



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue  
Seattle, WA 98101

February 29, 2008

Reply To  
Attn Of: ORC-158

Carol Kennedy  
Regional Hearing Clerk  
US Environmental Protection Agency, Region 10  
Mail Stop ORC-158  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

Re: In the Matter of: Firestone Pacific Foods, Inc., Docket No. EPCRA 10-2007-0204

Dear Regional Hearing Clerk:

Please find enclosed the original Complainant's Motion for Partial Accelerated Decision as to Liability, and one true and correct copy. A copy was sent to the Honorable Susan L. Biro, Chief Administrative Law Judge via pouch mail and to Respondent's counsel Ben Shafton by Certified Mail Return Receipt Requested. (see certificate of service for details).

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Robert Hartman".

Robert Hartman  
Assistant Regional Counsel

cc: Honorable Susan L. Biro  
Ben Shafton, Esquire

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HEARINGS CLERK  
EPA -- REGION 10

**BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF:

Firestone Pacific Foods, Inc.  
Vancouver, Washington

Respondent.

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)  
) DOCKET NO. EPCRA-10-2007-0204  
)  
)

) COMPLAINANT'S MOTION FOR  
) PARTIAL ACCELERATED DECISION  
) AS TO LIABILITY  
)  
)

**TABLE OF CONTENTS**

Page

Table of Authorities .....ii

I. INTRODUCTION .....1

II. STATUTORY AND REGULATORY BACKGROUND.....1

III. STANDARD OF REVIEW FOR ACCELERATED DECISION .....3

IV. FACTUAL BACKGROUND .....5

A. Description of Respondent and the Subject Facility .....5

B. Violations Alleged in Counts 1, 2, and 3 of the Complaint .....5

    1. Count 1 .....5

    2. Count 2 .....6

    3. Count 3 .....6

V. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT THAT  
RESPONDENT IS LIABLE FOR THE VIOLATIONS ALLEGED IN COUNTS 1, 2,  
and 3 OF THE COMPLAINT .....6

A. Respondent is a "Person" as Defined under EPCRA .....7

B. Respondent Owns and Operates a "Facility" as Defined Under EPCRA .....7

C. Respondent is Required Under OSHA to Prepare or Have Available an MSDS .....7

D. Respondent Failed to Timely Prepare and Submit an Emergency and Hazardous  
Chemical Inventory Form to the SERC, LEPC, and Fire Department for the Calendar  
Year 2005 .....8

VI. CONCLUSION .....10

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Federal Court Decisions</u></b>	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 248 (1986).....	4
<i>In re BWX Technologies, Inc.</i> , 9 E.A.D. 61, 75 (EAB 2000).....	4
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 323 (1986).....	4
<i>In re Clarksburg Casket Co.</i> , 8 E.A.D. 496, 501-502 (EAB 1999).....	3, 4
<i>Huls America, Inc. v. Browner</i> , 83 F.3d 445, 446 (D.C. Cir. 1996) ( <i>citing</i> H.R. Rep. No. 253, 99 <sup>th</sup> Cong., 2d Sess., pt. 1 at 60 (1986)).....	1
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 586 (1986).....	4
<i>In re Mayaguez Reg'l Sewage Treatment Plant</i> , 4 E.A.D. 772, 781 (EAB 1993), <i>aff'd sub nom. Puerto Rico Aqueduct &amp; Sewer Auth. v. EPA</i> , 35 F.3d 600 (1st Cir. 1994), <i>cert. denied</i> , 513 U.S. 1148 (1995) .....	4
<i>In re Pepperell Associates</i> , 1998 WL 743894 .....	4
<i>Steel Company v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998).....	2
<b><u>Statutes</u></b>	
42 U.S.C. § 11001 .....	1
42 U.S.C. § 11002(a) .....	3
42 U.S.C. § 11022(a) .....	1, 2, 5, 6, 8
42 U.S.C. § 11022(b).....	3, 8
42 U.S.C. § 11022(d).....	2

**TABLE OF AUTHORITIES**

Page

42 U.S.C. § 11049(4) ..... 7

42 U.S.C. § 11049(7) ..... 7

**Regulations**

29 C.F.R. § 1910.1000 ..... 8

29 C.F.R. § 1910.1200(c) ..... 8

29 C.F.R. § 1910.1200(d) ..... 8

29 C.F.R. § 1910.1200(g) ..... 7

40 C.F.R. § 22.16(a) ..... 1

40 C.F.R. § 22.20(a) ..... 1

40 C.F.R. § 370.20(b) ..... 3

**Other**

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Part 22 Rules) ..... 1

Federal Rule of Civil Procedure 56 ..... 3

## I. INTRODUCTION

Pursuant to Sections 22.16(a) and 22.20 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (“Part 22 Rules”), the United States Environmental Protection Agency, Region 10 (“Complainant” or “EPA”) hereby moves for partial accelerated decision as to the liability of Firestone Pacific Foods, Inc. (“Respondent”) for the violations alleged in Counts 1 through 3 of the Complaint. Because there are no genuine issues of material fact and Complainant is entitled to a determination of Respondent’s liability as a matter of law, Complainant respectfully requests an order granting this motion.

