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BEFORE
THE REGIONAL ADMINISTRATOR
REGION 10
U.S. ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

EMPIRE LUMBER CO.,

Respondent.

Docket No. CAA-10-2012-0054

RESPONDENT EMPIRE LUMBER
CO. d/b/a KAMIAH MILL'S
RESPONSE TO COMPLAINANT'S
MOTION FOR ACCELERATED
DECISION REGARDING LIABILITY

I. INTRODUCTION AND REQUEST FOR RELIEF

Complainant the Environmental Protection Agency's (EPA's) Motion for Accelerated Decision Regarding Liability may only be granted upon a showing of evidence "so strong and persuasive that no reasonable [finder of fact] is free to disregard it." *In re: Consumers Scrap Recycling, Inc.*, CAA Appeal No. 02-06, 2004 EPA App. LEXIS 1 at *40 (EAB 2004). Respondent Empire Lumber Co. (Empire) explains in this Response that EPA fails to meet this standard, and its Motion must be denied.

Furthermore, EPA's Motion seeks only an accelerated decision of Empire's liability. Its Motion expressly excludes any determination on any penalty amount:

RESPONDENT EMPIRE LUMBER CO.'S
RESPONSE TO MOTION FOR
ACCELERATED DECISION - 1

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1 Application of penalty factors requires finding of fact at hearing, hence
2 Complainant is not seeking Accelerated Decision on penalty.
3 EPA Motion at pp. 29-30. Thus, even if EPA's Motion is granted, it reaches only the
4 question of liability, and the question of the amount of civil penalty (if any) remains for
5 hearing.

6 **II. FACTS**

7 Empire incorporates by reference, as though fully set forth herein, the Factual
8 Background section and supporting evidence from its pending Motion to Dismiss for
9 Failure to State a Claim.

10 **III. ARGUMENT**

11 **A. Standard of Review.**

12 Motions for accelerated decision are evaluated according to considerations
13 comparable to motions for summary judgment under Federal Rule of Civil Procedure
14 56. *Consumers Scrap Recycling*, 2004 EPA App. LEXIS at *40 (citing *In re BWX*
15 *Tech., Inc.*, 9 E.A.D. 61, at 75 n.19 (EAB 2000) (citing, in turn, *Nunez v. Superior Oil*
16 *Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978))).

17 For such motions for accelerated decision, "in deciding whether a genuine
18 factual issue exists, the judge must consider whether the quantum and quality of
19 evidence is such that a finder of fact could reasonably find for the party producing that
20 evidence under the applicable standard of proof." *In re Mayaguez Reg'l Sewage*
21 *Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993) (citing *Anderson v. Liberty Lobby,*
22 *Inc.*, 477 U.S. 242, 252 (1985)). In a civil matter, such as the case at hand, the
23 applicable standard of proof is a preponderance of the evidence. *See* 40 C.F.R. § 22.24
24 ("Each matter of controversy [governed by the CROP] shall be decided by the [ALJ]

1 upon a preponderance of the evidence." Under the preponderance standard, because
2 EPA has the burden of persuasion at trial, it must present evidence "that is so strong
3 and persuasive that no reasonable jury is free to disregard it, and that entitles the
4 movant to a judgment in his favor as a matter of law." *Consumers Scrap Recycling*,
5 2004 EPA App. LEXIS at *40. Because EPA has not met this burden in its moving
6 papers, its Motion must be denied.

7 Furthermore, where accelerated decision is appropriate for only some, but not
8 all, liability issues, only a partial accelerated decision should be granted. *Cf. In re*
9 *Harpoon Partnership*, 2005 EPA App. LEXIS 31 at *2 (EPA App. 2005) (in a TSCA
10 decision, discrete legal issues resolved in a partial accelerated decision).

11 **B. Incorporation by Reference of Empire's Motion to Dismiss for Failure to**
12 **State a Claim.**

13 On March 7, 2013, Empire timely filed and served its Reply in Support of its
14 Motion to Dismiss for Failure to State a Claim. Empire incorporates herein the
15 evidence and arguments set forth in Empire's underlying Motion and the March 7
16 Reply brief. Those briefs explain that Empire is not subject to or otherwise controlled
17 by the opacity limits of the Federal Implementation Plan for the Nez Perce Indian
18 Reservation. The granting of Empire's Motion to Dismiss would moot, in its entirety,
19 EPA's Motion for Accelerated Decision Regarding Liability.

