employees, fall within Standard Industrial Classification Codes 20 through 39, and have manufactured, processed or used more than the threshold amount of a toxic chemical listed in 40 C.F.R. § 371.65 during the relevant year. *See*, 42 U.S.C. § 11023(b)(1)(A); 40 C.F.R. § 372.30.

With regard to penalties, the Act at Section 325(c) provides that:

> (1) Any person who violates any requirement of section . . . 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.
>
> * * *
>
> (3) Each day a violation . . . continues shall, for purposes of this subsection, constitute a separate violation.

42 U.S.C. § 11045(c).

III. Undisputed Facts

Respondent admits that during calendar year 2005 it processed approximately 731,661 pounds of styrene, which is a toxic chemical listed under 40 C.F.R. § 372.65, and that, as a result, it was required to submit a Form R in regard thereto to EPA and to the State of Arizona on or before July 1, 2006. Answer at 1, Stip. ¶¶ 5-7.

Respondent's consultant, Ole Solberg, prepared a Form R for styrene for reporting year 2005 on Respondent's behalf. Stip. ¶ 10. Respondent submitted timely a signed Form R in hard copy form to the State of Arizona. *See*, Order, dated August 12, 2008, at 10; Respondent's Motion to Strike, Exhibits 13-17. On June 20, 2006, 10 days prior to the July 1 filing deadline, Mr. Solberg completed and submitted an electronic Form R to EPA's contractor, identified in email correspondence as "CDX TRIME Admin," for electronic certification by Respondent and submittal to EPA. Stip. ¶ 12. EPA implemented software referred to as "TRI Made Easy" or "TRI-ME" with which facilities may submit reports to the Toxics Release Inventory through the internet via EPA's Central Data Exchange, referred to as "CDX." Complainant's Prehearing Exchange ("C's PHE") Exhibit 5; Respondent's Prehearing Exchange (R's PHE"), Exhibit 2. 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. The Toxic Chemical Release Inventory Reporting Forms 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," but 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.

Unfortunately, Mr. Solberg provided CDX TRIME Admin with an incorrect e-mail address for Mr. Sullivan in the submission, and as a result, Mr. Sullivan did not 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. 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.

Respondent submitted a certified hard copy of the Form R for styrene for 2005 by mail on June 12, 2007.

IV. Arguments of the Parties

Respondent in its Motion requests "[a] determination as to the magnitude of the violation in this case." Respondent asserts that a Notice of Noncompliance ("NON") is the appropriate response for the alleged violation. Respondent points to the statement in the Enforcement Response Policy for Section 313 of EPCRA (August 10, 1992)("ERP") that a NON "is the appropriate response for certain errors on Form R reports . . . which prevent the information on the Form R from being entered into EPA's database." ERP at 4. Respondent also points out the ERP's provision that one of the circumstances generally warranting a NON is "Magnetic media submissions which cannot be processed." ERP at 3. Respondent notes that the ERP was written prior to implementation of the TRI-ME program. Respondent asserts that its Form R for 2005 would have been timely submitted but for a technical problem that prevented the data on the Form R from being entered into EPA's database, which according to the ERP warrants issuance of a NON. Accordingly, Respondent requests an accelerated decision on the penalty.

Complainant opposes the Motion on the basis that the decision as to whether to issue a NON or a civil administrative complaint seeking a penalty is not a matter of law but rather a matter of Complainant's enforcement discretion. Citing, *inter alia, Wyoming Refining Company*, 2 E.A.D. 221, 223 (EAB 1986) and *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985), Complainant argues that courts have shown a reluctance to inquire whether a particular enforcement action fits an agency's enforcement policies "unless limitations on this discretion have been defined by the applicable substantive statute," and that EPCRA does not contain any limitation on EPA's enforcement discretion. Response at 1-2.

Complainant contends that according to the ERP, the issuance of a NON is appropriate when a Form R has been submitted in a timely manner but contains errors that have been detected by the Agency during the data entry process. Response at 3. Complainant asserts that this involves "data from Form Rs that the Agency received in a timely manner but cannot input because of error by the filer" and are therefore distinguishable from the instant case where EPA did not receive Respondent's Form R for 2005 until almost a year after it was due "because the electronic reporting year 2005 Form R was never sent to EPA and a hard copy was not filed with EPA until June 12, 2007." Response at 3. Complainant points out that the ERP provides that a

complaint for penalty assessment "is the appropriate enforcement response for the failure to report in a timely manner." *Id.* "[O]ne of Congress' primary objectives was to provide the public with information on releases of toxic chemicals in their communities," but, Complainant asserts, "EPA cannot process revisions to the TRI database on a continuing basis without significantly delaying the public availability of the data." *Id.* at 3-4. Consequently, submissions after the July 1 deadline "'have defeated the purpose of EPCRA Section 313, which is to make data available to the states and the public annually and in a timely manner.'" *Id.* at 3-4 (quoting ERP at 5).