## II. STATUTORY AND REGULATORY BACKGROUND

The Complaint alleges violations of Section 312(a) of the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11022(a). The purpose of EPCRA, 42 U.S.C. §§ 11001-11050, is “to provide communities with information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control accidental releases.” *Huls America, Inc. v. Browner*, 83 F.3d 445, 446 (D.C. Cir. 1996) (citing H.R. Rep. No. 253, 99<sup>th</sup> Cong., 2d Sess., pt. 1 at 60 (1986)). To achieve this goal, EPCRA established a system of State Emergency Response Commissions (“SERCs”) and Local Emergency Response Committees (“LEPCs”), 42 U.S.C. § 11001, and requires regulated facilities to comply with a system of notification requirements. *Id.*

The U.S. Supreme Court described these requirements in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), stating that:

EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health threatening release. Central to its operation are reporting requirements compelling users of specified toxic and hazardous chemicals to file annual 'Emergency and Hazardous Chemical Inventory Forms' . . . .

*Id.* at 86. Section 312(a) of EPCRA and its implementing regulations at 40 C.F.R. Part 370 require the owner or operator of a facility that is required by the Occupational Safety and Health Act ("OSHA") and regulations promulgated under that Act to prepare or have available a material safety data sheet ("MSDS") for a hazardous chemical, to submit a completed Emergency and Hazardous Chemical Inventory Form to the SERC, the LEPC, and the fire department with jurisdiction over the facility by March 1, 1988, and annually thereafter. The Emergency and Hazardous Chemical Inventory Form may be a Tier I or Tier II form. 42 U.S.C. § 11022(a)(2). Tier I forms must include an estimate of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year, an estimate of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year, and the general location of hazardous chemicals in each category. *Id.* at § 11022(d)(1). Tier II forms must include this information and also the chemical name or common name of the chemical as provided on the MSDS, a brief description of the manner of storage of the hazardous chemical, and an indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public. *Id.* at § 11022(d)(1)-(2).

Pursuant to EPCRA Section 312(b), 42 U.S.C. § 11022(b), EPA has established reporting threshold amounts for hazardous and extremely hazardous chemicals present at a facility. The requirement to submit a completed Emergency and Hazardous Chemical Inventory Form (Tier I or Tier II) covers all hazardous chemicals present at the facility at any one time during the preceding year in amounts equal to or exceeding 10,000 pounds and all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity ("TPQ") designated by EPA at 40 C.F.R. Part 355, Appendices A and B, whichever is lower. 40 C.F.R. § 370.20(b). EPA has designated ammonia as an "extremely hazardous substance" pursuant to EPCRA Section 302(a)(2), 42 U.S.C. § 11002(a)(2), with a TPQ of 500 pounds. 40 C.F.R. Part 355, Appendices A and B.

### **III. STANDARD OF REVIEW FOR ACCELERATED DECISION**

The standard of review for a motion for accelerated decision is set forth in Section 22.20 of the Part 22 Rules, which provides that:

[t]he 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) (*emphasis added*). This standard of review for motions for accelerated decision is analogous to the summary judgment standard established under Rule 56 of the Federal Rules of Civil Procedure. *See In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501-502 (EAB 1999).



The U.S. Supreme Court has held that it is the party seeking summary judgment who bears the initial burden of providing the court the basis for its motion, and of “identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which demonstrate that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Pepperell Associates*, 1998 WL 743894, Docket No. CWA-2-I-97-1088 (ALJ Gunning Oct. 9, 1998). In addition, the evidentiary basis for the moving party’s motion must be viewed in the light most favorable to the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To satisfy this burden, the moving party must present evidence “such that no reasonable decisionmaker could find for the nonmoving party.” *Clarksburg Casket Co.*, 8 E.A.D. at 502; *see also Anderson*, 477 U.S. at 252. On the other hand, to survive such a motion, the non-moving party must demonstrate to the court that the evidence presents “sufficient disagreement” such that a reasonable fact finder could decide in favor of either party. *Anderson*, 477 U.S. at 251-252; *see also In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). However, to do so, the nonmoving party cannot rely on the allegations or denials of its pleading, but rather must establish with affirmative evidence specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 256; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”); *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).

