UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
U.S. ARMY, FORT WAINWRIGHT	**)**	**Docket No. CAA-10-99-0121**
CENTRAL HEATING & POWER PLANT,	**)**	
	)	
Respondent.	**)**	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AND ON OTHER MOTIONS

I. Background

This proceeding was initiated by a Complaint filed on December 30, 1999, by the Director of the Office of Air Quality, United States Environmental Protection Agency, Region 10 (Complainant), against Respondent, the United States Army, Fort Wainwright Central Heating and Power Plant, located in Fairbanks, Alaska. The Complaint alleges in nine counts that Respondent violated the State Implementation Plan approved under the Clean Air Act (CAA or the Act) for the State of Alaska, and has thereby violated Section 113(a) of the Act, 42 U.S.C. § 7413(a).

Specifically, the Complaint alleges in Count 1 that Respondent failed to install, maintain and operate the continuous opacity monitors at the Fort Wainwright Central Heating and Power Plant (the Facility, Plant, or CHPP) since at least May 1, 1994 through August 8, 1998; in Count 2 that Respondent failed to install, maintain and operate continuous emission monitors since at least May 1994 through November 10, 1999; in Count 3 that Respondent failed to install, maintain, and operate emission control devices that provide optimum control of air contaminant emissions during all operating periods on its six coal-fired boilers since at least January 4, 1994 to present; in Count 4 that Respondent failed to test the continuous opacity monitors for compliance with certain regulatory procedures and submit a timely Comparison Report; in Count 5 that Respondent failed to test the continuous emission monitors for compliance with certain regulatory procedures and submit a timely Comparison Report; in Count 6 that Respondent failed to monitor quarterly the flue gas opacity from each exhaust stack from at least January 6, 1994, through August 8, 1998; in Count 7 that Respondent failed to monitor quarterly the carbon monoxide and oxygen concentrations from each exhaust stack from at least January 6, 1994, through November 10, 1999; in Count 8 that Respondent failed to control fugitive dust from material piles, roadways, and coal and ash handling and transport systems since at least June 23,

1997; and in Count 9 that Respondent failed to comply with the 20% opacity standard on almost a daily basis at the Facility. The Complaint alleges that such failures constitute violations of various provisions in Respondent's Air Quality Control Permit to Operate, dated April 30, 1993 (Permit), and of the Alaska State Implementation Plan (SIP), and of the CAA.

Respondent filed an Answer to the Complaint, denying the alleged violations, requesting a hearing, and setting forth eleven affirmative defenses. When attempts to settle this matter in Alternative Dispute Resolution were unsuccessful, the undersigned was designated to preside in this matter by Order dated August 29, 2000. Thereafter, the parties filed prehearing exchange documents.

II. Motion to Supplement Record and First Motion to Supplement Witness List

On December 15, 2000, Respondent submitted a Motion to Supplement Record, stating that counsel for Complainant does not oppose the Motion. Respondent seeks to supplement its Prehearing Exchange with 64 documents. Respondent asserts that it did not receive the documents from the Alaska Attorney General's Office until November 20, 2000 or later.

On January 23, 2001, Respondent submitted a First Motion to Modify Witness List, seeking to remove Ms. Alison Ling and to add Ms. Maureen Sullivan to Respondent's List of Witnesses in its Prehearing Exchange, on the basis that Ms. Ling will not be available for a hearing. Respondent states that Ms. Sullivan's testimony will encompass the same factual issues as would have been covered in Ms. Ling's testimony. Complainant did not file any response to either of the motions.

The hearing in this case has not yet been scheduled, and there is no opposition to the Motions from Complainant. Accordingly, the Respondent's Motion to Supplement Record and First Motion to Modify Witness List are hereby, GRANTED.

III. Motion for Accelerated Decision - Arguments of the Parties

On January 8, 2001, Complainant filed a Motion for Accelerated Decision and memorandum in support (Motion) as to the liability of Respondent for the nine counts alleged in the Complaint, and as to questions of law raised by Respondent's eleven affirmative defenses. Respondent filed an Opposition to the Motion on February 8, 2001, to which Complainant filed a Reply on March 6, 2001.

Complainant asserts that no genuine issues of material fact exist as to the allegations of violation or as to the affirmative defenses, and that it is entitled to judgment as a matter of law as to Respondent's liability for all nine counts of the Complaint under Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. part 22.

In its Opposition, Respondent first presents arguments and documents in support of the following "affirmative defense" stated in Paragraph 71 of its Answer:

> Complainant lacks the authority under the Clean Air Act to recover any civil penalty purporting to recoup an alleged economic benefit or based upon a "size of business" factor. Respondent further avers that "the size of Respondent's business," and "the economic benefit of noncompliance" are inapplicable factors to be considered in determining the amount of any assessed penalty because Respondent is a federal facility.

Respondent argues that Complainant has failed to establish a *prima facie* case for recovery of economic benefit penalties against Respondent and has failed to establish a *prima facie* case for application of size-of-business surcharges.

Second, Respondent argues that facts evidencing Respondent's efforts to comply and commitment to resolve extremely complicated operational issues bear on the existence and extent of the alleged violations. Third, Respondent argues that genuine issues of material fact exist as to Counts 3 and 8. Fourth, Respondent asserts that several of the counts alleged in the Complaint are impermissibly repetitious. Finally, Respondent argues that accelerated decision should be denied at least as to Counts 3 and 9 on grounds of impossibility of performance.

Respondent requests that Complainant's Motion be denied, and further requests a ruling as a matter of law: (1) that the United States Army Alaska Garrison is the proper Respondent; (2) that Complainant is not entitled to recover economic benefit penalties nor "size of violator" penalties dependent thereon; and (3) that certain counts of the Complaint are repetitious. Respondent further requests an oral argument before the Motion is decided.

In its Reply, Complainant maintains that no genuine issues of material fact exist as to liability, and asserts that Respondent's "affirmative defenses" involve questions of law that are appropriate for accelerated decision.

IV. Request for Oral Argument

As to Respondent's request for oral argument before the Motion for Accelerated Decision is ruled upon, the Consolidated Rules of Practice provide, at 40 C.F.R. § 22.16(d), that the Presiding Judge "may permit oral argument on motions in its discretion."

Complainant does not object to oral argument being held on the limited issue of whether as a matter of law the economic benefit and size-of-business factors may be considered in determining an appropriate penalty against a federal facility. However, Complainant asserts that Respondent raises issues of fact related solely to the penalty issue, and that oral argument on those issues is premature.

There are numerous issues raised by the parties on the Motion for Accelerated Decision, including whether genuine issues of material fact exist. An oral argument on all of these issues would result in an overly protracted and unfocused oral argument. Therefore, the request for oral argument prior to a ruling on the Motion for Accelerated Decision is DENIED.

