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EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:)	
)	DOCKET NO. EPCRA-10-2007-0204
)	
Firestone Pacific Foods, Inc.)	COMPLAINANT'S REPLY TO
Vancouver, Washington)	RESPONSE TO MOTION FOR
)	ACCELERATED DECISION
Respondent.)	
_____)	

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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 Complaint 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 replies to Respondent's Response to Complainant's Motion for Partial Accelerated Decision as to Liability. Because there are no genuine issues of material fact and Respondent cannot meet its burden to demonstrate either the traditional elements of estoppel or affirmative misconduct in this case, 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.

II. Respondent Cannot Establish Equitable Estoppel Under These Facts.

Respondent asserts EPA should be estopped from proceeding with its action against Respondent for its failure to submit completed Emergency and Hazardous Chemical Inventory Forms ("forms"), including Ammonia, to the state emergency response commission ("SERC"), the local emergency planning committee ("LEPC"), and the fire department with jurisdiction over the facility for the calendar year 2005 by March 1, 2006. Respondent raises equitable estoppel as a defense on grounds that EPA representatives allegedly advised Respondent's operations manager, Zackary Schmitz, on two separate occasions, both in late April and in June, 2006, that if the forms were completed and sent in "soon" that EPA would take no action would be taken against the company. Respondent states that "Mr. Schmitz relied on this representation

COMPLAINANT'S REPLY TO RESPONSE TO
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and submitted the forms in June.” Respondent’s Response to Motion for Accelerated Decision, p.4.

Even if these facts are true, Respondent can neither establish the traditional elements of equitable estoppel nor meet the heightened standard for establishing affirmative misconduct that is required to estop the government. Specifically, at the time the EPA inspectors made these statements, Respondent was *already* in violation: the March 1st reporting deadline had already passed and Respondent by its own admission had not yet submitted the required forms. Therefore, Respondent’s violations were not caused by its reliance on any misrepresentation by the EPA inspectors

a. Estoppel against the government is disfavored when the government is acting in its sovereign capacity.

The equitable doctrine of estoppel allows a court to avoid injustice in cases where one party has reasonably relied on the statements or representation of another. *Michigan Exp., Inc. v. U.S.*, 374 F.3d 424, 427 (6th Cir. 2004). However, it is well-established that estoppel against the government is a disfavored defense. As early as 1824, the U.S. Supreme Court stated that “[a]s a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.” *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 409 (1917), *citing*, *U.S. v. Kirkpatrick*, 9 Wheat. 720, 735 (1824). The Supreme Court has consistently held as such and has refused to apply the equitable estoppel doctrine against the government, no matter how compelling the circumstances. *See OPM v. Richmond*, 496 U.S. 414 (1990), *reh'g. denied*, 497 U.S. 1046 (1990) (noting that the U.S. Supreme Court

has reversed every finding of estoppel against the government that the Court has reviewed). Moreover, the Court has stated unequivocally that “those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.” *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984).

Consequently, the lower courts have generally not permitted the imposition of an equitable defense to prevent the United States from exercising its sovereign powers for the benefit of the public. *See generally e.g., Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176 (9th Cir. 2001); *Sulit v. Schiltgen*, 213 F.3d 449 (9th Cir. 2000); *Michigan Exp.*, 374 F.3d at 424; *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1347 (9th Cir. 1990); *de la Fuente v. F.D.I.C.*, 332 F.3d 1208 (9th Cir. 1990); *Fisher v. Peters*, 249 F.3d 433 (6th Cir. 2001).

There can be no question that this action is a sovereign exercise of the United States' powers. *See e.g.*, 42 U.S.C. § 11045 (EPA is expressly delegated the authority to enforce the provisions of EPCRA. 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, 99th Cong., 2d Sess., pt. 1 at 60 (1986)). To achieve this goal, EPCRA established a system of SERCs and 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. In bringing this action, the United States through EPA is properly exercising its sovereign powers to ensure the enforcement of the reporting provisions for the public good. When protection of the public interest is involved, as it is in this environmental case, the presumption against estopping the government is strong.¹

b. Respondent can show neither reasonable reliance nor affirmative misconduct.

Despite the historic precedent against estopping the government, the U. S. Supreme Court has left open the possibility that a respondent may successfully raise an estoppel defense. *Heckler*, 467 U.S at 60-61, n. 13. Typically, to establish an estoppel defense, a party must demonstrate: (1) misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel. *LaBonte v. United States*, 233 F.3d 1049, 1053 (7th Cir. 2000).

