UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
FIRESTONE PACIFIC FOODS, INC.,	)	Docket No. EPCRA-10-2007-0204
	)	
Respondent	)	

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY

I. Procedural History

The U.S. Environmental Protection Agency, Region 10 (EPA or Complainant) initiated this action on September 6, 2007 by filing a fifteen (15) count Administrative Complaint charging Respondent, Firestone Pacific Foods, Inc. (Firestone) with violating Section 312(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11022(a). Specifically, the Complaint alleges that in regard to five consecutive calender years (2001-2005) Respondent violated EPCRA Section 312(a) by failing to timely submit an Emergency and Hazardous Chemical Inventory Form identifying the presence of 500 or more pounds of the hazardous chemical ammonia at its fruit processing facility in Vancouver, Washington to: a) the State Emergency Response Commission (Counts 1, 4, 5, 6, 7); b) the Local Emergency Planning Commission (Counts 2, 8, 9, 10, 11); and c) the local fire department (Counts 3, 12, 13, 14, 15). The Complaint requests imposition of an aggregate penalty in the amount of $44,190 for these fifteen violations. On October 11, 2007, Respondent filed a brief Answer to the Complaint denying the violations and essentially all the factual allegations upon which they are based, and requesting a hearing thereon. Respondent raised no affirmative defenses in its Answer. Thereafter, pursuant to a Prehearing Order, the parties submitted their Prehearing Exchanges.

On February 29, 2008, Complainant filed a "Motion for Partial Accelerated Decision as to Liability" (Motion) seeking determination of Respondent's liability *only* as to Counts 1 through 3 of the Complaint, which pertain to calender year *2005,* and respectively allege in regard thereto that Respondent failed to submit the required form to each of the three pertinent governmental entities. On March 13, 2008, Respondent filed a Response to the Motion for Accelerated Decision (Response) supported by the Declaration of Zachary Schmitz, Firestone's operations manager. In its Response, Respondent does not deny that it was required to file the requisite forms for calender year 2005 and that such forms were not filed timely, *i.e.* by March 1, 2006. Rather, it raises as a defense that EPA is estopped from claiming liability against it as a result of the representations its inspectors made to Respondent in April and June of 2006 that no

action would be taken against it if it submitted the requisite forms "soon." Respondent asserts that it relied upon these representations and submitted the required forms in June of 2006, and that there have been no releases at the facility, so no harm to the public interest has occurred. On March 26, 2008, Complainant filed its Reply to Response to Motion for Accelerated Decision (Reply), in which it argued that Respondent's estoppel argument fails because such defense is disfavored when applied to the government acting in its sovereign capacity to protect a public interest and Respondent can neither show affirmative misconduct by the government nor any detrimental reliance thereupon.

II. Standards for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 ("Rules of Practice," or "Rules"). Section 22.20(a) of the Rules of Practice authorizes an Administrative Law Judge to "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).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, *8 (ALJ, Order Granting in Part and Denying in Part Complainant's Motion for Accelerated Decision on Liability, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See CWM Chemical Services, Inc.*, 6 E.A.D. 1, 95 EPA App. LEXIS 20, *25 (EAB 1995).[1] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, summary judgment is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" (FRCP 56(c)), but in addition, a court may take into account any material that would

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[1]*See also, Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2, 1994 EPA App. LEXIS 10, *14 (EAB 1994) ("In the exercise of ... discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524, n.10, 1993 EPA App. LEXIS 6, *26 n.10 (EAB 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *Detroit Plastic Molding*, 3 E.A.D. 103, 107, 1990 EPA App. LEXIS 4, *9 (CJO 1990).

be admissible or usable at trial. *Horta v. Sullivan,* 4 F.3d 2, 8 (1st Cir 1993)(citing, 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2d ed. 1983)); *Pollack v Newark,* 147 F. Supp. 35 (D.N.J. 1956)(In considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavit, or otherwise made admissible in evidence), *aff'd,* 248 F.2d 543 (3rd Cir. 1957), *cert. denied,* 355 U.S. 964 (1958). Such material may include documents produced in discovery. *Hoffman v. Applicators Sales & Service, Inc.*, 439 F.3d 9, 15 (1st Cir. 2006)(citing, 11 James M. Moore, *et al.*, Moore's Federal Practice § 56.10 (Matthew Bender 3rd ed.)(courts generally accept use of documents produced in discovery as proper summary judgment material)).