Issues upon which a resolution would not be particularly facilitated by oral argument, and issues which are not particularly complex, will be addressed herein. The legal issues raised by the parties as to whether penalties for "economic benefit of noncompliance" and "size of business" may be assessed against Respondent, described below, are complex and of far-reaching significance, and therefore warrant further examination in an oral argument. An oral argument on those issues will be scheduled for **October 4, 2001**.

V. Discussion on Motion for Accelerated Decision

A. Standards for Accelerated Decision

With respect to accelerated decision, the Consolidated Rules of Practice provide, at 40 C.F.R. § 22.20(a), as follows:

> The 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, of no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decision under the Consolidated Rules of Practice. *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 1995 TSCA LEXIS 10 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact, "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting Fed. R. Civ. Proc. 56(c)). Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company*, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997). A

factual issue is "*material* where, under the governing law, it might affect the outcome of the proceeding," and is "*genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." *Clarksburg Casket,* slip op. at 9. The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). In deciding whether a genuine issue of material fact exists, the judge "must consider whether the quantum and quality of evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof." *Mayaguez Regional Sewage Treatment Plant,* 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). The applicable standard of proof is "preponderance of the evidence." 40 C.F.R. § 22.24.

B. Party Respondent

Respondent believes that Complainant is confused as to the identity of the Respondent in this proceeding, pointing out Complainant's various references to Respondent as "United States Army," "DoD," "United States Army Fort Wainwright," and "United States Army Alaska Fort Wainwright Central Heat and Power Plant." Opposition at 22 and n. 1. Respondent asserts that "there exists only one properly served Respondent over whom this tribunal has personal jurisdiction: The United States Army Alaska Garrison." *Id.*

In response, Complainant states that it does not object to a finding that this proceeding is against the United States Army Alaska Garrison rather than against the entire DoD or U.S. Army.

The parties agree that the United States Army Alaska Garrison ("USARAK") was properly served in this matter, as the Complaint was served on the Post Commander, Fort Wainwright, Alaska. Opposition at 22 and n. 1; Reply at 21. The Complaint names as Respondent the "United States Army, Fort Wainwright Central Heating and Power Plant, Fairbanks, Alaska." The Answer to the Complaint names Respondent as "United States Army Alaska Garrison, Fort Wainwright Central Heat and Power Plant." To date, Complainant has not moved to amend the Complaint to change the name of the respondent, and it is not clear that any such amendment is necessary. Therefore, there are no issues presented that require a ruling as to the party respondent in this matter.

C. Economic Benefit and Size of Business

Respondent asserts that Complainant is not entitled to an accelerated decision because it has not established the essential elements of its *prima facie* case, under 40 C.F.R. § 22.24(a), "that the violation occurred as set forth in the complaint and that the relief sought is appropriate." Respondent asserts further that "[f]ailure to establish a right to the relief sought is sufficient to forestall accelerated decision and renders an Administrative Complaint subject to dismissal."

Opposition at 7. In particular, Respondent argues that Complainant has failed to establish a *prima facie* case for recovery of economic benefit penalties against Respondent, by failing to allege facts showing that Respondent received any economic benefit, and failing to establish EPA's statutory right to recover economic benefit penalties against Respondent. In addition, Respondent argues that Complainant has failed to establish a *prima facie* case for penalties based upon size of business, by failing to establish a statutory right to recover such penalties. Respondent also argues that EPA failed to utilize rulemaking procedures under the Administrative Procedure Act with respect to EPA's policy of imposing penalties for economic benefit of noncompliance against Federal facilities. Respondent concludes that penalties against Respondent for economic benefit and size of business must be eliminated from consideration as a matter of law. Respondent points out that Complainant seeks to impose a $16 million penalty, containing an economic benefit component exceeding $12 million. C's Ex. 33, 34.

Complainant also asserts that the issues of whether economic benefit and size of business must be considered by the Presiding Judge in determining an appropriate penalty is a matter of law appropriate for resolution by accelerated decision, and requests accelerated decision in its favor thereon. Motion at 45-49; Reply at 10. Complainant's position is that the penalty assessed against Respondent must include the economic benefit and size of business components, and Complainant sets forth arguments in support of its position in both its Motion and its Reply.

While the issues of whether economic benefit and size of business penalties may be imposed against a Federal facility, is a question of law, resolution of these issues is not necessary to rule on Respondent's liability for the violations alleged in the Complaint. To prevail on a motion for accelerated decision as to liability, EPA must only establish the elements of liability for the violations alleged in the complaint and successfully dispose of the affirmative defenses to liability. *BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 9 (EAB, April 5, 2000), slip op. at 22, 25; s*ee also, Amoco Oil Company v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); C. Wright, A. Miller & M. Kane, 10B Federal Practice & Procedure Civ. 3d § 2736 (West 1998). EPA need not make a *prima facie* case as to each component of a penalty, or establish its entitlement to assess each component of a penalty. EPA also need not address a respondent's arguments, albeit denominated "affirmative defenses," that are relevant only to the amount of penalty. Complainant proposes to assess a penalty which includes both an economic benefit component and a gravity component, which includes, *inter alia*, assessment of size of business, so a portion of the proposed relief is not subject to Respondent's economic benefit and size of business arguments. C's Ex. 33. Accordingly, Complainant's Motion will not be denied on the basis of Respondent's arguments that Complainant is not entitled to include in its penalty assessment the components of economic benefit and size of business.

The parties' requests for a ruling on whether EPA is entitled to impose penalties for economic benefit and size of business against Respondent may be characterized as cross motions for accelerated decision. To be addressed at this point is whether any genuine issue of material fact exists on that question.

Respondent asserts that Complainant has failed to allege facts and failed to put forth a theory that could show that Respondent realized any economic benefit. Respondent explains that Complainant's theory indicates that "economic benefit from delays occasioned by Federal budget appropriation process actually inures to the 'Federal Government' (*i.e*. Congress and/or Department of the Treasury) and not to Respondent," and that Complainant does not present any legal basis for demanding from Respondent an economic benefit that was realized by Congress or Treasury Department. Opposition at 9. Respondent also asserts that EPA has not established its statutory right to recover economic benefit penalties against Respondent. Respondent argues that application of the economic benefit penalty policy against Respondent violates the constitutional balance of power between the legislative and executive branches of the Federal Government, violates rulemaking requirements of the Administrative Procedure Act, is not based on a persuasive interpretation of the CAA, conflicts with Federal fiscal law, and as applied to this case, violates due process. Complainant, in support of its position, sets forth its interpretations of the CAA, case law, and the Due Process clause of the Fifth Amendment. The parties agree, and I find no basis in the record to disagree, that no genuine issue of material fact exists with regard to the question of whether Complainant is entitled to impose penalty components of economic benefit and size of business on a Federal facility. Motion at 45; Opposition at 9; Reply at 14.

Nevertheless, accelerated decision on that question will not be granted at this point in the proceeding, as the issues relating to this question are complex and have far-reaching significance, warranting further examination by oral argument.