20 **C. Any Finding of Liability Cannot Be Based on the First Notice of Violation.**

21 EPA issued a first notice of violation (NOV) based on an alleged upset or
22 malfunction under the FARR. *See* Complainant's Prehearing Exchange, Exh. 10.
23 However, such event was a covered event under Empire's Title V permit. *See* Empire's
24

1 Prehearing Exchange, Exh. 3. Thus, the first NOV cannot serve as the basis for any
2 finding of liability against Empire.

3 **D. Genuine Issues of Material Fact Preclude Dismissal of Any of Empire's**
4 **Affirmative Defenses.**

5 EPA criticizes Empire's Motion to Dismiss for referencing only one of its
6 affirmative defenses. EPA Motion at p. 23. The number of affirmative defenses
7 addressed in Empire's motion is irrelevant; Empire had no obligation to argue any of its
8 affirmative defenses in that motion. Empire explains below that genuine issues of
9 material fact preclude the summary dismissal of any of its affirmative defenses.¹

10 1. Genuine issues of material fact preclude accelerated decision on the
11 affirmative defense of consideration of equitable factors.

12 EPA cites the enforcement provisions of the CAA to argue that it has no
13 obligation to consider equitable factors (EPA Motion at p. 25); yet it concedes that
14 Executive Order 12,898 requires consideration for "areas with minority and low-
15 income populations." EPA Motion at p. 25. Environmental justice considerations
16 include the availability and quality of jobs in such economically disadvantaged areas:

17 Goal: To facilitate the active involvement of all federal agencies in
18 implementing EO 12898 by minimizing and mitigating disproportionate
19 negative impacts while fostering environmental, public health, and
20 *economic benefits* for overburdened communities.

21 Plan EJ 2014 at p. 19 (EPA's implementation plan undertaken in response to EO
22 12,898) (emphasis added).

23 ¹ Empire withdraws its first affirmative defense, set out in Paragraph 8.1 of its Answer
24 to EPA's Amended Complaint as follows: "The Amended Complaint fails to document
the joint inter-agency determination as required by 42 U.S.C. § 7413(d)(1). Empire
also withdraws its sixth affirmative defense, set out in Paragraph 8.6 of its Answer to
EPA's Amended Complaint as follows: "The Amended Complaint is barred by the
doctrine of waiver."

1 EPA has failed to submit any evidence of the environmental justice implications
2 of holding Empire liable under these circumstances. EPA has not disputed that Empire
3 provides jobs in an underserved region with a struggling economy; yet, it conducted no
4 analysis of the regional impacts of fining Empire.

5
6 2. Genuine issues of material fact preclude accelerated decision on the
affirmative defense of estoppel.

7 EPA argues erroneously that Empire has not alleged any affirmative misconduct
8 on the part of EPA. To the contrary, EPA's undisputed seven-year delay in processing
9 Empire's Title V permit renewal had a designed effect of chilling Empire's ability to
10 challenge this matter and denying due process of law.

11 3. Genuine issues of material fact preclude accelerated decision on the
12 affirmative defense of the bar in 42 U.S.C. § 7413(d)(1).

13 In this Response brief, Empire clarifies that its affirmative defense asserts
14 failure to comply with 42 U.S.C. § 7413(d)(1) and not 42 U.S.C. § 7413(d)(1)(C). In
15 support, Empire incorporates by reference its pending Motion to Dismiss for Failure to
16 State a Claim.

17 4. Genuine issues of material fact preclude accelerated decision on the
18 affirmative defense of laches.