A motion for summary judgment puts a party to its proof as to those claims on which it bears the burdens of production and persuasion. For the EPA to prevail on a motion for accelerated decision where there is an affirmative defense such as estoppel, as to which Respondent ultimately bears such burdens, EPA initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). If the EPA makes this showing, then Respondent, as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable fact finder could find in its favor by a preponderance of the evidence." *Id.*

Finally, while the Tribunal may look to the record as a whole in deciding upon a motion for accelerated decision, the burden of coming forward with the evidence in support of their respective positions rests squarely upon the litigants. *See, Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (noting that judges "are not archaeologists. They need not excavate masses of papers in search of revealing tidbits -- not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.").

III. EPCRA Section 312(a)

The statutory provision the Respondent is alleged to have violated in this case is EPCRA Section 312, which provides in relevant part as follows:

> (a) Basic requirement.
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> (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C. §651 *et seq.*] and regulations promulgated under that Act [29 C.F.R. §1902.1 *et seq.*] shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this title referred to as an "inventory form") to each of the following:
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> (A) The appropriate local emergency planning committee [LEPC].

(B) The State emergency response commission [SERC].

(C) The fire department [FD] with jurisdiction over the facility.

(2) The inventory form . . . shall be submitted . . . annually . . . on March 1, and shall contain data with respect to the preceding calendar year. . . .

* * *

(b) Thresholds. The Administrator [of EPA] may establish threshold quantities for hazardous chemicals covered by this section below which no facility shall be subject to the provisions of this section.

42 U.S.C. §§ 11022(a), (b). *See also*, 40 C.F.R. §§ 370.1-370.41 (regulations establishing reporting requirements under EPCRA).[2]

The regulations implementing the Occupational Safety and Health Act of 1970 (OSHA) referred to in EPCRA Section 312 above mandate that "[e]mployers shall have a material safety data sheet in the workplace for each hazardous chemical which they use." 29 C.F.R. § 1910.1200(g). *See also*, 29 C.F.R. § 1910.1200(b)(1),(b)(2)("all employers [are] to provide information to their employees about the hazardous chemicals to which they are exposed, by means of . . . material safety data sheets . . . This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.")[3]

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[2] Under EPCRA, "facility" means 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); the term "person" includes a corporation; "material safety data sheet" means the sheet required to be developed under [OSHA] 29 U.S.C. § 1910.1200(g); and "hazardous chemicals" are those designated under OSHA regulation 29 U.S.C. § 1910.1200(c). 42 U.S.C. §§ 11049(4)-(7), 11021(a), (e). In terms of the "Inventory Form," EPCRA Section 312(a) and the implementing EPA regulations, created two "tiers" for reporting information on hazardous chemicals present at a facility. "Tier I" reports contain only general information on the amount and location of hazardous chemicals present in the facility during the preceding calender year by category, and is to be submitted annually. "Tier II" reports contain more detailed information on individual chemicals and may be voluntarily submitted by a facility in lieu of a Tier I report or must be submitted by a facility upon request of any entity with whom the report is filed. 42 U.S.C. §§ 11022(d), 40 C.F.R. §§ 370.25. EPA has published forms for the inventory reports required under EPCRA Section 312. *See*, 40 C.F.R. § 370.40 (Tier I form), 40 C.F.R. § 370.41 (Tier II form); C's Ex. 2.

[3] For the purpose of this OSHA regulation, an "employer" is defined as "a person engaged in a business where chemicals are . . . used"; "[m]aterial safety data sheet (MSDS) means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section;" "exposed" means that an employee is subjected in the course of

(continued...)

For the purpose of this OSHA regulation, "hazardous chemicals" include those listed in 29 C.F.R. Part 1910, Subpart Z. 29 C.F.R. § 1910.1200(d)(3)(i). Ammonia (CAS No. 7664-41-7) is on that list. *See*, 29 C.F.R. § 1910.1000 Table Z-1 (Limits for Air Contaminants). Thus, employers are required to have material safety data sheets for ammonia under OSHA. In its regulations, EPA has designated ammonia as an "extremely hazardous substance" pursuant to 42 U.S.C. § 11002(a)(2), and in regard thereto established the presence of 500 pounds at any one time during the preceding calender year as the "threshold quantity" of the chemical triggering the reporting provisions of EPCRA § 312(a). 40 C.F.R. § 370.20(b), 40 C.F.R. Part 355, Appendices A and B (Lists of Extremely Hazardous Substances and their Threshold Planning Quantities).

Thus, in order for Respondent to be liable under EPCRA § 312(a) on Counts 1 through 3, this Tribunal must conclude that Complainant has shown that in calender year 2005: a) Respondent was an owner or operator of a facility; b) who was required as an employer to have a material safety data sheet for a hazardous chemical (specifically, ammonia) under OSHA; c) that 500 pounds or more of the hazardous chemical ammonia was present at the facility at any one point; and d) that it failed to submit an Emergency and Hazardous Chemical Inventory Form for that calender year to the applicable State Emergency Response Commission, the Local Emergency Planning Commission and/or the local fire department by the deadline of March 1, 2006.