D. Respondent's Efforts to Comply

Respondent asserts that it has implemented and planned projects to enhance CHPP operations, totaling over $53.5 million, from the mid-1980's through Fiscal Year 2001, as evidenced by a Statement of Patrick J. Driscoll, Chief of Utilities, Directorate of Public Works at Fort Wainwright, listing such projects. Opposition at 90-92; R's Ex. 76. Respondent describes its efforts in response to a Notice of Violation issued by ADEC in 1994 to negotiate a compliance order by consent and its application for a Title V permit application that included a schedule for coming into compliance.

Section 113(e) of the Clean Air Act requires EPA to take into account, *inter alia*, a respondent's "full compliance history and good faith efforts to comply" in determining the amount of a penalty. Thus, as noted by the Fourth Circuit, "Congress has directed that a court should address a violator's '. . . good faith efforts to comply' not at the liability phase of the litigation, but at the penalty phase." *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 229 (4th Cir. 1997); *see also, United States v. Vanguard Corp.,* 701 F. Supp. 390 (E.D.N.Y. 1988) (good faith efforts to comply is not a defense to liability). There is no authority cited by Respondent or otherwise found which supports "good faith efforts to comply" as a defense to liability.

E. Impossibility of Performance

On the basis that its "military mission and unavoidable fiscal law restraints placed [Respondent] in a unique circumstance rendering compliance impossible," Respondent requests denial of accelerated decision, at least with respect to Counts 3 and 9. Opposition at 103; *see*, Answer ¶ 76. Count 3 alleges that Respondent failed to install, maintain and operate emission control devices that provide optimum control of air contaminant emissions during all operating periods pursuant to Condition (4) and Exhibit D of the Permit, since at least January 4, 1994. Count 9 alleges that Respondent failed to comply with the 20 percent opacity standard (specified by 18 Alaska Administrative Code (AAC) § 50.050) on almost a daily basis, since at least January 6, 1994.

Respondent argues that the necessary construction to remedy opacity violations, namely a baghouse, could not be undertaken without specific Congressional authorization, under fiscal law requirements. The cost of baghouse construction was an estimated $16 million, and must be funded as a military construction project, authorized and approved under 10 U.S.C. §§ 2802, 2805(a). C's Ex. 46 p. 3. Failure to obtain such approval would subject Respondent to sanctions under the Federal laws such as the Antideficiency Act, 31 U.S.C. §1341. Respondent could not avoid the violations by terminating CHPP operations, because that would require closing Fort Wainwright, which cannot be done without notice and Congressional approval. Respondent asserts that the command decision to commence preparation of the funding request (Form 1391) required to initiate the military construction appropriation was executed on October 7, 1996, and that the Form 1391 was submitted on June 5, 1997. Opposition n. 63, R's Exs. 64, 125. In support of its argument, Respondent cites to an ALJ Order Denying Partial Accelerated Decision and Compliance Order stating that "[i]mpossibility of performance is an affirmative defense." *1833 Nostrand Avenue Corp*., EPA Docket No. UST-II-RCRA-93-0205, 1995 EPA ALJ LEXIS 48 (ALJ, August 10, 1995).

In reply, Complainant asserts that the Clean Air Act is a strict liability statute, under which impossibility is not an affirmative defense, but instead may bear on the penalty assessment. In support of its position, Complainant cites to *Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services*, EPA Docket No. CAA-X-1091-06-13-113, 1993 EPA ALJ LEXIS 431 at *47 (Initial Decision, December 22, 1993)(noting "[i]mpossibility of performance is generally no defense to liability for violations of the CAA . . ."), *aff'd*, 5 E.A.D. 626 (EAB 1994) and to *U.S. Ecology, Inc.*, EPA Docket No. RCRA-V-W-025-92, 1995 EPA ALJ LEXIS 41 at *18-19 (Decision and Orders Upon Motions for Accelerated Decision, October 4, 1995).

The ALJ opinion in *1833 Nostrand Avenue Corp.*, *supra*, is not persuasive here. That case involved violations of the Resource Conservation and Recovery Act (RCRA), concerning underground storage tanks (USTs). The ALJ in that case opined, "[i]f Complainant's argument is that Respondent must be held strictly liable without fault, I am not convinced that the statute and regulations require such a harsh result," and denied accelerated decision, finding that a

genuine issue of material fact existed as to whether to hold respondent liable for not having release detection records available, where the respondent showed that it owned but did not operate the service stations and USTs at issue, and the operators refused to submit the records to the respondent. 1995 EPA ALJ LEXIS 48, at *18-19. The opinion appears to be at odds with a decision of EPA's appellate tribunal, holding property owners strictly liable for hazardous waste violations resulting from lessees' activities on the property. *Arrcom, Inc.*, 2 E.A.D. 203, 209-211 (CJO, May 19, 1986). Moreover, Federal courts have held that a defense to non-compliance with financial responsibility requirements under RCRA based upon impossibility of obtaining insurance coverage - analogous to a defense of technological or economical infeasibility in a Clean Air Act case - is irrelevant to the issue of liability. *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 287 (W.D. Mich. 1988), *appeal dismissed*, 867 F.2d 611 (6th Cir. 1989); *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (D. Mich. 1990), *aff'd without opinion*, 955 F.2d 45 (6th Cir.), *cert. denied*, 506 U.S. 820 (1992)("neither an impossibility defense nor good faith efforts to secure financial assurances are defenses to liability").

For violations of the Clean Air Act, impossibility of compliance is no defense to liability. *United States v. Vanguard Corp.*, 701 F.Supp. 390 (E.D. N.Y. 1988) ("claims of infeasibility and good faith efforts, which may be relevant to the calculation of penalties under the [Clean Air] Act . . . are not a defense to non-compliance"); citing *United States v. Ford Motor Co.*, 814 F.2d 1099, 1103-4 (6th Cir. 1987)("technical infeasibility coupled with good faith efforts can be considered by the district court as a factor mitigating against the imposition of penalties in the enforcement action") and *Union Electric Co. v. EPA*, 427 U.S. 246, 258-9 (1976)(analyzing legislative history of the Clean Air Act). *See also, Friends of the Earth v. Potomac Electric Power Company*, 419 F. Supp. 528, 535 (D. D.C. 1976)(legislative history of the 1970 CAA amendments "plainly reflects a congressional intent that claims of technological and economic infeasibility not constitute a defense to an adjudication of violation of applicable SIP requirements"); *Indiana and Michigan Electric Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975). Similarly, under the Clean Water Act, where an impossibility argument was raised by a municipality, it was held that "impossibility is not, as a matter of law, a valid defense to Clean Water Act liability" because the Clean Water Act "imposes duties unilaterally . . . and without regard for parties' intention." *United States v. City of Hoboken*, 675 F.Supp. 189, 198 (D. N. J. 1987). The court explained, "if a party is a permit holder, the Act makes that party liable whenever the party discharges effluent that violates its permit," and "[e]xcuses are irrelevant; under the Act the party must either achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging." *Id.*

