BEFORE
THE REGIONAL ADMINISTRATOR
REGION 10
U.S. ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: EMPIRE LUMBER CO., Respondent.	Docket No. CAA-10-2012-0054 RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Respondent Empire Lumber Co., dba Kamiah Mill (Empire) moves dismiss this matter for failure to state a claim for which relief may be granted in accordance with applicable law, and requests that the this enforcement action by Region 10 of the U.S. Environmental Protection Agency (EPA) be found to be inconsistent with applicable substantive and procedural law, and therefore dismissed in its entirety as null and void.

I. LEGAL STANDARD

The Consolidated Rules of Practice, which govern this proceeding are set out in 40 CFR Part 22 (Rules). Those Rules look to the Federal Rules of Civil Procedure for guidance and in the context of this proceeding, Fed. R. Civ. P. 12(b)(6) requires that, if EPA has failed to state a claim, for which relief may be granted, Empire should be granted the relief it seeks. Here, Empire seeks the dismissal, with prejudice and

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without leave to amend, of the Complaint and Notice of Opportunity for Hearing filed by EPA on April 16, 2012 and its attorney fees as a prevailing party.

In resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations, including mixed questions of law and fact, as true and draw all reasonable inferences therefrom in the complainant's favor. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165, 357 U.S. App. D.C. 35 (D.C. Cir. 2003); *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). However, the Supreme Court has established that, "[t]o survive a motion to dismiss, a complaint must . . . state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citation omitted) (internal quotation marks omitted). In other words, the moving party must show that the complainant can prove no facts entitling it to relief. *In re: Argonics, Inc.*,CWA 6-1631-99 (2003), 2003 EPA RJO LEXIS 11,8 (EPA RJO 2003)(citations omitted). See also *D.C. Oil, Inc. v. ExxonMobil Oil Corp.*, 746 F. Supp. 2d 152, 155-156 (D.D.C. 2010).

Simply put, for the reasons set out below, and in this instance, EPA has failed to state a claim upon which relief can be granted.

EPA is seeking civil penalties from Empire under the Clean Air Act U.S.C. §309 et seq. (CWA) for Empire's alleged violations of the Federal Air Rules for Indian Reservations in Idaho, Oregon and Washington, 70 C.F.R. Part 49, (FARR). However, the FARR requirements are currently neither applicable, nor binding on Empire. EPA does have the authority to make the FARR requirements binding, but, in this instance,

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neglected to undertake the proper administrative actions to do so. The undisputed facts support the conclusion that the FARR requirements have not been incorporated into or made binding on Empire, as part of the Part 71 air operating permit (Air Permit), EPA issued to Empire, pursuant to Title V of the Clean Air Act (CAA) on August 8, 2001.

Therefore, the sole legal issue presented is:

> Whether EPA may amend Empire's Air Permit by the unilateral incorporation of subsequently enacted rules and thereafter seek to impose those rules, as enforceable permit conditions against Empire, without first re-opening or reissuing Empire's Air Permit?

The question is not whether EPA has the authority to include the FARR requirements as conditions in Empire's Air Permit. Empire concedes that EPA does have that authority however, before EPA may do so, the Agency must first either re-open Empire's current Air Permit to incorporate the FARR requirements, or issue a renewal air permit to Empire that includes the FARR requirements.[1] Here, the uncontested facts show that EPA has ignored its own legislative history and taken neither administrative action.[2] When an administrative agency acts outside the scope of its delegated authority it acts are *ultra vires* and void. 5 U.S.C.S. § 706(2)(C).

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[1] *See* 70 Fed.Reg.18,084 (April 8, 2005).

[2] See, *McAllister*, "EPA Promulgates New Air Rules for Northwest Indian Reservations," at page 9, 23-27 of the WSBA Indian Law Section Newsletter (January, 2006). A copy of this article is attached as Exhibit B.