¹ The undersigned has been unable to find a single case where a court has found the government equitably estopped from enforcing an environmental law. See, e.g., *U.S. v. Boccanfusco*, 882 F.2d 666, 671-72 (2d Cir. 1989); *U.S. v. Smithfield Foods*, 969 F. Supp. 975, 979-980 (E.D. Va. 1997); *U.S. v. Bethlehem Steel Corp.*, 829 F. Supp. 1023, 1035 (N.D. Ind. 1993), *aff'd in part, vacated in part*, 38 F.3d 862 (7th Cir. 1994); *U.S. v. CPS Chemical Co.*, 779 F. Supp. 437, 452-453 (E.D. Ark. 1991); *U.S. v. Eastern of N.J., Inc.*, 770 F. Supp. 964, 983-987 (D.N.J. 1991); *Public Interest Research Group of N.J. v. Yates Industries, Inc.*, 757 F. Supp. 438, 448-449 (D.N.J. 1991); *U.S. v. Chevron*, 757 F. Supp. 512, 515-516 (E.D. Pa. 1990); *Slagle v. U.S.*, 809 F. Supp. 704, 710 (D. Minn. 1992); *U.S. v. Menominee, Michigan*, 727 F. Supp. 1110, 1121-22 (W.D. Mich. 1989); *U.S. v. Arkwright, Inc.*, 690 F. Supp. 1133, 1143 (D.N.H. 1988), *reh. denied*, 697 F. Supp. 1229 (D.N.H. 1988); *U.S. v. Vanguard Corp.*, 701 F. Supp. 390, 392 (E.D.N.Y. 1988); *Clawson v. U.S.*, 24 Cl. Ct. 366 (Cl. Ct., 1991); *U.S. v. Manning*, 787 F.2d 431, 437 (8th Cir. 1986); *California v. Neville Chemical Co.*, 213 F.Supp.2d 1142, 1144 (C.D. Cal., 2002), *aff'd*, 358 F.3d 661 (9th Cir. 2004).

However, because the U.S. Supreme Court presumes that estoppel against the government would undermine “the interest of the citizenry as a whole in obedience to the rule of law,” the government “may not be estopped on the same terms as any other litigant.” *Heckler*, 467 U.S. at 60; *see also U.S. v. Arkwright, Inc.*, 690 F. Supp. 1133, 1143 (D.N.H. 1988), *reh’g. denied*, 697 F. Supp. 1229 (D.N.H. 1988). As a result, a respondent must demonstrate “affirmative misconduct” by the government in addition to the other estoppel elements. *Michigan Exp.*, 374 F.3d at 427.

The Ninth Circuit defines “affirmative misconduct” as a “deliberate lie or a pattern of false promises.” *Socop-Gonzalez* at 1184 (9th Cir. 2001) (*en banc*); *see also Sulit*, 213 F.3d at 454 (“[n]either the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct”); *Michigan Exp.*, 374 F.3d at 427 (review of how various Circuits have defined affirmative misconduct).

In *In re B.J. Carney Industries, Inc.*, 7 E.A.D. 171 (EAB 1997), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999), *dismissal vacated*, 200 F.3d 1222 (9th Cir. 2000), the Environmental Appeals Board (“EAB”) adopted the same standard as the federal courts for estoppel against the government. In *BJ Carney*, the EAB rejected the respondent’s equitable estoppel argument and held, *inter alia*, that the respondent failed to make the requisite showing that the Region’s conduct amounted to affirmative misconduct. *See also In re Friedman and Schmitt Construction Co.*, 2002 WL 31030987, Docket No. CAA-09-99-0004 (ALJ Moran Aug. 28, 2002), *aff’d* 2004 WL 1658592 (EAB 2004) (found that the respondent failed to present evidence of affirmative misconduct).

Respondent's argument rests entirely on the contention of Mr. Schmitz, Firestone Pacific Foods, Inc.'s operations manager, that EPA inspectors allegedly told him at the time of the inspection, in April 2006, and again in June 2006, that if the forms were completed and sent in "soon" EPA would take no action against the company for failing to complete the forms by March 1, 2006, for the calendar year 2005. Respondent states that Mr. Schmitz "relied on these representations and submitted the forms in June 2006." Respondent's Response to Motion for Accelerated Decision, p. 4. Regardless of what the EPA inspectors told Mr. Schmitz, Respondent cannot show detrimental reliance in this case because Respondent was already in violation of EPCRA when the statements were made. Thus, at most, such reliance goes to penalty, not liability.