IV. Analysis of Liability

In its Motion, Complainant alleges as undisputed that, as all times relevant hereto, Respondent corporation was the owner and/or operator of a facility located in Vancouver, Washington engaged in the business of processing individual quick-frozen fruit. In such facility, it operates a anhydrous ammonia[4] refrigeration system and, as a result, during calendar year 2005 ammonia in an amount in excess of 500 pounds was present there. Nevertheless, Respondent did not submit an Emergency and Hazardous Chemical Inventory form identifying the presence of ammonia at its facility for calendar year 2005 by the due date of March 1, 2006 to the applicable

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[3](...continued)
employment to a chemical that is a physical or health hazard, and includes potential (e.g. accidental or possible) exposure. "Subjected" in terms of health hazards includes any route of entry (e.g. inhalation, ingestion, skin contact or absorption); and "foreseeable emergency means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace." 29 C.F.R. § 1910.1200(c).

[4] "Anhydrous" means "without water." Gaseous ammonia is generally referred to as *anhydrous* ammonia to distinguish it from household ammonia, which is an ammonium hydroxide aqueous solution. See, Hawley's Condensed Chemical Dictionary 63 (11th Ed. 1987).

State Emergency Response Commission (SERC), the Local Emergency Planning Commission (LEPC), or the local fire department (FD).[5] Motion at 6-9. In support thereof, Complainant cites to its Prehearing Exhibits nos. 3, 8, 13, 14, 16-19, 21, 22 and 24 (hereinafter cited as "C's Ex. __").

Complainant's Prehearing Exhibits reflect that on April 28, 2006, two EPA investigators, Ted Mix and Harry Bell, conducted a four hour on-site EPCRA compliance inspection of Respondent's "grower-processing operation" which is a "state-of the-art stainless steel processing operation" located at 3211 NW Fruit Valley Road in Vancouver, Washington, which opened in 1993. C's Exs. 3, 19. At such facility, fruit berries are packed, individually quick frozen, and pureed for domestic and export distribution. C's Ex. 3. The investigators observed that Respondent's operation utilized two freezer rooms cooled with anhydrous ammonia operating in a high pressure receiver with three condensers. *Id. See also*, C's Ex. 2 (inspectors' photographs of Respondent's refrigeration system). The Plant Manager, Zachary Schmitz, advised the investigators that the ammonia refrigeration system contained approximately 4,000 pounds of anhydrous ammonia. C's Ex. 3, at 3, C's Ex. 19. The Report of the Inspection dated October 18, 2006 indicates that as of that date "no EPCRA Section 311/312 notifications" had ever been submitted by Respondent for its facility to the Washington SERC, the LEPC, or the Vancouver FD. C's Ex. 3, at 4. *See also* C's Ex. 13, 14, 21, 22 (notes of telephone conversations or e-mail communications between EPA and SERC, LEPC, and/or FD representatives regarding the status of Respondent's EPCRA filings). The Inspection Conclusion Data Sheet indicates that the Respondent advised the inspectors that it was unaware of the EPCRA Regulations. C's Ex. 19.

Complainant's Prehearing Exhibits further include the following:

A. A Material Safety Data Sheet for Anhydrous Ammonia (CAS # 7664-41-7) prepared by Terra Industries Inc. C's Ex. 1

B. Letter from PermaCold Engineering, Inc. dated March 23, 2007 advising Respondent that the "approximate ammonia charge" of its high pressure receiver is 1,820 pounds. C's Ex. 8.

C. The Declaration of Sadie Whitener, a team member responsible for managing the EPCRA Tier II reporting activities for the relevant SERC, dated October 23, 2007. Therein, Ms. Whitener declares under oath that "prior to December 22, 2006," the SERC had never "received an emergency and hazardous chemical inventory (Tier II) report form from Firestone Pacific Foods, Inc. of Vancouver Washington, for any years" and that on that date it did receive such a form, signed by Zachary

[5] It appears undisputed in this case that the applicable SERC is the Washington State Department of Ecology, the applicable LEPC is the Clark Regional Emergency Services Agency; and the applicable FD is the Vancouver Fire Department. *See*, C's Ex. 3.