Where the argument is raised by a Federal government entity or Federal facility, based on lack of funding or appropriations, the same reasoning applies. In *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1998), the Secretary of Interior raised a defense of impossibility, based on resource limitations, a moratorium and insufficient monetary allocations, to his failure to designate a critical habitat within statutory deadline under the Endangered Species Act. The Tenth Circuit rejected the defense that inadequate Congressional appropriations relieved him of

his duties, stating that repeals or suspensions of legislation by implication are disfavored, "especially when the claimed repeal rests solely on an Appropriations Act." *Id.*, citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). Courts have found Federal executive departments and agencies liable for failure to perform a duty, and then addressed the agency's defense of impossibility in the context of remedy or injunctive relief. *Conservation Law Foundation of New England, Inc. v. Reilly*, 743 F. Supp. 933, 942-43 (D. Mass. 1990) and 755 F.Supp. 475 (D. Mass. 1991); *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 787 (N.D. Cal. 1982); *Firebaugh Canal Co. v. Department of Interior*, 203 F.3d 568 (9th Cir. 1998).

Indeed, Respondent is subject to the same standards, requirements, process and sanctions under the CAA as any other regulated entity, pursuant to Section 7418(a) of the CAA, which provides in part:

> Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State . . . and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any . . . requirement respecting permits and any other requirement whatsoever), . . . (C) to the exercise of any Federal, State or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State or local courts, or in any other manner.

A Federal facility is subject to an exemption, set forth in Section 7418(b) of the CAA, which provides, in part, "The President may exempt any emission source of any department, agency or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . . [n]o such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation."

Because Congress has specifically addressed lack of appropriation in the statute, and generally prohibited the President from granting an exemption based on lack of appropriation, no merit can be given to an argument that, without any Presidential exemption, Respondent should be excused from a requirement under the CAA due to lack of appropriation, or due to delays associated with requests for and receipt of appropriation.

Accordingly, Respondent's claim that unavoidable fiscal law restraints placed it "in a unique circumstance rendering compliance impossible," does not raise any genuine issues of fact

material to the issue of liability.

F. Repetitious Counts

Respondent asserts that EPA has "double counted" alleged violations of essentially identical requirements of the Permit in Counts 1 and 6, 2 and 7, and 3 and 9. Respondent states that, because the permit conditions are redundant, they should not be separately enforceable, and the issue of whether such counts are impermissibly repetitious presents a genuine issue of material fact. Opposition at 100; *see*, Answer ¶ 68. Respondent suggests consolidating Counts 1 and 6 into one count, consolidating Counts 2 and 7 into one count, and consolidating Counts 3 and 9 into one count.

The standard for multiplicitous counts is set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) as follows: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. In the case at hand, although permit provisions rather than statutory provisions are at issue, the parties both apply the *Blockburger* standard. Opposition at 100; Reply at 6. This is not unreasonable, as the CAA provides that a penalty may be assessed for each permit requirement that was violated. Specifically, Section 113(d)(1)(B) of the CAA authorizes a civil administrative penalty to be assessed against a person "whenever . . . the Administrator finds that such person . . . has violated or is violating any . . . requirement or prohibition of this subchapter or subchapter III, IV-A, V or VI of this chapter, including . . . a requirement or prohibition of any rule . . . permit, or plan promulgated, issued or approved under this chapter . . . ."

The permit provisions that are the subject of Counts 1, 2, and 3 are Condition (4) of the Permit, which states, "[p]ermittee shall install, maintain, and operate, in accordance with manufacturer's procedures, emission control devices, testing equipment and monitoring equipment to provide optimum control of air contaminant emissions during all operating periods," and Exhibit D of the Permit. As relevant to Count 1, Exhibit D specifies that"[p]ermittee shall maintain and operate in good working order a continuous system for recording and monitoring carbon monoxide corrected to 7% oxygen" and "[t]he system shall be installed and calibrated according to 40 CFR part 60, Appendix B, Performance Specification 3 and 4." As relevant to Count 2, Exhibit D specifies, "[p]ermittee shall install, maintain and operate in good working order a continuous system for recording and monitoring opacity" and "[t]he system shall be installed and calibrated according to 40 CFR part 60, Appendix B, Performance Specification 1." C's Ex. 1; R's Ex. 102.

The permit provision that is the subject of Counts 6 and 7 is Condition (17), which provides, "[p]ermittee shall monitor flue gas opacity, carbon monoxide, and oxygen concentration from each exhaust stack for each quarter of operation, as stipulated in Exhibit C."

Id. The Complaint indicates that the reference to Exhibit C is an error, that it should reference Exhibit D, which requires Respondent, *inter alia*, to "monitor and report process and emission parameters as prescribed" in the chart therein.

Counts 1, 2, 6 and 7

Count 1 alleges that Respondent "failed to install, maintain and operate the COMS [continuous opacity monitors] since at least May 1, 1994, through August 8, 1998, in violation of Condition (4) and Exhibit D" of the Permit. Count 6 alleges that Respondent "failed to monitor the flue gas opacity from each exhaust stack for each quarter of operation, from at least January 6, 1994 through August 8, 1998, in violation of Condition (17)" of the Permit.

Count 2 alleges that Respondent "failed to install, maintain and operate the CEMS [continuous emission monitors] since at least May 1, 1994, through November 10, 1999, in violation of Condition (4) and Exhibit D" of the Permit. Count 7 alleges that Respondent "failed to monitor carbon monoxide and oxygen concentrations from each exhaust stack for each quarter of operation, from at least January 6, 1994 through November 10, 1999 in violation of Condition (17)" of the Permit.

A portion of the allegations of Counts 1 and 2 -- failure to "operate" the monitors – appears to overlap with the allegations of Counts 6 and 7, failure to "monitor." As explained by Complainant, COMS and CEMS monitor and record on a continuous basis. Motion at 9, 13. Thus, if they are properly operating, they are monitoring. Complainant does not assert that a violation of Condition (17) of the Permit to "monitor" requires proof of a fact that a violation of Condition (4)'s provision to "operate" the monitoring systems does not require. However, there may be some distinction between the requirement of Condition (17) for the permittee to monitor, connoting the permittee's receipt and observation of the data, and the requirement of Condition (4), to operate the system in good working order. Nevertheless, the Condition (4) provisions for installation and maintenance of the monitors require proof of facts different from the Condition (17) provision for monitoring. That is, only a violation of Condition (4) requires proof of failure to install, properly install, or maintain the system in good working order, regardless of whether any monitoring data were received or observed by Respondent. Only a violation of Condition (17) requires proof of failure of Respondent to receive or observe monitoring data during each quarter of boiler operation. Therefore, to establish Respondent's liability for Counts 1 and 2 as separate violations from Counts 6 and 7, Complainant must show *prima facie* that Respondent failed to install and/or maintain in good working order the COMS and CEMS during all times that the boilers were operating within the time periods alleged in the Complaint.