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II. FACTUAL BACKGROUND

A. Empire's Title V Air Permit Contains No Requirements Related to Opacity Limitations or Visible Emissions Monitoring

Empire is a family owned business and its Kamiah Mill, the subject of EPA's enforcement action, is located in wholly within the Nez Perce Indian Reservation in Lewis County, Idaho, on land leased from Nez Perce Tribal members. At the Kamiah Mill facility, green lumber is dried in kilns and is then processed into dimensional lumber. A portion of the wood by-products generated from the lumber processing equipment is transferred through a pneumatic air pressure system to a state-of-the-art wood gasification burner where the wood waste is used as fuel to generate steam for the kilns. The rest of the wood by-products is stored and sold to other third parties. Emissions from the wood gasification burner are subject to the operating requirements of Empire's Title V Clean Air Act Permit (Permit, Section III.)

Empire submitted its initial application to EPA for a Title V Air Permit for the Kamiah Mill facility in January 2001.[3] EPA subsequently issued Title V Air Permit number R10T5-ID-00-02 to Empire on August 8, 2001 (Air Permit). The Air Permit was issued for a five year term and the expiration date was August 8, 2006.[4]

The Air Permit states that Empire is "authorized to operate air emission units and to conduct other air pollutant emitting activities in accordance with the permit

[3] EPA's authority to issue operating permits to major stationary sources located in Indian country under Title V of the Act, pursuant to regulations at 40 CFR part 71, was affirmed in *State of Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001).

[4] As discussed below, the Air Permit has been administratively extended by EPA.

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conditions listed in this permit." (Permit, p. 1). Under Section III. Requirements for Specific Units, the Permit lists the regulatory requirements for operation of the wood gasification burner (the only regulated air emission source at the Empire facility), which included recordkeeping and reporting requirements related to the wood gasification burner.

Section IV of the Air Permit entitled "Facility-Wide Requirements" includes the following conditions: (1) chemical accident prevention program (*Id.,* Section IV.A.); (2) stratospheric ozone and climate protection (*Id.,* Section IV.B.); and, (3) asbestos removal and disposal (*Id.,* Section IV.C.). The Air Permit also includes general testing, recordkeeping and reporting requirements. ((*Id.,* Section V.) However, there are no opacity limitations or requirements for visible emissions monitoring contained in the Air Permit.

Pursuant to Section X.I.(a)(i), the Air Permit expires five years from the date of issuance on August 8, 2006. Notwithstanding the expiration date, Subsection (c) of the Air Permit provides that the "terms and conditions of the permit, shall remain in effect until the renewal permit is issued or denied" by EPA. (Permit, p. 23-24).

In June of 2005, Empire submitted a timely application for renewal of its Air Permit. As of today, over seven years after the renewal was submitted and six years after the Air Permit expired, EPA has still not acted on Empire's pending Air Permit application. Thus, under the terms of the Air Permit, and EPA regulation 40 CFR

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§ 71.5(a)(2), *the Permit has been administratively continued with no modifications*, i.e. no addition of new conditions, and no change to the original conditions.

Empire did not anticipate that EPA's issuance of the renewal permit would be delayed for over seven years. Nevertheless, Empire is entitled to rely on Section XI(a)(i) of the Air Permit extending the term of the current Air Permit. EPA's inaction in the processing of Empire's permit renewal perpetuates the *status quo*. EPA has the means to include the FARR either in the current Air Permit or in the new one, but such action must be done in accordance with applicable substantive and procedural law.[5] To date, EPA has not acted to make the FARR requirements legally enforceable against Empire.[6]

It should be noted that, with the exception of one minor incident in 2006,[7] Empire has been in full and complete compliance with the terms and conditions of the

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[5] EPA can reopen the Air Permit for cause, as allowed under Section X.F. of the Air Permit and 40 CFR § 71.7(f), to add new requirements, such as the FARR requirements.

[6] EPA Region 10's internal guidance document entitled, Framework for Implementation of the Federal Air Rules for Reservations (FARR) (February 2005), specifically address how EPA will incorporate the FARR requirements into existing Title V Permits. Section III.M. states that "[p]romulagation of the FARR will require the reopening of operating permits which Region 10 has already issued under CAA Title V and 40 CFR Part 71 so that the permits include the applicable new requirements." A copy of the document is attached as Exhibit C.