Schmitz purportedly on March 15, 2006, indicating that for the 2005 calendar year the average daily amount on site of ammonia was 2,000 pounds and the maximum daily amount was 4,000 pounds. C's Ex. 16;[6]

D. The Declaration of John Wheeler, an Emergency Management Coordinator at Clark Regional Emergency Services Agency responsible for managing EPCRA reporting activities for the relevant LEPC, dated November 13, 2007. Therein, Mr. Wheeler declares under oath that as of September 18, 2006 the LEPC did not have any Tier II forms for Respondent on file. Mr. Wheeler further states that his review of "the current" LEPC records reveal a Tier II form, signed by Zachary Schmitz purportedly on March 15, 2006, which indicates that for calendar year 2005 the average daily amount of ammonia on Respondent's site was 2,000 pounds and the maximum daily amount was 4,000 pounds. C's Ex. 17;

E. The Declaration of Daniel Monaghan, Chief of Special Operations for the City of Vancouver, Washington Fire Department responsible for receiving and maintaining records submitted by entities pursuant to EPCRA Section 312, dated November 15, 2007. Therein, Mr. Monaghan declares under oath that "prior to December 21, 2006, the Fire Department had never, at any time, received an emergency and hazardous chemical inventory (Tier II) report from Firestone Pacific Food, Inc. of Vancouver, Washington for any year." Mr. Monaghan further states that such a form signed by Zachary Schmitz and dated March 15, 2006 was received by the Fire Department on December 21, 2006, which indicated that for calendar year 2005 the average daily amount of ammonia on Respondent's site was 2,000 pounds and the maximum daily amount was 4,000 pounds. C's Ex. 18;

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[6] The term "purportedly" is used in regard to Mr. Schmitz's signature date of "March 15, 2006" shown on Respondent's Tier II Reports for 2005 referred to in this Declaration and others and attached as C's Exs. 22 and 24 because as noted further herein, Mr. Schmitz has submitted a Declaration in this case in support of Respondent's Opposition to Complainant's Motion wherein he represents under oath that he first completed the Tier II forms for filing in "June of 2006." Such statement is consistent with the report on the inspection conducted in *April of 2006,* at which time Mr. Schmitz indicated to the EPA investigators that he was not familiar with the EPCRA filing requirements, rather than that he had *already* completed such forms, and the conversations he allegedly had with them then and thereafter in *June 2006* regarding completing and filing the forms "soon." *See,* Schmitz Declaration attached as Response. *See also*, R's Prehearing Exchange wherein it notes it first had "actual knowledge due to the inspection on April 28, 2006." Thus, it appears clear that Mr. Schmitz back-dated his signature on the Inventory Forms while certifying "under penalty of law" the "submitted information is true, accurate, and complete." *See*, C's Exs. 22 and 24. No explanation for his action in this regard appears in the record.

F. A Tier Two Emergency and Hazardous Chemical Inventory Form for the "Facility" identified as Firestone Pacific Foods, 4211 NW Fruit Valley Road, Vancouver, Clark County, Washington, signed by Zachary Schmitz purportedly on March 15, 2006, indicating that for the 2005 "Reporting Period" that the "average daily amount" of ammonia (CAS 7664-41-7) maintained in inventory on site, 365 days a year, was 2,000 pounds and the maximum daily amount was 4,000 pounds. The form bears a date-stamp indicating that it was received by the Vancouver Fire Department on December 21, 2006. C's Ex. 22.

G. A Tier Two Emergency and Hazardous Chemical Inventory Form for the "Facility" identified as Firestone Pacific Foods, 4211 NW Fruit Valley Road, Vancouver, Clark County, Washington signed by Zachary Schmitz purportedly on March 15, 2006, indicating for the 2005 "Reporting Period" that the "average daily amount" of ammonia (CAS 7664-41-7) maintained in inventory on site, 365 days a year, was 2,000 pounds and the maximum daily amount was 4,000 pounds.[7] The form is date stamped as having been received by the State Ecology Unit (the relevant SERC) on December 22, 2006 and is accompanied by an envelope addressed to the Department of Ecology which bears a postage cancellation mark dated December 20, 2006. C's Ex.24.