While in its Reply Complainant emphasizes the failure to install the monitors as the distinction from Counts 6 and 7 (Reply at 5-6, 8), in its Motion Complainant concedes that during most of the 1990s, Respondent has "repeatedly installed COMS, tested them, determined they did not work, and then repaired or replaced them," and attempted to install functional

CEMS.[1] Motion at 10, 13-14. This leaves open the possibility that Respondent installed COMS and CEMS and despite some breakdowns, maintained them in good working order.

The documents in the case file, however, do not show that Respondent installed and maintained in good working order, during all periods that the boilers were operating, COMS from May 1, 1994 through August 8, 1998 for Count 1, and CEMS from May 1, 1994 through November 10, 1999. *See*, C's Ex. 4 p. 4 (ADEC inspection report, dated February 7, 1994, indicating that each boiler stack is equipped with an opacity monitor, but that Respondent's inability to properly monitor flue gas carbon monoxide and oxygen requires installation of additional parts or equipment); R's Ex. 108 (letter dated February 23, 1995 from ADEC referring to study recommending installation of operational oxygen, carbon monoxide and opacity monitors); R's Ex. 110 (letter dated March 17, 1995 from ADEC requesting source testing for emissions); R's Ex. 115 (letter dated October 4, 1995 from Respondent to ADEC referring to installation of opacity and gas monitors being added to project contract); C's Ex. 5 (ADEC inspection report, dated December 14, 1995, stating "[t]he permittee is not complying with the requirement to maintain CO monitors" and that "none of the monitors were working properly"); R's Exs. 126, 128, 129 (letters dated November 25, 1996 and December 12 and 26, 1996 regarding CEMS testing); R's Ex. 131 (letter dated January 16, 1997 from Respondent to ADEC indicating that opacity monitors were installed and tested in March 1996, but that a power spike destroyed the circuit boards in the monitors, so "[r]eplacement circuit boards were immediately ordered and installed when received"); R's Ex. 133 (letter dated June 6, 1997 from Respondent to ADEC indicating that Respondent's opacity system could be repaired but questioning its reliability, and indicating that a project was initiated to purchase and install a new opacity monitoring system); C's Ex. 15 (EPA inspection report, dated July 18, 1997, stating that there are no CEMS or COMS operating); R's Ex. 139 n. 4 (ADEC memorandum, dated March 24, 1999, indicating that oxygen and carbon monoxide monitors are in the process of certification, and that uncertified opacity monitors are also employed); C's Ex. 23 (letter dated July 1, 1999 from Respondent to ADEC, describing history of COMS and CEMS).

Respondent does not contend that it has done so; rather, as stated in its Prehearing Exchange statement (at 17 and 18), Respondent "contends that the monitors were installed during some portion of time" identified in Paragraphs 37 and 39 of the Complaint (emphasis added), and cites to its Prehearing Exchange exhibits referenced in the preceding paragraph herein. Respondent has not raised any genuine issue of material fact as to liability for Counts 1 and 2.

As to Count 6, Complainant cites to documents in its Prehearing Exchange showing that

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[1] Respondent admitted in its Answer that "subsequent to the inspection, the Army installed the COMS and obtained state certification of the installation of the COMS on August 8, 1998," and that "subsequent to the inspection, the Army installed the CEMS and obtained state certification of the installation of the CEMS on November 10, 1999." Complaint and Answer ¶¶ 30, 31. Although these admissions alone might suggest that Respondent did not install any COMS or CEMS until after the inspection, prehearing exchange documents indicate otherwise.

Respondent failed to monitor opacity continuously due to the COMS being inoperative. C's Exs. 4, 15, 58D. In support of Count 7, Complainant cites to documents in its Prehearing Exchange showing that Respondent failed to continuously monitor carbon monoxide and oxygen concentrations. C's Exs. 4, 15. Respondent's Opposition and Prehearing Exchange statement do not set forth specific facts or refer to any documents showing that there are any genuine issues for trial, as to either Count 6 or Count 7.

It is concluded that there are no genuine issues of material fact as to Respondent's liability for Counts 1, 2, 6, or 7.

Furthermore, there are no genuine issues of material fact as to those counts being repetitious. As discussed above, a violation of the installation and maintenance provisions of Condition (4) requires proof of facts that Condition (17) does not require, and a violation of Condition (17) requires proof of facts that the installation and maintenance provisions of Condition (4) do not require. Consequently, it is not appropriate to consolidate Counts 1 and 6 into one count, or to consolidate Counts 2 and 7 into one count.

Counts 3 and 9

Count 3 alleges that "Respondent failed to install, maintain and operate emission control devices that provide optimum control of air contaminant emissions during all operating periods on its six coal-fired boilers since at least January 4, 1994 to present, in violation of Condition (4) and Exhibit D of the . . . Permit . . .and in violation of the Alaska SIP and the Act." Complaint ¶ 41. Count 9 alleges that Respondent failed to operate the coal-fired boilers at the CHPP in compliance with the 20 percent opacity standard (specified by 18 Alaska Administrative Code (AAC) § 50.050) since at least January 6, 1994, in violation of Condition (2) and Exhibit B of the Permit, and that Respondent failed to comply with that standard on almost a daily basis. Condition (2) provides, "[p]ermittee shall comply with the most stringent of applicable emissions standards, limits and specifications set out in State Air Quality Control Regulation." Exhibit B in turn sets an emission limit for particulate matter as "20% opacity not to be exceeded more than three minutes in any one hour," and sets emissions limits for sulfur dioxide, nitrogen oxides and carbon monoxide. C's Ex. 1; R's Ex. 102.

Complainant presents its claims as to Counts 3 and 9 in such a way that they appear similar, considering that, in support of Count 3, Complainant cites to evidence that Respondent violated the 20% opacity standard. Motion at 16; Reply at 4. However, only Count 3, *i.e.*, a violation of Condition (4), requires proof of failure to install, maintain and/or operate emission control devices, and it does not require proof of violation of the opacity standard. On the other hand, as to Count 9, Condition (2) and Exhibit B require proof of failure to comply with that standard (or other emission standards in the permit), and do not require proof as to emission control devices. R's Ex. 102. As proof of the violation alleged in Count 3, Complainant has proffered documents showing that Respondent failed to install emission control devices, namely baghouses, that would provide optimum control of air contaminant emissions, as discussed

below. As proof of the violation alleged in Count 9, Complainant proffers documents showing opacity violations, and points out that Respondent has admitted the opacity violations. C's Exs. 54-60; Answer ¶ 53, Opposition p. 94.

It is concluded that there are no genuine issues of material fact as to Count 9, or as to Counts 3 and 9 being repetitious. It is further concluded that Counts 3 and 9 are not repetitious as a matter of law.