In this case, no question of material fact exists as to whether Respondent violated EPCRA. Therefore, this is an issue of law suitable for a motion for accelerated decision.

#### **IV. FACTUAL BACKGROUND**

##### **A. Description of Respondent and the Subject Facility**

Respondent is a processor of individual quick-frozen fruit. Respondent's facility is located at 4211 NW Fruit Valley Road, Vancouver, Washington ("the facility"). The facility is a fully integrated grower-processing operation for domestic and export berry customers. Berries are packed, individually quick-frozen, and pureed for customers in the U.S., North America, Japan, and other Pacific Rim countries. Respondent's two freezer rooms are cooled with anhydrous ammonia in a high pressure receiver. See EPA's Inspection Report, Complainant's Exhibit 3.<sup>1</sup>

##### **B. Violations Alleged in Counts 1, 2, and 3 of the Complaint**

###### **1. Count 1**

EPA alleged that Respondent did not submit to the SERC a completed Emergency and Hazardous Chemical Inventory Form, including ammonia, for the calendar year 2005, by March 1, 2006. Respondent's failure to submit to the SERC a completed Emergency and Hazardous Chemical Inventory Form, including ammonia, for the calendar year 2005, by March 1, 2006 is a violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

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<sup>1</sup> Citations to Complainant's exhibits in this motion refer to the exhibits provided in Complainant's Initial Prehearing Exchange.

2. Count 2

EPA alleged that Respondent did not submit to the LEPC a completed Emergency and Hazardous Chemical Inventory Form, including ammonia, for the calendar year 2005, by March 1, 2006. Respondent's failure to submit to the LEPC a completed Emergency and Hazardous Chemical Inventory Form, including ammonia, for the calendar year 2005, by March 1, 2006 is a violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

3. Count 3

EPA alleges that Respondent did not submit to the fire department a completed Emergency and Hazardous Chemical Inventory Form, including ammonia, for the calendar 2005, by March 1, 2006. Respondent's failure to submit to the fire department with jurisdiction over the facility a completed Emergency and Hazardous Chemical Inventory Form, including ammonia, for the calendar year 2005, by March 1, 2006 is a violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

**V. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT THAT RESPONDENT IS LIABLE FOR THE VIOLATIONS ALLEGED IN COUNTS 1, 2, AND 3 OF THE COMPLAINT**

There is no genuine dispute that Respondent failed to comply with the EPCRA requirements described above. Respondent is liable under EPCRA Section 312(a), 42 U.S.C. § 11022(a), because: (A) Respondent is a person (B) which owns and operates a facility (C) which is required to prepare or have available an MSDS for a hazardous chemical under OSHA and regulations promulgated under that Act and (D) failed to timely prepare and submit an Emergency and Hazardous Chemical Inventory Form to the SERC, LEPC, and the fire

department with jurisdiction over the facility for the calendar year 2005. The following four subsections address each of these elements in turn.

**A. Respondent is a “Person” as Defined Under EPCRA.**

EPCRA Section 329(7), 42 U.S.C. § 11049(7), defines “person” as “any individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or interstate body.”

Respondent admits it is a corporation, incorporated in the State of Washington. *See*

Respondent’s Answer, ¶ 1. Thus, Respondent is a “person” under EPCRA.

**B. Respondent Owns and Operates a “Facility” as Defined Under EPCRA.**

EPCRA Section 329(4), 42 U.S.C. § 11049(4), defines a “facility” as “all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person).” In 2005, Respondent owned and operated the buildings, equipment, structures, and other stationary items located at 4211 NW Fruit Valley Road, Vancouver, Washington. *See* EPA’s Inspection Report, and EPA’s Inspection Conclusion Data Sheet, Complainant’s Exhibits 3 and 19. These buildings, equipment, structures and other stationary items constitute a “facility” under EPCRA Section 329(4).

**C. Respondent is Required Under OSHA to Prepare or Have Available an MSDS.**

OSHA regulations at 29 C.F.R. § 1910.1200(g) require that “[e]mployers shall have a material safety data sheet in the workplace for each hazardous chemical they use.” OSHA

regulations define "hazardous chemical" as "any chemical which is a physical hazard or a health hazard." *Id.* at § 1910.1200(c). Ammonia is listed as a toxic and hazardous substance under OSHA regulations at 29 C.F.R. § 1910, Subpart Z, Toxic and Hazardous Substances, Table Z-1. Under OSHA regulations at 29 C.F.R. § 1910.1200(d)(3)(i), chemicals listed in Table Z-1 are "hazardous chemicals." Because ammonia is a hazardous chemical, Respondent is required under OSHA to prepare or have available an MSDS.

