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5 BEFORE THE  
6 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

7 In the Matter of:

Docket No. EPCRA-10-2007-0204

8 FIRESTONE PACIFIC FOODS, INC.,  
9 Vancouver, Washington,

RESPONSE TO MOTION FOR  
ACCELERATED DECISION

10 Respondent.

11  
12 INTRODUCTION

13 In this case, the Environmental Protection Agency (EPA) is seeking in excess of \$40,000.00  
14 from Firestone Pacific Foods, Inc., for failing to send a form to various agencies in a timely fashion.

15 The form required disclosure that ammonia was in use at the plant. There is no doubt that the  
16 required forms did make their way to the agencies. There is also no doubt that there have been no  
17 ammonia releases during the intervening time period. In other words, there has been no harm.

18 Nonetheless, EPA continues to proceed with this action.

19  
20 This is the sort of proceeding that causes small business concerns to wonder what the  
21 government is up to.

22 FACTUAL STATEMENT

23 On April 28, 2006, Ted Mix and Harry Bell of the EPA arrived at Firestone Packing  
24 Company to conduct an inspection of the plant. At length, Zackary Schmitz, the plant's operation  
25

1 manager, met them and took them around the plant. They noted that the plant processed frozen  
2 fruit and employed a "state of the art stainless steel processing operation." Exhibit 3.

3 The gentlemen from the EPA gave Mr. Schmitz forms to complete to notify the appropriate  
4 governmental agencies of the presence of ammonia. They told him that if he completed them  
5 "soon," that the EPA would take no action against the company for failing to complete the forms by  
6 March 1, 2006, for calendar 2005. (Declaration of Zackary Schmitz)

7  
8 One of the gentlemen from the EPA contacted Mr. Schmitz again in June of 2006 to follow  
9 up. The message was repeated—if the forms were sent in "soon," the EPA would take no action.  
10 Mr. Schmitz then completed the forms and took steps to see that they were mailed to the necessary  
11 agencies—the Vancouver Fire Department; the Washington Department of Ecology; and Clark  
12 Regional Emergency Services Agency. (Declaration of Zackary Schmitz)

13  
14 At least one agency recalls receiving the form—Clark Regional Emergency Services  
15 Agency—during the summer of 2006. (Document attached to Respondent's Prehearing Exchange)  
16 All agencies acknowledge receiving the forms at the latest by early 2007. (Complainant Exhibits  
17 16-18)

18  
19 In September of 2006, Mr. Nix inquired at the agencies as to whether the forms had been  
20 received. The Vancouver Fire Department expressed knowledge of the Firestone facility.  
21 (Complainant Exhibits 13-16)

22 There has been no ammonia release at the plant at any time between the initial EPA visit in  
23 April of 2006 and the present. (Declaration of Zackary Schmitz)

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ARGUMENT

I. Procedural Posture.

The EPA has sought an accelerated decision under the terms of 40 C.F.R. §22.20(a). That motion is analogous to a motion for summary judgment. In order to prevail, EPA must show that there is no genuine issue of material fact. All reasonable inferences from the evidence must be viewed in the light most favorable to the non-moving party. *ALM Corp. v. U.S. EPA, Region II*, 974 F.2d 380, 383 fn. 2 (3d Cir. 1992); *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

As will be seen below, the EPA cannot meet its heavy burden. Its motion must be denied.

II. EPA Is Estopped from Making Any Claim for 2005.

EPA claims that Respondent is guilty of a violation of 42 U.S.C. § 11022(a) based on a failure to submit forms by March 1, 2006, for calendar 2005. Its agents advised Respondent's operations manager that there would be no action if the forms were filed "soon," a term that was not defined precisely. The forms for 2005 were ultimately filed. This estops EPA from proceeding with its claims for 2005.

A federal agency is estopped when a person relies on misrepresentations by governmental agencies to his, her, or its detriment. There must also be a showing that the failure to estop the government will work a serious injustice and will not cause undue harm to the public interest. *Watkins v. U.S. Army*, 875 F.2d 699 (9<sup>th</sup> Cir. 1989). These elements are present here.