H. A "Revised" Tier Two Emergency and Hazardous Chemical Inventory Form for the "Facility" identified as Firestone Pacific Foods, 4211 NW Fruit Valley Road, Vancouver, Clark County, Washington (ID # CRK000066430) signed by Zachary Schmitz purportedly on June 15, 2006, for the 2005 "Reporting Period," indicating that the "average daily amount" of ammonia (CAS 7664-41-7) maintained in inventory on site, 365 days a year, was 2,000 pounds and that the maximum daily amount was 2,000 pounds. The Form is date stamped as having been received by the Vancouver Fire Department on February 22, 2007. C's Ex. 22.[8]

I. A "Revised" Tier Two Emergency and Hazardous Chemical Inventory Form for the "Facility" identified as Firestone Pacific Foods, 4211 NW Fruit Valley Road, Vancouver, Clark County, Washington (ID # CRK000066430) signed by Zachary Schmitz purportedly on June 15, 2006, for the 2005 "Reporting Period," indicating that the "average daily amount" of ammonia (CAS 7664-41-7)

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[7] This form (C's Ex. 24), while containing information identical to that on C's Ex. 22, does not appear to be a photocopy of that exhibit.

[8] C's Ex. 22 also contains a Tier II Report from Respondent for the 2006 Reporting Period which is also dated as having been signed by Mr. Schmitz on February 20, 2007 and bears a stamp indicating receipt by the Vancouver Fire Department two days later on February 22, 2007.

maintained in inventory on site, 365 days a year, was 2,000 pounds and the maximum daily amount was 2,000 pounds. The Form is date stamped as having been received by the Ecology Department (SERC) on February 27, 2007. C's Ex.24.[9]

J. Notes of a January 14, 2008 telephone conversation between EPA and the Washington Department of Labor and Industries, during which the latter advised EPA that its records show it had first inspected Respondent's ammonia pressure vessels in 1993, and then again in 2001, 2003, 2005 and 2007. C's Ex. 25. *See also*, C's Ex. 26 (Labor Department Inspection Records).[10]

K. Notes of a January 28, 2008 telephone conversation between EPA and Seattle Refrigeration Co., during which the latter stated that it installed a high pressure ammonia receiver at Firestone's facility in 1993 which holds 1,100 pounds of ammonia at 80% full. C's Ex. 27.

In its Response to Complainant's Motion, Respondent does not contest the accuracy of Complainant's factual allegations establishing a prima facie case of the three EPCRA §312(a) violations alleged in Counts 1 through 3, *i.e.* that during calendar year 2005 Respondent owned and/or operated a facility at which was present 500 pounds or more of ammonia, a hazardous chemical under OSHA regulations as to which it was required to have available a material safety data sheet, that as such it was required under EPCRA § 312(a) to submit an Emergency and Hazardous Chemical Inventory form in regard thereto by the due date of March 1, 2006 to the SERC, the LEPC, and the local FD, and that it failed to do so.[11] *See*, Response and supporting Declaration of Zachary Schmitz, Respondent's Operations Manager, dated March 12, 2008 attached thereto. Rather, in its Response, Respondent only argues that EPA is estopped from making its claims of violation because during the April 2006 inspection and again during a telephone communication occurring in June 2006, EPA's agents made representations to Respondent to the effect that EPA would take no action against the company if the requisite forms were completed "soon." Response at 1-2. In further support of this defense, Respondent

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[9] C's Ex. 24 also contains a Tier II Report from Respondent for the 2006 Reporting Period, signed under oath by Zachary Schmitz purportedly on February 20, 2007 and date-stamped as having been received by the Ecology Unit (the SERC) seven days later, on February 27, 2007.

[10] The Complainant apparently solicited the additional information included in its Exhibits 25-27 and submitted the information with its Rebuttal Prehearing Exchange in response to the statement made by Respondent in its Prehearing Exchange at 1 that: "There is no proof that ammonia in specified quantities was present a respondent's facility during the years 2001-4."

[11] Respondent's failure to proffer any evidence contesting or even argue the truth of these factual allegations forming the basis of its liability for Counts 1-3 suggests that its denial of the analogous allegations of the Complaint in its Answer constituted "artful" pleading at best.

notes that requisite EPCRA forms were prepared and ultimately filed with the necessary authorities between June and December 2006.[12]

V. Analysis of Respondent's Estoppel Defense

Respondent's estoppel argument rests on the notion that a "federal agency is estopped when a person relies on misrepresentations by governmental agencies to its detriment" and when "failure to estop the government will work a serious injustice" and estoppel will not cause undue harm to the public interest. Response at 3 (citing *Watkins v. U.S. Army,* 875 F.2d 699 (9th Cir. 1989). Respondent argues that its plant manager relied on representations that there would be no action taken against the company by EPA if the forms were filed "soon," and that the manager merely "did what he was told." *Id.* at 4. Respondent further argues that there is no harm to the public interest because "(1) Respondent has an excellent facility; (2) Respondent takes its safety responsibilities seriously; (3) the relevant agencies learned of the plant before any release of hazardous materials; (4) there have been no releases; and (5) the forms were ultimately filed." *Id.* at 4, 5. Respondent even goes so far as to state that the public interest will be advanced if EPA is estopped because it will avoid tensions between EPA and the small business community. *Id.* at 5.