19 EPA concedes that the affirmative defense of laches is a particularly fact-
20 dependent defense. EPA Motion at p. 28 ("In determining whether the doctrine of
21 laches should bar a suit, *particular circumstances of each case must be considered . . .*
22 *.*") (emphasis added). Here, the facts surrounding the length in EPA's delay in issuing
23 its NOV and commencing this action, the reasons for the delay, its effect on Empire,
24 and overall fairness must be considered. *See Goodman v. McDonnell Douglas Corp.*,
606 F.2d 800, 806 (8th Cir. 1979) (quoted in EPA Motion at p. 28). The NOV was not

1 issued until November 2010 – almost 16 months after inspection of Empire's
2 operations. If EPA had issued the NOV earlier, Empire would have had the
3 opportunity to take additional actions to modify the pneumatic system. See Empire's
4 Prehearing Exchange at p. 2 (Scope of testimony of witnesses Dan Musgrave and Chris
5 Johnson). On these facts, Empire's affirmative defense cannot be dismissed by
6 accelerated decision but, rather, require hearing.

- 7
8 5. Genuine issues of material fact preclude accelerated decision on the
9 affirmative defense of failure to satisfy all required administrative
10 procedural steps and substantive due process prior to bringing this
11 matter before the Presiding Officer.

12 For the reasons set forth in its pending Motion to Dismiss for Failure to State a
13 Claim (incorporated herein by reference), Empire's affirmative defense regarding
14 failure to satisfy administrative process and substantive due process bars EPA's
15 allegations of Empire's liability.

- 16 6. Genuine issues of material fact preclude accelerated decision on failure
17 to mitigate or reduce the civil penalty amount.

18 Empire agrees with EPA that the amount of the civil penalty, if any, cannot be
19 decided on an accelerated decision basis, and requires presentation of evidence at a
20 hearing to the finder of fact. EPA does not seek to dismiss Empire's defense regarding
21 the mitigation or reduction of the civil penalty amount, but to convert that affirmative
22 defense to a post-liability decision assessment. Empire concurs. Therefore, even if
23 liability is decided on an accelerated basis, that decision must leave open the question
24 of the amount of penalty, if any.

1 7. Genuine issues of material fact preclude accelerated decision on the
2 affirmative defense of undue delay.

3 EPA's undue delay in seeking an increased penalty bears on the calculation of
4 the penalty amount, if any. Thus, Empire reserves this defense for argument and
5 consideration if liability is found.

6 **IV. CONCLUSION**

7 For the foregoing reasons, EPA's Motion for Accelerated Decision Regarding
8 Liability should be denied. Issues of liability require hearing and resolution by the
9 finder of fact.

10 Even if liability is decided on an accelerated basis, Empire concurs with EPA
11 that the amount of any civil penalty must be sent to the finder of fact for resolution and
12 cannot be decided with the Motion for Accelerated Decision. *See In re: John A.*
13 *Biewer Co. of Toledo, Inc.*, RCRA (3008) Appeal Nos. 10-01 & 10-02, 2013 EPA App.
14 LEXIS 13 at *15 (EAB 2013) (accelerated decision not appropriate as to amount of
15 penalty where disputes of fact remained).

16 RESPECTFULLY SUBMITTED this 12th day of March, 2013.

17 SHORT CRESSMAN & BURGESS PLLC

18
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RESPONDENT EMPIRE LUMBER CO.'S
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1 **CERTIFICATE OF SERVICE**

2 I, Melody Wasley, certify and declare: I am over the age of 18 years, make this
3 Declaration based upon personal knowledge, and am competent to testify regarding the
4 facts contained herein. On March 12, 2013, I served true and correct copies of
RESPONDENT EMPIRE LUMBER CO.'S REPLY IN SUPPORT OF MOTION
TO DISMISS on the parties and in the manner listed below:

5 M. Lisa Buschmann, Admin. Law Judge
6 U.S. EPA, Office of Admin. Law Judges
7 U.S. EPA Office of the Hearing Clerk
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9 1200 Pennsylvania Avenue N.W.
10 Washington DC 20460

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Seattle, WA 98101

11 **And to:**
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13 Suite 350 Franklin Court
14 Washington, D.C. 20005

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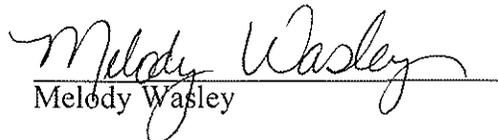
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21 I certify under penalty of perjury pursuant to the laws of the State of
22 Washington that the foregoing is true and correct.

23 SIGNED on March 12, 2013 at Seattle, Washington.

24 
Melody Wasley

RESPONDENT EMPIRE LUMBER CO.'S
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