**D. Respondent Failed to Timely Prepare and Submit an Emergency and Hazardous Chemical Inventory Form to the SERC, LEPC, and Fire Department with Jurisdiction Over the Facility for the Calendar Year 2005.**

Under EPCRA Section 312(a)(1)(A), 42 U.S.C. § 11022(a)(1)(A), the owner or operator of a facility that is required by OSHA to prepare or have available an MSDS for a hazardous chemical must prepare and submit an Emergency and Hazardous Chemical Inventory Form (a Tier I or Tier II form as described at 40 C.F.R. § 370.25) to the appropriate SERC, LEPC, and fire department with jurisdiction over the facility. This submittal must be made unless EPA has, pursuant to EPCRA Section 312(b), 42 U.S.C. § 11022(b), established "a threshold quantity for hazardous chemicals covered by this section below which no facility shall be subject to the provisions of this section" (i.e., a TPQ) and the facility stores less than that threshold quantity. EPA has established a TPQ for ammonia of 500 pounds. 40 C.F.R. Part 355, Appendices A and B. Some time during the calendar year 2005, ammonia was present at Respondent's facility in an amount equal to or greater than the TPQ. *See* EPA's Inspection Report, Letter from PermaCold Engineering, Inc., to Mr. Stan Firestone, EPA's Inspection Conclusion Data Sheet, and Copies of Firestone Pacific Foods, Inc. Tier II reports for the calendar year 2005 received by

the SERC on December 22, 2006; Complainant's Exhibits 3, 8, 19, and 24. Therefore, this exception to the reporting requirement does not apply, so Respondent was required to submit a Tier I or Tier II form to the SERC, LEPC, and the fire department with jurisdiction over the facility for the calendar year 2005, by March 1, 2006.

Respondent failed to submit a Tier I or Tier II form to the SERC for the calendar year 2005, by March 1, 2006. *See* Declaration of Sadie Whitener, Complainant's Exhibit 16.

Respondent failed to submit a Tier I or Tier II form to the LEPC for the calendar year 2005, by March 1, 2006. *See* Record of Ted Mix's telephone conversation with John Wheeler on September 18, 2006, Declaration of John Wheeler, and Record of Ted Mix's telephone conversation with John Wheeler and Deb Needham on April 2, 2007; Complainant's Exhibits 13, 17, and 21.

Respondent failed to submit a Tier I or Tier II form to the Vancouver Fire Department for the calendar year 2005, by March 1, 2006. *See* Records of Ted Mix's telephone conversations with Capt. Daniel Monaghan on September 18, 2006, and April 9, 2007, and Declaration of Capt. Daniel Monaghan; Complainant's Exhibits 14, 22, and 18.

**VI. CONCLUSION**

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant Complainant's Motion for Partial Accelerated Decision as to Liability for Counts 1, 2, and 3 of the Complaint.

Respectfully submitted this 29<sup>th</sup> day of February, 2008.



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Robert Hartman  
Assistant Regional Counsel  
EPA Region 10

In the Matter of: Firestone Pacific Foods, Inc.  
Docket No. EPCRA 10-2007-0204

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY** was sent to the followings persons in the manner specified on the date below:

Original and one true and correct copy, by hand delivery:

*Carol Kennedy, Regional Hearing Clerk  
US Environmental Protection Agency, Region 10  
Mail Stop ORC-158  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101*

One true and correct copy by hand delivered to:

*Robert Hartman, Assistant Regional Counsel  
US Environmental Protection Agency, Region 10  
Mail Stop ORC-158  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101*

One true and correct copy by pouch mail delivered to:

*The Honorable, Susan L. Biro, Chief Administrative Law Judge  
Office of Administrative Law Judges  
US Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460*



One true and correct copy by Certified Mail Return Receipt Requested delivered to:

*Ben Shafton, Esquire  
Caron, Colven, Robinson & Shafton, P.S.  
900 Washington Street, Suite 1000  
Vancouver, Washington 98660*

Dated: \_\_\_\_\_

*2/29/08*

*Shawn Ely*

COMPLAINANT'S MOTION FOR  
PARTIAL ACCELERATED DECISION

U.S. Environmental Protection Agency  
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