In addition, Complainant contends that Respondent submitted the Form R 344 days late, failed to respond to frequent and repeated notices communicating that the 2005 Form R had not been filed, failed to respond when an EPA official spoke with Respondent's General Manager, Mark Rackley, in February 2007, and never explained why it took so long to file the Form R. Complainant argues that any problem with the electronic filing process "never relieved [Respondent] of its obligation to file the . . . Form R as expeditiously as possible or take all reasonable measures to do so." Response at 6. Complainant submits an Affidavit of Ole Solberg, indicating his actions in following up with Respondent regarding certification of the Form R, admitting he sent the wrong email address of Todd Sullivan to CDX, and stating that "[a]t one point, [Respondent's] General Manager, Mark Rackley, informed me that he and Todd Sullivan [Respondent's certifying official] had tried to certify and could not get through but he never described the problem they were having nor did he ask for my assistance to resolve it." Response, Exhibit 2. Complainant submits an Affidavit of Nancy Sockabasin of EPA, indicating, *inter alia,* that on February 14, 2007, she spoke with Mr. Rackley by phone and left messages for him thereafter, but was informed on May 1, 2007 that he no longer worked for Respondent, and the next day Mr. Solberg called and told her that he would have Respondent submit the Form R. Response (Addendum), Exhibit 3. Complainant asserts that the emails from CDX forwarded by Mr. Solberg contained a CDX Helpline telephone number, "yet there is no indication that Respondent ever called the Helpline." Response at 6 and Exhibit 4. Complainant argues that Respondent could have printed the electronic Form R sent on June 20, 2006 by Mr. Solberg and submitted a signed hard copy to EPA.

Complainant concludes that given the statute, ERP, nature of the violation and the facts above, filing a complaint rather than a NON was an appropriate exercise of its enforcement discretion.

In its Reply, Respondent asserts that after its Form R data was submitted to EPA's TRI-ME program, Respondent made at least two attempts to certify the Form R, and "Respondent fully believed it **had** certified the timely submitted data." Reply at 1-2; *see*, Affidavit of Todd Sullivan, attached to Respondent's Response to Motion for Accelerated Decision, dated July 14, 2008. Respondent points out that only the first email response from CDX, which was dated June 20, 2006 and sent from the CDX Help Desk to Mr. Solberg and to the wrong email address for Mr. Sullivan, stated that "This submission will not be sent to EPA until it is certified." Reply at 2, quoting C's PHE Exhibit 3. Respondent points out that the subsequent emails, sent from CDX TRIME Admin to the same addressees, did not contain that statement. *See*, C's PHE Exhibit 4.

Respondent asserts that because it believed that the submission was timely certified, "these robotically generated emails were viewed simply as a computer glitch." Reply at 2. Respondent argues that a computer-generated email does not hold the same authority as a formal letter from EPA, and that the subject line on the email "FYI" does not convey the magnitude of the problem. Reply at 4, 5.

Respondent points out that Ms. Sockabasin's Affidavit indicates that EPA did not look into Respondent's Form R until February 2007, two months after the Form R data was cancelled by EPA's contractor; and that rather than issuing a NON, she merely called the facility and when Todd Sullivan was not available, she only left messages for Mr. Rackley, Respondent's production manager, and not for Mr. Sullivan, who is the certifying official. Reply at 2.

Respondent disagrees with Complainant's assertion that the Form R could have been sent in hard copy form, pointing out that in the document entitled "How to Submit Form R(s) and or Form A(s)," EPA specifically instructed those who choose to submit via internet: "do not send duplicate paper or diskette copies of the reports." Reply at 3, citing C's PHE Exhibit 5. Respondent argues that there is no reason to believe that it wilfully refused to certify the data. Respondent believes that the Form R electronic certifying process in 2005 did not comply with the Cross Media Electronic Reporting Rule (CROMERR), citing Respondent's Exhibit 29. Respondent asserts that EPA no longer uses the TRI-ME system. Reply at 5.

Respondent concludes that the NON is the appropriate response to the facts of this case, which are, as stated in the ERP, "errors that prevent the information on the Form R from being entered into EPA's database." Reply at 4. Respondent queries, if the data had been sent in paper format, whether EPA would have relied on an automated email system to advise of missing certification letter, or voicemail messages once a month with "some guy" at the facility, or would EPA have issued a NON?

V. Standard 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.

40 C.F.R. § 22.20(a).

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), *aff'd sub nom., Puerto Rico Sewer Authority v. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). 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).