EPA did not mislead Respondent regarding the requirements of EPCRA or the consequences of failing to comply. There is no dispute that, on April 28, 2006, the date of EPA's inspection, Respondent had not submitted the required forms which were due on March 1, 2006, and therefore, Respondent was already out of compliance with EPCRA. It is true that the EPA inspectors informed Respondent it was out of compliance, advised Respondent to complete the forms as soon as possible since the March 1st reporting deadline for the calendar year 2005 had already passed, and explained that EPA could take enforcement action against Respondent for failure to file the required forms. See EPA Region 10's Investigation Report for Firestone Pacific Foods, Inc., Facility, Vancouver, Washington, dated October 18, 2006; Complainant's Exhibit 3, p. 3. The EPA inspectors also left Respondent an Emergency Chemical Release Reporting Compliance Assistance Packet. *Id.* There is also no dispute that shortly after the

inspection, EPA called Respondent to remind the company to submit the required forms. *See* Record of Ted Mix's Telephone Conversation with Zack Schmitz on May 15, 2006, Complainant's Exhibit 15; Declaration of Zackary Schmitz ¶ 3.² However, the SERC, LEPC and the fire department did not receive the required forms from Respondent for calendar year 2005 until December 2006, more than seven months later.³ *See* Declarations of Sadie Whitener, John Wheeler, and Daniel Monaghan; Complainant's Exhibits 16, 17, and 18 respectively.

Even if the EPA inspectors made the statements that Respondent claims they made, Respondent still has not met its burden of proving estoppel against the government. To prevail on its estoppel defense, Respondent must not only prove that the EPA inspectors made misrepresentations, but also demonstrate there was "affirmative misconduct." Respondent does not provide any affirmative evidence that the EPA inspectors deliberately lied or demonstrated a pattern of false promises, which the inspectors had reason to believe that Respondent would rely on, nor does Respondent present any evidence that its alleged detrimental reliance was

² The parties apparently disagree about the exact date of the follow-up call. Mr. Mix's declaration states he called on May 15; Mr. Schmitz's declaration states he received the call in early June.

³ Respondent claims it submitted the forms in June 2006. *See* Declaration of Zackary Schmitz, ¶s 3-5. The only documentary evidence Respondent cites is an email from Deborah Needham, Emergency Management Coordinator for Clark Regional Emergency Services Agency (the LEPC) to Stan Firestone of Firestone Pacific Foods, Inc., dated March 8, 2007, stating that "although the envelope with the date stamp was unfortunately discarded, I do recall receiving Firestone's Tier II reports [*i.e.*, EPCRA forms] early summer." However, the earliest date-stamped form the LEPC has is a "revised form" for the calendar year 2005; the LEPC received it on February 23, 2007 (that form, signed by Mr. Schmitz, is dated June 15, 2006). The LEPC files also contain a form for 2005 with no date stamp. It was also signed by Mr. Schmitz, and is dated March 15, 2006 (*i.e.*, before EPA's inspection). This form is identical to the 2005 forms received by the SERC and the fire department in December 2006; presumably, Respondent submitted this form to the LEPC in December 2006 as well.

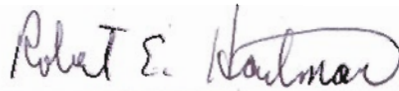
reasonable in light of its responsibility to know and follow the law. *Socop-Gonzalez*, 272 F.3d at 1184; *LaBonte*, 233 F.3d at 1053.

Respondent simply claims that the EPA inspectors advised Respondent's operations manager, Mr. Schmitz, that EPA would take no action if the forms were filed "soon," and since the forms for 2005 were ultimately filed, "[t]his estops EPA from proceeding with its claims for 2005." See Respondent's Response to Motion For Accelerated Decision, page 3. However, according to the Ninth Circuit, this claim is insufficient to prove affirmative misconduct because "[n]either the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct." *Sulit*, 213 F.3d at 454. In short, Respondent cannot meet its burden to demonstrate either the traditional elements of estoppel or affirmative misconduct in this case.

III. Conclusion

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

Respectfully submitted this 26 day of March, 2008.



Robert Hartman
Assistant Regional Counsel

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 REPLY TO RESPONSE TO MOTION FOR ACCELERATED DECISION** 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*

**COMPLAINANT'S REPLY TO RESPONSE TO
MOTION FOR ACCELERATED DECISION**

9

**U.S. Environmental Protection Agency
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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: 3/26/08

Robert C. Hartman



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

March 26, 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 of Complainant's Reply to Response to Motion For Accelerated Decision, 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 cursive script that reads "Robert E. Hartman".

Robert Hartman
Assistant Regional Counsel

cc: Honorable Susan L. Biro
Ben Shafton, Esquire