1 EPA representatives visited Respondent's plant in late April, 2006. By that time,  
2 the deadline for submitting forms for 2005 had already passed. In other words, Respondent may  
3 have already been in violation of 42 U.S.C. § 11022(a) for 2005. Nonetheless, EPA representatives  
4 advised Respondent's operation manager on two separate occasions—both in late April and in  
5 June, 2006—that if the forms were completed and sent in "soon" that no action would be taken  
6 against the company. Mr. Schmitz relied on these representations and submitted the forms. He  
7 states that he did so in June of 2006. At least one agency recalls receipt of these during the summer  
8 of 2006. There is no doubt that the forms for 2005 were ultimately received by all necessary  
9 agencies. The bases for estoppel are clearly present.

11 The failure to estop the government will work an injustice here. Mr. Schmitz did  
12 what he was told to do by the EPA representatives. They should be held to their word.

14 There will also be absolutely no harm to the public interest if the EPA is estopped in  
15 this case. Respondent takes its safety responsibilities seriously. In the words of the EPA  
16 representatives, it maintains a "state of the art" processing plant. Presumably, the statutory  
17 requirement of reporting is designed to acquaint relevant agencies with the presence of hazardous  
18 substances so that they can promptly react in the event of a release. There have been no releases.  
19 At least one agency was already aware of Respondent's facility. The inquiries made by EPA  
20 personnel in September of 2006 served to alert the other agencies. In short, the public interest was  
21 not harmed because (1) Respondent has an excellent facility; (2) Respondent takes its safety  
22 responsibilities seriously; (3) the relevant agencies learned of the plant before any release of  
23  
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1 hazardous materials; (4) because there have been no releases; and (5) because the forms were  
2 ultimately filed.

3 Presumably, the public interest is advanced when members of the community gain  
4 respect for governmental agencies such as EPA. This proceeding will not advance that goal. At  
5 bottom, EPA is seeking to collect in excess of \$40,000.00 from Respondent because it claims that  
6 Respondent filed certain forms too late. There is no hint that there has been any damage or danger  
7 to the Clark County community. EPA's position in this case will cause the small business  
8 community to question its mission. Not only will a ruling in favor of estoppel not harm the public  
9 interest—it will promote the public interest.  
10

11 The EPA representatives would have been within their rights simply to advise  
12 Respondent that it was going to commence this action and move on. They did not have to indicate  
13 that filing the forms "soon" would eliminate any chance of adverse action. They did, however.  
14 That means that the EPA must be estopped from claiming violations for calendar 2005.  
15

16 CONCLUSION

17 As is apparent, there is at least a genuine issue of material fact concerning  
18 application of estoppel in these circumstances. On that basis, the motion for an accelerated  
19 determination should be denied.  
20

21 DATED this 13 day of May, 2008.

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23   
24 BEN SHAFTON, WSB #6280  
25 Of Attorneys for Respondent

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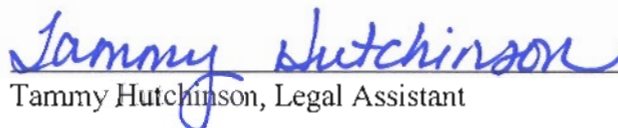
**CERTIFICATE OF SERVICE**

THE UNDERSIGNED, states as follows: I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action. On the 13th day of March, 2008, I caused the document to which this Certificate is affixed to be served as follows:

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MR. ROBERT HARTMAN US ENVIRONMENTAL PROTECTION AGENCY REGION 10 1200 SIXTH AVE MS ORC-158 SEATTLE WA 98101	<input type="checkbox"/> By hand delivery <input type="checkbox"/> By first class mail* <input checked="" type="checkbox"/> By certified mail – return receipt requested*
HON SUSAN L BIRO CHIEF ADMINISTRATIVE LAW JUDGE US ENVIRONMENTAL PROTECTION AGENCY MAIL CODE 1900L 1200 PENNSYLVANIA AVE NW WASHINGTON DC 20460	<input type="checkbox"/> By hand delivery <input type="checkbox"/> By first class mail* <input checked="" type="checkbox"/> By certified mail – return receipt requested*

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CARON, COLVEN, ROBISON & SHAFTON, P.S.

  
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Tammy Hutchinson, Legal Assistant