In its Reply, EPA contests Respondent's estoppel claim by arguing that estoppel is disfavored when government is acting in its sovereign capacity and that Respondent cannot demonstrate affirmative misconduct on the part of EPA or its reasonable reliance thereon. Citing voluminous case law, Complainant first argues that EPA was acting in a sovereign capacity in bringing this enforcement action and therefore must be afforded deference. Reply at 2-4. Complainant goes on to assert that Respondent cannot show detrimental reliance because Respondent was already in violation when the representations were made and that EPA never misled Respondent, so there is no misconduct on the part of EPA. *Id.* at 6, 7. Complainant therefore concludes that Respondent's failure to show reliance or misconduct defeats any

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[12] In its Response, Respondent represents that Mr. Schmitz (first) prepared and "took the steps customary in the company at the time to see that the forms were mailed" to the requisite governmental authorities after receiving a telephone message from one of the EPA inspectors in "*June of 2006.*" *See*, Respondent's Prehearing Exchange at 3 and Declaration of Zachary Schmitz ¶¶ 3-5 attached to Response. In further support thereof, Respondent also cites the singular exhibit submitted with its Prehearing Exchange which is an e-mail from Deborah Needham, Emergency Management Coordinator of the Clark Regional Emergency Services Agency (the relevant LEPC), dated March 8, 2007, where she states that "although the envelope with the date stamp was unfortunately discharged, I do recall receiving Firestone's Tier II report in early summer." *See*, attachment to R's Prehearing Exchange. On the other hand, Complainant's Exhibits reflect that the earliest EPCRA filing from Respondent actually *received* by any of the three applicable governmental entities was the inventory form for the 2005 reporting period purportedly signed by Mr. Schmitz on March 15, 2006 and stamped as having been received by the Vancouver Fire Department on December 21, 2006. *See*, C's Exs. 3, 13-18, 21-24.

estoppel argument Respondent might put forward.

As a preliminary matter, it is noted that the applicable Rules of Practice required Respondent to state in its Answer "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). Estoppel is an affirmative defense. *BWX Technologies, Inc.*, 9 E.A.D. 61, 2000 EPA App. LEXIS 9 *48 (EAB 2000)(citing Rule 8c of the Federal Rules of Civil Procedure); *V-1 Oil Co.*, 8 E.A.D. 729, 2000 EPA App. LEXIS 4 *2, *30 (EAB 2000)(same); *Lee Brass Co.*, 2 E.A.D. 900, 1989 EPA App. LEXIS 10 *15 (EAB. 1989)(same). Respondent did not raise an estoppel defense in its Answer nor in its Prehearing Exchange and it has not moved to amend its Answer to add such defense. Thus, arguably Respondent waived this defense. *J. Phillip Adams*, 13 E.A.D. __, 2007 EPA App. LEXIS 24 *44, n. 19 (EAB 2007)("Although the Federal Rules do not themselves clearly address the question of waiver, the courts have found that because the rules are clear in terms of when defenses must be asserted, courts have the authority to treat untimely defenses as waived."); *Lazarus, Inc.*, 7 E.A.D. 318, 1997 EPA App. LEXIS 27 *31 (EPA App. 1997)("The general rule is that failure to include an [affirmative] defense in the answer constitutes a waiver of that defense" (citing *Charpentier v. Godsil*, 937 F.2d 859, 863 (3rd Cir. 1991) and *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990)). "However, the rule of waiver is not automatically applied. 'Technical failure to comply precisely with Rule 8(c) is not fatal.'" *Lazarus, Inc.*, 7 E.A.D. at 331, 1997 EPA App. LEXIS at *32 (*quoting Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986)). Thus, where the opposing party is not prejudiced or unfairly surprised by the later introduction of the defense, waiver of the defense is generally found not to have occurred. *Zaclon, Inc.*, 7 E.A.D. 482, 1998 EPA App. LEXIS 13 *19-20 (EAB 1998)(noting that in EPA administrative proceedings, liberal amendment is allowed and waiver is not strictly enforced); *Norman C. Mayes*, 12 E.A.D. 54, 64, 2005 EPA App. LEXIS 5 *28 (EAB 2005)(observing that "it is well established . . . that failure to raise an affirmative defense by responsive pleading does not always result in waiver;" if no prejudice and if defense raised in "reasonable time," there is no waiver)(quoting *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993)); *Lazarus, Inc.*, 7 E.A.D. at 329-35 (upholding ALJ's decision to entertain late-raised defense where no prejudice to complainant resulted from respondent's assertion of the defense).