[7] In 2006, Empire did receive a Notice of Violation related to its wood gasification burner. The cause of the exceedance was a one-time situation that was brought about by a structural problem with the burner. Empire took immediately action to permanently remedy the problem with the burner, and it has no similar issues since.

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CAA and its Air Permit for over the past 11 years.[8] In light of Empire's record of compliance, the vigor of EPA's apparent rush to judgment, in this case, without due process of law, appears to be even more abusive and arbitrary.

B. EPA Disregarded Its Own Process for Incorporating the FARR Requirements Into Existing Title V Air Permit.

On April 8, 2005, EPA promulgated a final rule establishing Federal Implementation Plans for 39 Indian reservations located in Idaho, Oregon, and Washington, pursuant to the Agency's authority under sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a). 70 Fed. Reg. 18,076. (April 8, 2005). The FARR requirements, for Indian reservations, include the Nez Perce Reservation.

As of the date that the FARR requirements came into effect, there were a number of air pollution sources (including Empire) operating within the 39 Indian reservations under existing air permits issued pursuant to Title V of the CAA and 40 CFR 71 (Part 71 Permits). The preamble to the Final FARR Rule describes how EPA intends to incorporate the FARR requirements into existing Part 71 Permits, as follows:

> Promulgation of the FARR will compel "reopening for cause" of the part 71 air operating permits that EPA has already issued on the covered reservations to include FARR requirements. The procedures for re-issuing such a permit are the same as for issuing initial and renewed permits. Because some permits will (that) have less than three years remaining on their terms, they will not need to be reopened when the FARR becomes effective, but will be updated when their term naturally expires. 70 Fed. Reg. 18,084 (April 8, 2005).

A copy of the preamble is included as Exhibit A. The preamble is consistent with the EPA's procedural rules regarding the reopening of a Part 71 permit:

[8] It is Empire's expectation that its new Air Permit will include the FARR opacity requirements.

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> Reopening for cause. (1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:
>
> (i) Additional applicable requirements under the Act become applicable to a major part 71 source with a remaining permit term of 3 or more years. Such a reopening shall be completed no later than 18 months after promulgation of the applicable requirement. *No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions have been extended pursuant to paragraph (c)(3) of this section* [which provides that all terms and conditions remain in effect if the permittee has timely submitted a complete renewal application, but EPA had failed to issue a new permit]. 40 CFR § 71.7(f). [Emphasis added].

Therefore, for those Part 71 Permits that expired on or after June 5, 2008 (three years after the effective date of the FARR), the FARR Rule anticipates that EPA will reopen those permits and modify them to incorporate the FARR requirements. However, existing permits that expired prior to June 5, 2008, were not to be reopened. Instead, the expectation is that the FARR requirements would be included in the subsequently issued renewal permits. However, in neither instance does the legislative history of the FARR contemplate EPA unilaterally amending existing Permits without due process of law.[9]

C. Empire's Proactive Voluntary Opacity Monitoring Program Is Independent of and Not Required Under Empire's Air Permit

Since 2005, Empire has taken steps to improve its operations and further limit emissions from the Kamiah Mill facility. For example, Empire has retained the assistance of a qualified air consultant to develop a program for monitoring opacity at

[9] See note 5, *supra,* and Exhibits A, B and C.

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the Kamiah Mill facility. Moreover, in anticipation of EPA's future incorporation of the FARR into its Air Permit, Empire arranged for its employee, Mark Servais, to be trained in Method 9 visual observations. In the course of his duties, from about February, 2009 through September, 2009, Mr. Servais monitored and recorded opacity readings (some of which he found to be in excess of 20%) from the facility's pneumatic blower system that transfers wood by-products from the planers to either the wood gasification burner (for fuel) or to be stored for commercial sale. Mr. Servais filed the visual emissions (VE) survey forms with the facility's compliance records, but did not notify facility management that some six- minute average opacity readings were in excess of 20%. The facility voluntary compliance program procedures were immediately revised to insure that such reporting results will promptly be brought to the attention of facility management so that necessary adjustments can be made to plant operations.