G. Whether Any Genuine Issue of Material Fact Exists as to Liability on Counts 3 and 8

Count 3

Respondent contends that disputed issues of material fact exist not only as to Count 3 being repetitious with Count 9, but also as to what specific emission control devices were required under the Permit and whether, during the alleged time frame, the requirement was met. Opposition at 99.

Complainant concedes that there may be a factual dispute between the parties as to what constitutes "optimum control," but asserts that the "multiclones" currently on the boilers do not provide "optimum control," as the Army's own studies show that the only viable solution for meeting the 20 percent opacity standard is to install baghouses on its boilers. Motion at 15. These studies, "Central Heat and Power Plant Refurbishment Study, Fort Wainwright, Alaska" (August 1996) and "Design Charrette Workshop for the FY 00 Emission Reduction System, CHPP Fort Wainwright, Alaska" (May 14, 1999) are presented as exhibits in Complainant's Prehearing Exchange. Specifically, Complainant points to language in the 1996 study: ". . . [t]he plant was already cited for opacity violations . . . [t]o meet particulate emission limits, the CHPP refurbishment recommendations include the installation of baghouses for all 6 boilers" (C's Ex. 47B at 8), and in the 1999 study: "[t]he proposed Full-stream [Baghouse] Emission Control modifications to the Central Heating and Power Plant will provide compliance to the current air pollution standards . . . ." and "Fort Wainwright's existing [CHPP] can not produce adequate quantities of steam to meet the fort's heating and electrical load demand without violating current regulatory limits on opacity." C's Ex. 48 at 18, 19. Emphasizing Respondent's admission of daily violations of opacity standards (*Id.*; Answer ¶ 53), Complainant concludes that the air emission control devices were "wholly inadequate" to prevent these violations, and therefore, that they did not provide "optimum control" of air emissions. Motion at 16-17.

Respondent points out that the Permit did not require installation of a baghouse. R's Ex. 102. In support, Respondent presents the Statement of Patrick J. Driscoll (R's Ex. 76), in which Mr. Driscoll states that at the time the Permit was issued, April 30, 1993, neither the State nor Respondent had determined that baghouses would ever be required, and that in his negotiations with the Alaska Department of Environmental Conservation (ADEC) in 1995 concerning a proposed compliance order, they were "discussing the importance of ongoing operational studies

which were being undertaken to determine if certain operational changes could address opacity concerns," and "operational changes were implemented during soot blows and ash pulls, for example, which positively affected emissions." R's Ex. 76 ¶ 22. In Mr. Driscoll's Statement is a list of several projects implemented at the Facility, such as reducing firing rates, bypassing the coal crusher and sealing around the boilers in 1993; replacing the boiler multiclones and installing electric/electronic controls in the plant to improve monitoring and control of various processes in 1994; replacing the coal crusher, opacity meters and boiler air plates in 1995; negotiating to purchase screened coal in 1996; and installing certain items to reduce ash and coal dust in 1997 and 1998. *Id.* ¶ 8. Thus, "at least for some significant time after 1994," Respondent asserts that it was "engaging in operational practices to minimize opacity." Opposition at 100.

Included in Mr. Driscoll's list of projects is a 1993 Emission Troubleshooting Study, submitted to Respondent in November 1994, which, as stated in the list, "indicated that a full stream bag-house would provide the best assurance of meeting particulate emission standards during boiler operations." R's Ex. 76 ¶ 8. Mr. Driscoll asserts in his statement that he relied on the Permit conditions and ADEC representatives' direction to conduct studies "in continuing with these studies to investigate whether baghouses would have to be installed." R's Ex. 76 ¶ 22. Thus, Respondent admits that it was on notice from November 1994 that "a full stream bag-house would provide the best assurance of meeting particulate emission standards," (R's Ex. 76 ¶ 8) but that Respondent did not install a full stream baghouse at any time prior to issuance of the Complaint.

The Permit does not specify that "optimum control" requires a full stream baghouse, and does not otherwise define the term "optimum control." C's Ex. 1; R's Ex. 102. The dictionary definition of "optimum" is "the amount or degree of something that is most favorable to some end" and "the greatest degree attained or attainable under implied or specified conditions." *Webster's Ninth New Collegiate Dictionary* 829 (1990). It is undisputed that full stream baghouses provide the greatest degree of particulate emissions control, given the demand for steam and electricity at Fort Wainwright. Thus, considering compliance with the opacity standard as the "end," which Respondent does not contest, full stream baghouses are the "most favorable" degree of air contaminant emissions control. Respondent does not claim that any of the operational changes that it implemented resulted in compliance with the opacity standard. Respondent also does not claim that there are any conditions specified in the Permit as to such compliance, or control of particulate air emissions. Thus, the remaining question is whether Respondent has pointed out any conditions *implied* in the Permit as to control of air emissions. Mr. Driscoll's statements that ongoing operational studies were undertaken to determine if operational changes could address opacity concerns, and that operational changes positively affected emissions (R's Ex. 76 ¶ 22) merely indicate Respondent's efforts to comply, and do not indicate any implied conditions to the Permit's requirements for air contaminant control.

Moreover, Respondent does not claim or point to any evidence that the multiclones and the operational changes provided optimum control of air contaminant emissions "during all

operating periods," as required by Permit Condition (4). Respondent only argues that disputed facts exist as to whether violations continued from January 1994. To make a *prima facie* case of Respondent's liability for Count 3, Complainant need only prove that Respondent failed to install, maintain or operate emission control devices that provide optimum control of air contaminant emissions during *some* operating period of time between January 1994 and the date of the Complaint; Complainant need not prove that Respondent failed to do so for the entire period alleged.[2] Thus, for a factual issue to be "material" to liability for Count 3, Respondent must raise an issue of fact that pertains to all operating periods between January 4, 1994 and the date of the Complaint. Respondent has not done so.

Respondent has not raised any genuine issue of material fact as to Count 3, that Respondent failed to "install, maintain, and operate, in accordance with manufacturer's procedures, . . . emission control devices . . . to provide optimum control of air contaminant emissions during all operating periods" between January 4, 1994 and the date of the Complaint.

Count 8

Respondent asserts that genuine issues of material fact exist as to Count 8, which alleges that "Respondent failed to control fugitive dust from material piles, roadways, and coal and ash handling and transport systems since at least June 23, 1997, to present, in violation of Condition (6) of the . . . Permit . . . and in violation of the Alaska SIP and the Act." Complaint ¶ 51. Condition (6) of the Permit states that "[p]ermittee shall control the following sources of fugitive dust to prevent release of particulate matter beyond the facility boundary: a. Material piles and roadways; b. Coal and ash handling and transport systems." C's Ex. 1; R's Ex. 102.