In this case, Complainant has neither objected to Respondent raising the affirmative defense of estoppel at this point in the proceedings nor is there any evidence of record suggesting prejudice or unfair surprise from the Respondent's failure to raise this defense earlier in the proceedings. Therefore, it is found that the Respondent has not waived its estoppel defense, and such defense will be substantively addressed at this point in this proceeding. *Fey v. Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974)(Where proof tending to establish defense of estoppel was received without objection, although such affirmative defenses were not pleaded, answer could be deemed amended to conform to proof.).

Estoppel is "an equitable doctrine invoked to avoid injustice in particular cases." The elements of the defense are: (a) a definitive misstatement or omission of fact made by one party to another with reason to believe that the other will rely upon it; and (b) the other party does in fact reasonably rely upon the misrepresentation to his detriment. For the reliance to be

reasonable, the party claiming the estoppel defense must show that at the time it acted to its detriment, it did not have knowledge of the truth nor could such knowledge have been obtained with reasonable diligence. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 58 (1984). The defense of estoppel is rarely valid against the Federal Government acting in its sovereign capacity. *Heckler*, 467 U.S. at 60-63; *OPM v. Richmond*, 496 U.S. 414, 422 (1990), *reh'g denied*, 497 U.S. 1046 (1990)(noting that the Supreme Court has reversed every finding of estoppel against the government by lower courts); *Tennessee Valley Authority*, 9 E.A.D. 357, 415, 2000 EPA App. LEXIS 25, n. 56 (EAB 2000)(noting laches and estoppel defenses against the Agency typically fail as a matter of course). In *Heckler*, the Supreme Court explained that "when the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler*, 467 U.S. at 60 (citations omitted).

As a result, it is well established that to prevail on an estoppel defense against the government, the proponent of the defense must not only prove the traditional elements but must also prove "affirmative misconduct" by the government. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996); *B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196, 1997 EPA App. LEXIS 7 (EAB, 1997). Affirmative misconduct has been defined to mean a "deliberate lie" or "a pattern of false promises," and does not include a government agent negligently providing misinformation. *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001); *see also*, *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981)("misinformation provided by a Government official does not rise to the level require estoppel."); *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994)("The erroneous advice of a government agent does not reach the level of affirmative misconduct.").

Respondent's estoppel argument here fails because Respondent has not demonstrated any affirmative misconduct on the part of the government and any detrimental reliance thereon. Respondent rests its entire argument on Mr. Schmitz's Declaration, in which he states that EPA inspectors told him at the time of the inspection in April 2006 that the company was out of compliance with EPCRA but that if the requisite forms were completed "soon," EPA would take no action against the company for failing to file the forms by March 1, 2006. Schmitz Declaration ¶ 2. Mr. Schmitz further states in his Declaration that "[i]n June of 2006 . . . [t]he statement was again made that if the forms were completed and sent to the proper agencies 'soon,' that no action would be taken by the EPA against our company. . . . Upon receipt of this message, I immediately completed the forms and directed that they be sent to the agencies in question." Schmitz Declaration ¶¶ 3, 4. Assuming *arguendo* that those statements were made by the EPA inspectors, by and of themselves, they fall far short of constituting "affirmative misconduct." First, its not clear that the agents and the Agency did mislead Respondent. As Respondent itself notes, "soon" is a term that is "not defined precisely." Response at 3. "Soon" does not covey a measurable period of time but rather implies some indefinite, relatively short period of time in the future, which could be minutes, hours, or days, depending upon the circumstances and the person. As to the first representation that if it acted "soon" no action would be taken, Respondent acknowledges that it did not prepare and put for mailing the forms

until June of 2006, *two months* after the statement was made. As to the second representation of acting "soon," while Mr. Schmitz says he prepared the forms "*immediately* after *receipt* of the message," he neither provides a specific date as to when the message was left or how long thereafter he received it, nor states how long thereafter he prepared and mailed the forms.[13] Like the term soon, "immediately," is an indefinite term of time which could mean, hours, days, weeks, or longer. Thus, to Respondent it may have acted "soon," but to the Agency, Respondent's "immediate" action taken some point after the message was received could well not be "soon" enough. Respondent bears the burden of proof to show misconduct. The use of this vague term "soon" simply does not rise to the level of misrepresentation.