On September 15, 2009, air inspectors from the Nez Perce Tribe Environmental Restoration & Waste Management division (ERWM) conducted an annual air compliance inspection of the Kamiah Mill facility. During the inspection, one of the inspectors noted that several of the facilities visual opacity reports recorded opacity readings in excess of 20%, and the Tribal ERWM inspectors brought this information to the attention of facility manager, Mike Steiger. We understand that this was the first time that Mr. Steiger had been made aware of the periodic high opacity events. As

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noted above, Mr. Servais had filed the monitoring forms with the facility's compliance records without relaying the results to facility management.

Once management became aware of the high opacity readings, Empire immediately took corrective action to adjust flows and fine tune the pneumatic blower system to reduce visible emissions. This effort was successful, and within 60 days of being informed of the opacity issue, opacity readings at the facility were at or below 20%, and have not exceeded 20% to date. Empire has kept both EPA and the Tribal ERWM informed of its continuing voluntary efforts to adjust the blower system and to reduce opacity at the facility. As noted above, Empire also modified its opacity reading and reporting procedures so that management is now immediately notified in the event that any six minute average opacity readings were over 20%.

D. EPA Notice of Violation

Over ten months after EPA was notified by Tribal ERWM air inspectors that they had observed the over 20% opacity monitoring reports at the Kamiah Mill, EPA first sent an Information Request for facility visible emission information to Empire on June 22, 2010. Empire promptly responded. On November 10, 2010, almost 14 months after the Tribal ERWM inspection, EPA issued a Notice of Violation (NOV) to Empire in which EPA asserted that Empire was responsible for multiple violations of the FARR (40 C.F.R. § 49.124(d)(1) and 40 C.F.R. § 49.10410(b)) (visible emissions, from an air pollution source, must not exceed 20%). EPA issued the NOV to Empire due to the alleged opacity violations without first taking action to either re-open

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Empire's existing Permit to incorporate the FARR requirements or issue Empire's renewal permit with the FARR requirements. In taking such action, EPA disregarded the Federal Administrative Procedure Act and due process of law.

Thereafter, on April 16, 2012, EPA filed a Complaint and Notice of Opportunity for Hearing against Empire, captioned "In the Matter of Empire Lumber Co." (EPA Complaint). The EPA Complaint boldly asserts the following three alleged violations:

(1) That from February 2, 2009, until October 23, 2009, Respondent violated 40 C.F.R. § 49.124(d)(1) and 40 C.F.R. § 49.10410(b) at the Facility's Planer #1. ("Violation #1)

(2) That from May 15, 2009, until October 23, 2009, Respondent violated 40 C.F.R. § 49.124(d)(1) and 40 C.F.R. § 49.10410(b) at the Facility's Planer #2. ("Violation #2)

(3) That on September 25, 2010, Respondent violated 40 C.F.R. § 49.124(d)(1) and 40 C.F.R. § 49.10410(b) at the Facility's Planer #1. ("Violation #3) (Complaint, IV. Violations, p. 5-6)

The EPA Complaint seeks a significant proposed penalty, based on the three alleged violations of the FARR, in the amount of $90,200. Here again, EPA, takes a shortcut and bypasses the requirements of due process and Administrative Procedure Act substantive compliance and unilaterally asserts alleged violations of opacity in direct disregard of its own legislative history set out in the preamble to the FARR.

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III. LEGAL ARGUMENTS

A. EPA's Failed to Follow Its Own Regulations.

The preamble to the Final Rule adopting the FARR states, that Part 71 Permits with less than three years remaining on their terms "will be updated when their term naturally expires." 70 Fed. Reg. 18,084 (April 8, 2005). Specifically,

> [p]romulgation of the FARR will compel ''reopening for cause'' of the part 71 air operating permits that EPA has already issued on the covered reservations to include FARR requirements. The procedures for re-issuing such a permit are the same as for issuing initial and renewed permits. Because some permits will (that) have less than three years remaining on their terms, they will not need to be reopened when the FARR becomes effective, but will be updated when their term naturally expires. 70 Fed. Reg. 18,084 (April 8, 2005).