Respondent states that it does not dispute the condition of the Facility as observed and reported by EPA's inspector in June 1997. The inspector observed, *inter alia*, coal dust on all surfaces and on the floor of the coal handling area, ash on the traffic lanes of the truck-loading area, a pile of ash stored on the grounds, and dust generated along unpaved roads. Motion at 26; C's Ex. 15; Opposition at 96. However, Respondent asserts that Complainant has not alleged or established that any observed dust escaped the Fort Wainwright boundary during the inspection or at any time thereafter, that the Permit does not specify how fugitive dust should be controlled, and that Complainant has failed to establish that the alleged violations have occurred from June 23, 1997 until the date of the Complaint. Respondent cites to the Statement of Patrick J. Driscoll, wherein Mr. Driscoll states that "numerous projects have been undertaken after June 1997 to control fugitive dust," and lists several projects to reduce fugitive dust, completed in 1985, and in 1993 through 1996, as well as projects completed from 1997 through 1999, some of

[2] The length of time during which Respondent failed to install, maintain or operate emission control devices that provide optimum control of air contaminant emissions may be relevant to calculation of a penalty for the violation alleged in Count 3.

which were recommended in the EPA inspector's report, according to Respondent. R's Ex. 76 ¶ 20. Thus, Respondent claims that the issues of whether the Permit was intended to restrict fugitive dust from escaping Fort Wainwright's boundary, whether such escape occurred, what operating practices were required by the Permit, and the duration of any violation, are genuine issues of material fact.

Complainant argues in reply that the Permit applies only to the Central Heating and Power Plant (CHPP), not to the entire base, Fort Wainwright, pointing out that Respondent's 1988 Air Quality Control Permit to Operate, which was renewed as the 1993 Permit, states that it is a permit "for the operation of the Fort Wainwright power and heating plant, consisting of eight coal-fired boilers, four diesel-fired boilers, and seven diesel electric generator sets . . . ." C's Ex. 3; R's Ex. 100. Complainant asserts that the EPA inspector noted fugitive dust emissions extending beyond the boundary of the CHPP from the coal storage pile and the ash loading area, citing to the Inspection Report, C's Ex. 15 pp. 9, 18. The Inspection Report states as follows, in pertinent part:

> " . . . we saw the truck-loading area (coal ash), and . . . it appeared that quite a bit of ash was on the traffic lanes and spilling over where ash is loading into the disposal trucks, and also a pile of ash was stored on the grounds.
> * * * *
> Fugitive Dust: This is a chronic, facility-wide problem. Dust is generated along unpaved roads, at the landfill from truck traffic, from the utility's coal storage pile, and on the grounds of the power plant. . . . In addition, an approximately 6,000-cubic-foot pile of old boiler ash, with tire tracks running through it, was observed on the grounds of the utility. This material could easily be disposed of at the base landfill, instead of being left out to be a source of fugitive dust.

C's Ex. 15 at pp. 9, 18-19.

Respondent does not point to any facts bearing on the meaning of the words in Permit Condition (6) "beyond the facility boundary." The Permit, and the cover letter to the Permit, indicate that the term "facility" refers to the CHPP, or to the eight boilers therein, and not to the base, Fort Wainwright. The cover letter states in pertinent part: "U.S. Army Ft. Wainwright heat and power plant has an existing facility which consists of eight boilers on base. . . . [t]he facility is subject to the permitting requirements . . . [t]he facilities is [sic] subject to opacity, particulate matter, sulfur dioxide, fugitive dust and Public Nuisance Standards . . . ." C's Ex. 1; R's Ex. 102. In contrast, Fort Wainwright is referred to as "The Fort" in the cover letter. The Permit states that it is issued to "U.S. Army Ft. Wainwright Heating and Power Plant for the operation of the Ft. Wainwright heating and power plant, consisting of eight coal-fired boilers," and refers thereafter to "the facility." *Id.* The Permit requires submission of a "Facility Operating Report" providing information as to the power plant. *Id.* No genuine issue of material fact has been raised as to the meaning of the words in the Permit, "beyond the facility boundary."

The next question is whether Respondent complied with the Permit requirement to "control" the named sources of fugitive dust to prevent such release. Mr. Driscoll's list of projects implemented to control fugitive dust raises a genuine issue of fact as to whether Respondent complied with the Permit requirement. While Respondent does not claim that any genuine issue exists as to whether particulate matter was released beyond the CHPP, the documents referenced by the parties in the case file do not clearly establish the boundaries of the CHPP and whether the fugitive dust traveled beyond those boundaries. It is concluded that genuine issues of material fact exist as to whether Respondent failed to control the named sources of fugitive dust to prevent release of particulate matter. Accordingly, Complainant's request for accelerated decision as to Count 8 is denied.

H. Whether Any Genuine Issues of Material Fact Exist as to Liability for Counts 4 and 5

Count 4 alleges that Respondent failed to test the COMS for compliance with the procedures set forth in 40 C.F.R. part 60, Appendix B, Performance Specifications 1, 3 and 4, and submit a Comparison Report before May 1, 1994, as required by Condition (15) of the Permit. Count 5 alleges that Respondent failed to test the CEMS for compliance with the procedures set forth in 40 C.F.R. part 60, Appendix B, Performance Specifications 1, 3 and 4, and submit a Comparison Report before May 1, 1994, as required by Condition (15) of the Permit. In its Motion, Complainant cites to documents in its Prehearing Exchange to support these allegations. C's Ex. 4 (report of ADEC inspection on January 6, 1994 states observation of non-compliance with requirements of Condition (15) of the Permit to test the COMS and CEMS); C's Ex. 21 (June 15, 1994, COMS still not certified); C's Ex. 15 (during EPA inspection on June 23-25, 1997, COMS was not even operational, and none of the carbon monoxide or oxygen monitors were certified).

In its Opposition, Respondent does not specifically discuss either Count 4 or 5, but admits that "fully tested and functional monitoring equipment was not in continuous operation at the Plant until 1998 for [COMS] and 1999 for [CEMS]." Opposition at 94. In its Prehearing Exchange statement, Respondent merely asserts that the monitors were tested pursuant to the compliance schedule in the Title V Operating Permit Application, dated December 7, 1997. R's Ex. 134. In its Motion (at 11), Complainant points out the provision in the Title V regulations that "any such schedule of compliance shall be supplemental to, and shall not sanction compliance with, the applicable requirements on which it is based." 40 C.F.R. § 70.5(c)(8)(iii)(C). Complainant has carried its initial burden of production on its Motion for Accelerated Decision on liability as to Counts 4 and 5, and Respondent has not set forth any facts showing that there is a genuine issue for trial on those Counts.

I. Other "Affirmative Defenses"

Respondent raised several other Affirmative Defenses in its Answer which are not

addressed by the issues discussed above, to wit: the Regional Hearing Officer lacks subject matter jurisdiction over allegations in the Complaint (Answer Paragraph 66); the Complaint does not aver a joint determination among EPA and U.S. Attorney General as required by CAA 113(d)(1) (Answer Paragraph 67); failure to join Alaska Department of Environmental Conservation as party (Answer Paragraph 69); claims are barred by laches, estoppel and detrimental reliance (Answer Paragraph 70); EPA should address concerns through CAA Section 113(b), as EPA's sole purpose in this action is recovering penalties that the state cannot (Answer Paragraph 74); and EPA has no authority to overfile a state enforcement action (Answer Paragraph 75).