Moreover, even assuming the agents' representations were untrue, Respondent proffers no evidence that the agents deliberately lied, engaged in a pattern of false promises, or otherwise acted in bad faith in making such statements. At best, the evidence suggests that the agents' misrepresentations were negligently made, but mere negligence does not constitute affirmative misconduct. *Board of County Comm'rs v. Isaac,* 18 F.3d 1492, 1499 (10th Cir. 1994)(mere negligence does not constitute affirmative misconduct); *Socop-Gonzalez, supra*; *FDIC v. Hulsey, supra*; *Schweiker v. Hansen, supra.*

Even more clearly, Respondent has failed to demonstrate the requisite element of *detrimental* reliance on the inspector's statements. Mr. Schmitz says he "relied on these representations and submitted the forms in June 2006." Schmitz Declaration ¶ 4. However, Respondent does not provide any other evidence suggesting that it suffered harm as a result of believing and acting upon the statements at that point, rather than presumably some other later point. At the time of the inspection, Respondent was already in violation of law and subject to penalty a therefor. Filing sooner, rather than later, could only work to its benefit, rather than to its detriment.

Finally, Respondent proffers a policy argument in favor of upholding its estoppel defense in this case. First, it argues that no harm to public interest has occurred from the violations because "(1) Respondent has an excellent facility; (2) Respondent takes its safety responsibilities seriously; (3) the relevant agencies learned of the plant before any release of hazardous materials; (4) because there have been no releases; and (5) because the forms were ultimately filed."

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[13] Mr. Schmitz declares in his Declaration that the message was left for him in "June of 2006." Schmitz Declaration ¶ 3. No documentary support is provided for this assertion. However, included among Complainant's Exhibits is a Telephone Conversation Record which indicates that on May 15, 2006, Mr. Mix, one of EPA's investigators, attempted to call Mr. Schmitz to remind him of the required filings and, in light of information the inspector had recently obtained, that the EPCRA inventory forms he had left with Mr. Schmitz during the inspection had not yet been filed. The Telephone Conversation Record indicates that Mr. Schmitz was not available, so the inspector left a voice mail message for him, but it does not contain any mention of whether the Agency would forgo taking action if Respondent acted "soon." See, C's Ex. 15. However, for the purposes of this decision, all of Respondent's allegations regarding the message are taken as true.

Response at 4. Next, Respondent asserts that by upholding its estoppel defense, this Tribunal would be promoting the public interest by garnering respect for EPA among small business owners and the regulated community, who might otherwise question the Agency's mission upon hearing that it sought to recover significant penalties from a company that merely filed too late when no harm has occurred. Response at 5. In response, this Tribunal notes that "the courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *B&R Oil Co.*, 8 E.A.D. 39, 51, 1998 EPA App. LEXIS 106 *26 (EAB 1998); *see also*, *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996)(Governmental authorities have a broad range on discretion in enforcing the law.); *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir.1996), *cert. denied*, 519 U.S. 928 (1996)(Due to limited enforcement budgets, government regulators must make difficult decisions about who to pursue in enforcing the law.). In doing so, undoubtedly the Agency takes into account many factors hopefully including the impact of the action on public interest and whether pursuing the case will foster or undermine its respect in the regulated community. It is not within the purview of this Tribunal to second guess the Agency's choice in this regard. Rather, Respondent's representations regarding lack of public harm can be addressed in the context of determining an appropriate penalty to be imposed for the violations.

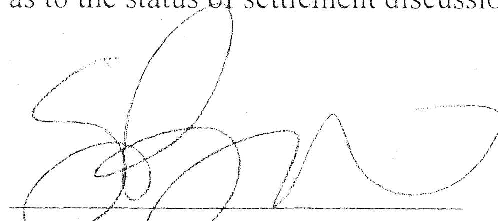
Therefore, Respondent is found to have violated EPCRA Section 312(a), 42 U.S.C. § 11022(a), as alleged in Count 1, 2 and 3 of the Complaint.

ORDER

1. Complainant's Motion for Partial Accelerated Decision is **GRANTED**.

2. The hearing on the remaining Counts of the Complainant and the appropriate penalty to be imposed as to those upon which Respondent was found liable herein shall proceed as scheduled on **June 3, 2008**.

3. Prior thereto, the parties shall in good faith to attempt to settle this matter. Complainant shall file a status report as to the status of settlement discussions on or before **May 9, 2008.**



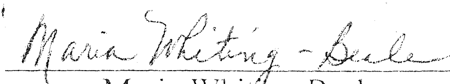
Susan L. Biro
Chief Administrative Law Judge

Dated: May 1, 2008
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion For Partial Accelerated Decision On Liability**, dated May 1, 2008, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: May 1, 2008

Original and One Copy By Pouch Mail To:

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Regional Hearing Clerk
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy By Pouch Mail And Facsimile To:

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