Empire's Air Permit was issued 44 months before EPA promulgated the FARR and expired on August 8, 2006, 16 months after the effective date of the FARR. Therefore, as defined by its own legislative history and consistent with its own regulations and guidance, EPA had two options: EPA could have re-opened the permit for cause or, it could have issued a new permit. Both options would have resulted in EPA's incorporation of the updated FARR requirements, including the opacity limitations into Empire's Air Permit. However, EPA did neither.

The Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, requires that "the agency shall incorporate in the rules adopted a concise statement of their basis and purpose." 5 U.S.C. § 553(c). This statement, generally described as the preamble to a rule, advises interested persons about the rule and how the agency will apply it. This is the Agency's version of legislative history upon which the agency itself must rely in future applications of the rule, and which governs interpretation of the rule by both

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reviewing courts and administrative forums. (The statement of basis and purpose is "designed to enable the public to obtain the general idea of the purpose of, and a statement of the basic justification of the rules." Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79-258 (1946); *See also*, *Dry Colors Mfrs. Ass'n v. Dep't of Labor*, 486 F.2d 98, 105 (3d Cir. 1973) (stating that the preamble "provides an internal check on arbitrary agency action by insuring that prior to taking action an agency can clearly articulate the reasons for its decision; it makes possible informed public criticism of a decision by making known its underlying rationale; and it facilitates judicial review of agency action by providing an important part of the record of the decision."))

The preamble, or "legislative history," of the FARR describes the process that EPA must follow to incorporate FARR requirements into existing Title V operating permits. EPA's unilateral incorporation of the FARR requirements by agency mandate is not identified as one of the options. In the instant case, EPA failed to follow its own procedures by not taking action to either reopen the permit and include the applicable FARR requirements, or timely issue a new permit to Empire that includes the applicable requirements of the FARR. When all is said and done, the Agency's arrogance is no substitute for compliance with law.

By not following the law, EPA has failed to incorporate either 40 C.F.R. § 49.124(d)(1) or 40 C.F.R. § 49.10410(b) into Empire's existing administratively continued Air Permit. Consequently, the FARR requirements do not apply to the

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Kamiah Mill facility, the alleged opacity violations have not occurred and EPA's Complaint against Empire should therefore be dismissed with prejudice.

Assuming *arguendo* that EPA asserts that opacity limitations of the FARR apply to Empire's Kamiah Mill facility because the requirements of FARR are intended to apply to all sources within Indian country in Idaho. This argument has no merit. Not only does this assertion contravene the stated objective of EPA's Title V permitting program of creating "a single document that serves as a comprehensive statement of a source's obligations for air pollution control, " 57 Fed. Reg. 32,250 (July 24, 1992), but the Agency itself has acknowledged that the rationale behind EPA's Air Permit program was to strike a balance.

> [B]alance must be struck between providing certainty to sources as to which requirements are applicable to them and how these requirements are interpreted, and achieving improvements in air quality. This balance can be achieved by appropriately defining the scope of the permit shield, when a shield expires, and when a permit must be terminated, modified, or revoked and reissued for cause. *Id. [Emphasis Added.]*

The FARR is consistent with the Clean Air Act, EPA regulations, and EPA policy and guidance in that it describes a clear process by which EPA may address existing Part 71 Permits so that permitted parties may understand and have certainty as to how and when the FARR requirements will become applicable to their facilities. Here, EPA just dropped the ball, and as a result, acted outside of the scope of its delegated authority to attempt to unilaterally amend Empire's Air Permit and enforce the FARR requirements on the Kamiah Mill facility by brute force rather than by complying with applicable law.

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B. EPA's Actions Violate The Basic Principles of Administrative Law and Disregards Due Process of Law.

Section 504 of the Clean Air Act discusses permit requirements and conditions. The content of a Part 71 Permit includes the limits and conditions to assure compliance with all applicable requirements under the Act, including requirements of the applicable implementation plan and Title V. 42 U.S.C. § 7661c.(a); *See also* 40 CFR § 71.1 (b)("All sources subject to the operating permit requirements of title V and this part shall have a permit to operate that assures compliance by the source with all applicable requirements.") As stated in the rule adopting the Title V air permit program, the operating permit "will enable the source, States, EPA, and the public *to understand better the requirements to which the source is subject*, and whether the source is meeting those requirements. " 57 Fed. Reg 32,250 (July 24, 1992). [Emphasis added]. Consequently, a permittee has the expectation that all requirements applicable to its facility will be included as conditions in its permit. And, as noted in the preamble to the Title V final rule, 57 FR 32,250, EPA's action to include all requirements applicable to a facility into the permit will provide for increased source accountability and better enforcement.