The moving party has the burden of showing there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A "material" issue is one which "affects the outcome of the suit," *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1985), or "needs to be resolved before the related legal issues can be decided." *Mack v. Great Atlantic and Pacific Tea Co.,* 871 F.2d 179, 181 (1st Cir. 1989). A dispute is "genuine" if "there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of truth at trial." *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 48 (1st Cir. 1990). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company,* 8 E.A.D. 496, 502 (EAB 1999); *Green Thumb Nursery,* 6 E.A.D. 782, 793 (EAB 1997). The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990); *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 (10th 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).

VI. Discussion and Conclusion

Applying the standard for accelerated decision, the question presented is whether Respondent has shown that there are no genuine issues of material fact *and* that it is entitled to judgment as a matter of law on the penalty. The specific penalty Respondent claims he is legally entitled to is an NON based upon the language of the ERP.

Putting aside the criterion of whether there is any genuine issue of material fact as to penalty, the initial question is whether Respondent may be entitled to judgment *as a matter of law* based on the NON provisions in the ERP. It is noted that these provisions are not drawn from any statutory language. The relevant provisions of EPCRA, Sections 313(a) and 325, require a toxic chemical release form to be submitted to EPA and the State by July 1 and provide that a person who violates this requirement "*shall be* liable to the United States for *a civil penalty* in an *amount* not to exceed $25,000." 42 U.S.C. § 11045(c)(1)(emphasis added). The word "shall" has been held to generally impose a mandatory, rather than discretionary, obligation. *Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 513 (EAB 2004) (*citing Farmer's & Merchants' Bank v. Fed. Reserve Bank*, 262 U.S. 649, 662-63 (1923)). According to Webster's II

New Riverside University Dictionary 102 (1984), "amount" means a "number" or "sum" or "quantity." Consequently, the statute does not appear to provide for the imposition upon violators of a sanction other than a civil *monetary* penalty. Further, it is noted that neither the statute nor the implementing regulations provide any penalty assessment criteria which could provide a basis for reducing or eliminating a civil monetary penalty.

Thus, while EPA on its own initiative set out guidelines in the ERP for penalty assessments and enforcement alternatives, such guidelines are not "laws" which are binding or which can provide any legal defense to a penalty assessment. Therefore, accelerated decision cannot be rendered "as a matter of law" as to Respondent's entitlement to an NON based on the ERP's guidelines as to enforcement alternatives.

Moreover, while the ERP lists the event of "[m]agnetic media submissions which cannot be processed" in the "Summary of Circumstances *Generally Warranting* a NON," (ERP at 3 (italics added)), such language also indicates by inference that there can be situations in which such event occurs which do not warrant a NON but instead warrant a complaint for a penalty, and that it is within EPA's discretion to choose the enforcement response it deems most appropriate under the particular circumstances. The Agency's exercise of discretion under its guidelines generally is not a matter of law. *Cf.*, *Wyoming Refining Company*, 2 E.A.D. 221, 223 (CJO 1986)("The decision whether to issue a warning or a complaint [as provided under the Federal Insecticide, Fungicide and Rodenticide Act, "FIFRA"] is a matter within complainant's enforcement discretion."); *Chempace Corporation*, FIFRA Appeals No. 99-2 & 99-3, 2000 EPA App. LEXIS 15 (EAB, May 18, 2000)("absent specific statutory guidance that constrains discretion, such prosecutorial choices are ordinarily matters within the prerogative of responsible enforcement officials").

However, the question of whether the Agency *abused* its discretion may be a matter of law. *See, Chempace, supra* ("the decision to assess a penalty or issue a warning [under FIFRA] is only subject to review for clear abuse."); *Wyoming Refining, supra*. Complainant's citation to *Heckler v. Chaney* does not indicate the contrary, as it held that an agency's decision *not* to enforce is generally committed to the agency's absolute discretion, but when an agency *does* act to enforce, that action may be reviewed, at least as to whether the agency exceeded its statutory power. 470 U.S. at 832. The Environmental Appeals Board ("EAB") has stated that "the Presiding Officer acts to ensure that the Agency's penalty assessment satisfies the Administrative Procedure Act's 'abuse of discretion' standard, 5 U.S.C. §706(2), i.e. that the assessment is neither 'unwarranted in law' nor 'without sufficient justification in fact,'" *Employers Insurance of Wausau and Group Eight Technology*, 6 E.A.D. 735, 1997 EPA App. 1 * 52 (EAB 1997). Respondent has not specifically alleged an abuse of discretion, Complainant has merely focused on Respondent's submittal of the hard copy of the Form R on June 12, 2007, and the facts as to Complainant's decision to issue the Complaint rather than a NON have not been fully developed. The facts are not sufficiently developed at this point in the proceeding to determine whether the Complainant abused its discretion in issuing the Complaint.