Respondent does not discuss these Affirmative Defenses in its Opposition, despite the fact that Complainant in its Motion asserts that they do not raise any genuine issues of material fact and that Complainant is entitled to judgement on them as a matter of law. Specifically, in the Motion, Complainant cites to the authority in 40 C.F.R. Part 22 for the Presiding Administrative Law Judge to hear this case, in response to Paragraph 66 of the Answer. As to Paragraph 67 of the Answer, Complainant refers to Paragraphs 59 and 60 of the Complaint, averring the concurrence of the Department of Justice to pursue this action, and to Complainant's Exhibit 30, the written concurrence document. Complainant explains that the State of Alaska is not an indispensable party under Federal Rule of Civil Procedure 19(a), as complete relief can be accorded without adding the State as a party, and asserts that Respondent has not identified any interest for which the State would be indispensable or for which Respondent would be unfairly prejudiced. Complainant cites to *United States v. Summerlin*, 310 U.S. 414, 416 (1940), holding that laches does not generally apply to the Federal government when acting in its sovereign capacity. Complainant asserts that Respondent did not establish any affirmative misconduct or misrepresentation on the part of EPA, or reliance on any misrepresentation, which is required in order to estop the Government, citing to *N. Jonas & Co. v. EPA*, 666 F.2d 829, 834 (3rd Cir. 1981). Complainant points out that "mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government." *BWX Technologies, Inc., supra*, slip op. at 29. Complainant asserts that this action is not "overfiling" because Respondent's violations were not resolved by state action, and that even if there was a state enforcement action, courts have held that Section 113 of the CAA confers independent enforcement authority on the United States, citing *United States v. LTV Steel Co., Inc.,* 118 F. Supp. 2d 827, 833 (N.D. Ohio 2000) and *United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983). Complainant therefore requests these Affirmative Defenses be resolved in its favor. Reply at 8.

Respondent's burden in opposing the Motion is to designate specific facts showing that there is a genuine issue for trial. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). "The requirement of pointing to specific facts to defeat a summary judgment motion is especially strong when the nonmoving party would bear the burden of proof at trial," such as on affirmative defenses. *Harper v. Delaware Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1090 (D. Del. 1990), *aff'd*, 932 F.2d 959 (3rd Cir. 1991). Neither in its Prehearing Exchange statement nor in its Opposition has Respondent established its entitlement to judgment as a matter of law, or identified specific

facts showing a genuine issue for trial, on any of the Affirmative Defenses set forth in Paragraphs 66, 67, 69, 70, 74 and 75 of the Answer. As to Paragraph 69 of the Answer, Respondent's argument that the state administers its Title V Operating Permit which includes a schedule for compliance, and that "a holding in this action providing a different compliance schedule could expose Respondent to, effectively, the risk of inconsistent requirements" (Prehearing Exchange Statement at 14), fails to consider that the case at bar does not involve a compliance schedule. As to Paragraphs 74 and 75, Respondent's arguments that "Complainant's actions effectively 'un-delegate' the State of Alaska federal facility Clean Air Act program without complying with . . . Section 113(a)(2)," that ADEC had already issued a Notice of Violation to Respondent and that Respondent submitted a Title V Permit Application, do not withstand the holdings of *LTV Steel Co.* and *Harford Sands, supra*. Respondent's assertion (Prehearing Exchange Statement p. 15) that "Complainant was aware of [Respondent's] status for years," but "'laid in the weeds,' and then belatedly initiated this action . . . rather than providing requisite compliance assistance to Respondent," does not state specific facts showing that there is a genuine issue of material fact as to affirmative misconduct or detrimental reliance. Thus, Respondent's Prehearing Exchange statement does not refute the Complainant's arguments as to the Affirmative Defenses set forth in Paragraphs 66, 67, 69, 70, 74 and 75 of the Answer.

Moreover, by its failure to address these Affirmative Defenses in its Opposition, Respondent has either reserved them for consideration only as to any penalty assessment, or has abandoned them. *United States v. Mattolo*, 26 F.3d 261, 263 (1st Cir. 1994)("[a]t summary judgment on the issue of liability, unproffered affirmative defenses to liability normally are deemed abandoned"); *United Mine Workers 1974 Pension Fund v. Pittston Co.*, 984 F.2d 469, 478 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993)("[a]s a general rule . . . the failure to raise an affirmative defense in opposition to a motion for summary judgment constitutes an abandonment of the defense."); *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164, 1167 (S.D. Ind. 1992). Consequently, the Affirmative Defenses stated in Paragraphs 66, 67, 69, 70, 74 and 75 of the Answer do not bar an accelerated decision as to Respondent's liability.

VI. Conclusion on Motion for Accelerated Decision

Complainant has met its burden of production on the Motion for Accelerated Decision as to liability, referring therein to documents in the prehearing exchanges, to support the elements of Respondent's liability for the violations alleged in Counts 1 through 9 as discussed above. Of those Counts, Respondent has established that there are genuine issues of material fact only as to Count 8, and therefore Complainant's Motion for Accelerated Decision as to Count 8 is denied. None of Respondent's Affirmative Defenses bar a finding of liability. Complainant is entitled to judgment as a matter of law as to Counts 1, 2, 3, 4, 5, 6, 7 and 9, and accordingly, accelerated decision as to Respondent's liability is granted as to those counts.

ORDER

1. Respondent's Motion to Supplement Record and First Motion to Modify Witness List are **GRANTED.**

2. Respondent's Request for Oral Argument on the Motion for Accelerated Decision is **DENIED** to the extent that it requests oral argument prior to a ruling on the Motion. Respondent's Request for Oral Argument is **GRANTED** as to presentation of an oral argument on the issues raised by the parties on whether EPA is entitled to impose penalties for economic benefit and size of business against Respondent. Oral argument on these issues will be held **at 10:00 a.m. on OCTOBER 4, 2001**, at the Franklin Court Building, 1099 14 St. N.W., Washington, D.C., 20005, in the Courtroom, 8th Floor West Tower. For security purposes, the parties shall, at least two weeks in advance of the oral argument, provide written notification to the undersigned of the identities of all persons expected to attend the oral argument.

3. Respondent's request for a ruling that certain counts in the Complaint are repetitious is **DENIED.**

4. Complainant's Motion for Accelerated Decision on Liability is **GRANTED** as to Counts 1, 2, 3, 4, 5, 6, 7 and 9.

5. Complainant's Motion for Accelerated Decision on Liability is **DENIED** as to Count 8.

6. The parties shall continue in good faith to settle this matter. Complainant shall file a status report on the progress of settlement efforts on **Friday, July 27, 2001.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 3, 2001
Washington, D.C.