EPA's asserted enforcement action demanding that Empire comply with a subsequently enacted regulatory requirement, not included in its Air Permit, amounts to the retroactive application of a regulation that violates due process of law and flies in the face of standard administrative law rule-making procedures. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be

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construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown* University Hospital, et.al., 488 U.S. 204, 208, 109 S.Ct. 468, 500 (S. Ct. 1988). In this case, the FARR does not in any way anticipate retroactive application and as such, cannot be unilaterally and retroactively applied against Empire as a "permit condition" in this manner.

EPA rulemaking is governed by the Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237, ("APA"). The APA defines a "rule" to mean:

> "the whole or part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of any agency...." 5 U.S.C. § 554 (4). *Id.,* 488 U.S. at 216 (Scalia, A. concurring). (Emphasis added).

As Justice Scalia stated, "[t]he only plausible reading of this italicized phrase is that rules have legal consequences only for the future. Quite simply, a rule is an agency statement "of future effect, not "of future effect and/or reasonable past effect.""). *Id.,* 488 U.S. at 220.

Empire should be entitled to the expectation that its Air Permit controls and includes all requirements applicable to its facility, and that Empire will not be subject to additional requirements through the retroactive application of subsequently enacted agency rules without due process of law. In fact, the FARR itself provides for such due process by stating that Part 71 permits in place--as of the date the FARR was promulgated-- were to be reopened, or if less than three years remained on their term, the subsequently issued renewal permits would include the new FARR requirements.

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Such permit reopening and renewal actions, under EPA part 71 requires that EPA follow a public participation process that includes: (1) adequate notice of a draft proposed permit; (2) public availability of all non-confidential information submitted by the applicant; (3) a 30-day public comment period; and (4) opportunity for an informal public hearing. 40 C.F.R. § 71.11.

In short, in the instant case, EPA blundered. The agency proceeded with an enforcement action before it timely renewed Empire's Part 71 Air Permit. But if the Board does not act to contain the Agency in this instance, EPA Region 10 will be allowed to effectively circumvent this process by its unilateral incorporation of the FARR opacity limitations in Empire's Air Permit in a manner that is arbitrary, capricious, and in violation of applicable law.

IV. CONCLUSION

By enacting the FARR requirements, EPA Region 10 intended to fill regulatory gaps in the administration of the CAA with regard to air emission sources located, within the exterior boundaries of Indian reservations, in Idaho, Oregon and Washington. In addition, the FARR was intended to establish an administrative process to govern EPA Region 10's implementation of the FARR requirements. However, in the case of Empire, that gap has not yet been filled and, as a consequence, EPA cannot now enforce the FARR requirements on Empire until and unless EPA complies with applicable law, and issues a new Title V permit to Empire that includes the appropriate FARR requirements.

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To date, EPA has failed to lawfully incorporate the FARR opacity requirements into Empire's Air Permit. EPA now needs to step back and do its job in accordance with the CAA, the FARR and applicable principles of administrative and constitutional law. For the reasons stated above, Empire will respectfully requests that the Board dismisses the EPA Complaint with prejudice, because EPA Region 10 failed to state a claim upon which relief can be granted, award Empire its attorney's fees as the prevailing party in this matter, and take such further action as the Board deems appropriate.

RESPECTFULLY SUBMITTED, this 6th February, 2013.

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CERTIFICATE OF SERVICE

I, Tricia Backus, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On February 6, 2013, I served true and correct copies of RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM on the parties and in the manner listed below:

The Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. EPA
Office of Administrative Law Judges
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Mail Code 1900L
Washington, D.C. 20460

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on February 6, 2013, at Seattle, Washington.

Tricia Backus

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