An alternative related issue presented by Respondent's Motion is whether a "civil penalty" in the amount of "zero" may be assessed as a matter of law based on the undisputed facts of this case. The EAB has recognized that "sometimes only a zero penalty can be justified." *Green Thumb Nursery, Inc.,* 6 E.A.D. 782 n. 35 (EAB 1997)(zero penalty is not justified where there was a complete lack of due care by the respondent, and its failure to register a pesticide can cause significant harm to the national pesticide product registration program), citing *Rollins Environmental Services, Inc.,* 937 F.2d 649 (D.C. Cir. 1991)(zero penalty is justified where respondent's interpretation of regulation was logically consistent with language of regulation and EPA had internal disagreements over the interpretation).

The facts here are not similar to either *Green Thumb* or *Rollins*, but the D.C. Circuit's belief expressed in *Rollins* - that a zero penalty was warranted where "EPA's misleading imprecision, not [respondent's] lack of acuity, led the company astray," may be relevant. *Rollins,* 937 F.2d at 653. In the present case, Respondent was arguably "led astray" by EPA's "misleading" or imprecise" processes for filing electronic Form Rs as part of an extended chain of circumstances and events: (a) Respondent's consultant prepared an electronic Form R for Respondent for the first time rather than a hard copy; (b) Respondent's consultant provided EPA with the wrong email address for Mr. Sullivan so that he did not receive any emails from CDX; (c) electronic Form Rs are submitted to EPA's contractor CDX and are not received by EPA unless certified electronically; (d) Respondent's alleged attempts to certify electronically were not successful; (e) EPA provided instructions not to send a Form R hard copy if filing by internet; (f) the Toxic Chemical Release Inventory Reporting Forms and Instruction Book (Revised 2005 version) did not provide instruction on how to certify electronically; (g) CDX emails were forwarded to Respondent from its consultant on only two occasions; (h) the text of the CDX emails did not describe the process such that certifying officials would immediately know whether the certification was successful or not; and finally, (i) CDX deleted Respondent's Form R for lack of certification, as if the Form R was never filed.

However, these facts do not lead to the conclusion that *only* imposition of a zero penalty can be justified as a matter of law in this case. Admittedly the facts here are somewhat analogous to "circumstances generally warranting a NON," namely "magnetic media submissions which cannot be processed" and "certain errors on Form R reports detected by the Agency . . . which prevent the Form R from being entered into EPA's database." ERP at 3-4. It is also noted that if Respondent's Form R had been submitted on a diskette but could not be processed due to a technical error in the certification portion, the ERP indicates that a NON would be the appropriate enforcement response. Still, on Respondent's Motion for Accelerated Decision, the facts must be viewed in a light most favorable to Complainant and all reasonable inferences drawn in its favor. As such, there are facts of record from which one *could infer* that it was actually Respondent's "lack of acuity" in whole or in part which "led it astray" and as such a zero penalty would not be appropriate. Moreover, there may be other facts relevant to the penalty assessment which have not yet been fully developed as there are unexplained gaps in the materials presented. For example, facts as to the availability of guidance and assistance for electronic certification, the extent to which Respondent should have known that its attempts at certification were not successful, and the extent of attempts made by Respondent and/or its

consultant to follow through on the certification process, may be pertinent to material issues regarding the penalty. For this reason and others, it has been observed that accelerated decision "as to the amount of penalty (or whether a penalty will be assessed for violations) . . . is seldom granted." *MRM Trucking*, EPA Docket No. MWTA-II-89-0102, 1993 EPA ALJ LEXIS 387 * 4 (ALJ, Aug. 18, 1993).

Therefore, at this point, it cannot be concluded that there are no genuine issues of material fact such that Respondent is entitled to judgment as a matter of law on the penalty.

Finally, the circumstances of this case suggest that one or both parties may have considered whether the additional expenditure of the substantial amounts of time and money required to hold an oral evidentiary hearing is warranted, although to date, no an amicable resolution avoiding such expenditures has come to fruition. As such, this Tribunal hereby offers the parties another opportunity to participate in Alternative Dispute Resolution ("ADR"), prior to hearing. If the parties are both agreeable, an Administrative Law Judge will be again appointed to act as a neutral and to conduct ADR in whatever form the parties' agree to, that is ,either mediation, early neutral evaluation, or facilitation, in an effort to expeditiously and economically amicably resolve the matter. Failing that, an oral evidentiary hearing will be scheduled and held in this matter in the immediate future.

ORDER

1. Respondent's Motion for Accelerated Decision on Notice of Noncompliance and Penalty is **DENIED.**

2. Complainant shall submit a status report as to whether the parties have agreed to engage in Alternative Dispute Resolution on or before **October 28, 2008.**

3. If the parties do not agree to engage in Alternative Dispute Resolution, this matter will be reset for hearing.

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 16, 2008
Washington, D.C.