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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 EMPIRE LUMBER
CO. d/b/a KAMIAH MILL'S REPLY
IN SUPPORT OF MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM

I. INTRODUCTION

The response of the Environmental Protection Agency (EPA) to Respondent Empire Lumber Co.'s (Empire's) Motion to Dismiss disregards the express permit shield in Empire Lumber's Title V permit, and inappropriately attempts to apply the agency record on *Title 70* permits to Empire's Title 71 permit. Accordingly, this Reply explains that EPA has not justified its efforts to apply later-enacted regulation to Empire's Title V permit, without due process.¹

¹ Empire will respond under separate cover to EPA's Motion for Accelerated Decision Regarding Liability.

RESPONDENT EMPIRE LUMBER CO.'S
REPLY IN SUPPORT OF MOTION TO
DISMISS - 1

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1 **II. ARGUMENT**

2 **A. EPA Does Not Contradict Empire's Description of Its Timely Permit**
3 **Renewal Application, EPA's Failure to Act on the Renewal, and Empire's**
4 **Efforts Regarding Opacity Monitoring.**

5 Empire's Motion recounted its compliance history with the applicable
6 provisions of the Clean Air Act and its implementing regulations, and EPA did not
7 refute that evidence. Therefore, the following key facts are undisputed for the purposes
8 of Empire's Motion:

- 9 1. Empire sought and obtained a Title V permit.
- 10 2. In 2005, Empire timely filed a renewal application for its Title V permit.
- 11 3. To this day, EPA still has taken no action to process Empire's renewal
12 permit application.
- 13 4. Empire established an opacity monitoring program, and has obtained
14 related training for its technical personnel.

15 The undisputed facts illustrate Empire's diligence with the permitting process
16 and compliance issues, and EPA's decision to not reopen or reissue the permit despite
17 having a complete renewal application on file for nearly eight years.

18 **B. Empire's Title V Permit Contains an Express, Applicable Permit Shield.**

19 EPA takes the position that the Clean Air Act permits later-enacted regulations
20 to be enforced against Title V permittees, *unless* the permit contains a relevant express
21 permit shield. EPA Response at pp. 11-12. However, EPA does not once acknowledge
22 that Empire's permit includes an express permit shield sufficient to exempt Empire
23 from the later-enacted 20% opacity limits found at 40 C.F.R. § 124. The language of
24 the permit shield can be interpreted to subject the permittee only to alleged violations
of applicable requirements "prior to or at the time of permit issuance" – not *after* permit
issuance:

1 Nothing in this permit shall alter or affect the following . . . The liability
2 of a permittee for any violation of applicable requirements prior to or at
the time of permit issuance.

3 Empire Title V Permit, at p. 5, attached as Exhibit 3 to Empire's Prehearing Exchange.
4 Empire's permit itself anticipates that the permit look back, but not forward. EPA's
5 attempt to apply later-enacted opacity standards contravenes the permit intent, and
6 should be foreclosed.

7 As Empire explained in its Motion, foreclosing EPA from the instant effort to
8 wrongfully impose opacity standards on Empire does not preclude EPA from ever
9 applying those regulations to Empire. EPA may simply take the effort to process
10 Empire's renewal application, and afford Empire the due process of law to which it is
11 entitled.

12 **C. EPA's Reliance on Part 70 Agency Rulemaking History Disregards that**
13 **Empire's Permit Was Issued under Part 71.**

14 Finally, EPA's response draws heavily from the agency rulemaking record
15 applicable to Part 70 regulations. *See, e.g.*, p. 10, n. 6; p. 11, n. 7. But, EPA
16 acknowledges that Empire's permit was issued under Part 71 regulations, not Part 70.
17 The agency attempts to mask this distinction by quoting the Federal Register's
18 commentary on the compatibility of 40 C.F.R. § 71.6 and 40 C.F.R. § 70.6, but
19 parallels between just two sections of Parts 70 and 71 cannot be extrapolated to a
20 conclusion that *all of* Part 71 can be interpreted by looking to interpretations of Part 70.
21 Therefore, EPA's reliance on the "narrow" permit shield for Part 70-issued permits,
22 cannot be summarily applied to Part 71 permits, such as Empire's. EPA has failed to
23 establish that the later-enacted 20% opacity limits can be imposed on Empire during
24 the extended life of its Part 71 permit.

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III. CONCLUSION

For the foregoing reasons and those set forth in Empire's Motion, there is no justifiable basis for imposing the later-enacted 20% opacity limits on Empire's facility. Its Motion to Dismiss should be granted.

RESPECTFULLY SUBMITTED this 27th day of March, 2013.

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By 

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Attorneys for Respondent, Empire Lumber Co.
dba Kamiah Mills

1 **CERTIFICATE OF SERVICE**

2 I, Tricia Backus, certify and declare: I am over the age of 18 years, make this
3 Declaration based upon personal knowledge, and am competent to testify regarding the
4 facts contained herein. On March 7, 2013, I served true and correct copies of
RESPONDENT EMPIRE LUMBER CO.'S REPLY IN SUPPORT OF MOTION
TO DISMISS on the parties and in the manner listed below:

5 M. Lisa Buschmann, Admin. Law Judge Candace Smith, Regional Hearing Clerk
6 U.S. EPA, Office of Admin. Law Judges U.S. EPA, Region 10
7 U.S. EPA Office of the Hearing Clerk Mail Stop: ORC-158
8 Mailcode 1900L 1200 Sixth Ave., Suite 900
9 1200 Pennsylvania Avenue N.W. Seattle, WA 98101
10 Washington DC 20460

11 **And to:** [] Via Facsimile
12 1099 14th Street, NW [] Via U.S. Mail
13 Suite 350 Franklin Court [] Via Legal Messenger
14 Washington, D.C. 20005 [X] **Via Federal Express Overnight**
15 [X] Via E-Mail: Smith.Candace@epamail.epa.gov

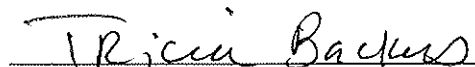
11 [] Via Facsimile
12 [] Via U.S. Mail
13 [] Via Legal Messenger
14 [X] **Via Federal Express Overnight**
15 [X] Via E-Mail: oaljfiling@epa.gov

16 Shirin Venus, Asst. Regional Counsel
17 U.S. EPA, Region 10
18 Mail Stop: ORC-158
19 1200 Sixth Ave., Suite 900
20 Seattle, WA 98101

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18 [] Via U.S. Mail
19 [] Via Legal Messenger
20 [X] **Via Federal Express Overnight**
21 [X] Via E-Mail: venus.shirin@epamail.epa.gov

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

24 SIGNED on March 7, 2013 at Seattle, Washington.


Tricia Backus

RESPONDENT EMPIRE LUMBER CO.'S
REPLY IN SUPPORT OF MOTION TO
DISMISS - 5

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