BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	Docket No. CAA-10-2012-0054
EMPIRE LUMBER CO.,	)	**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND MOTION FOR ACCELERATED DECISION REGARDING LIABILITY**
Respondent.	)	

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I. INTRODUCTION

Complainant U.S. Environmental Protection Agency ("EPA" or "Complainant") initiated this action seeking penalties for violations of the requirements of the Clean Air Act ("CAA") pursuant to Section 113(d), 42 U.S.C. § 7413(d)(1977), by filing a Complaint and Notice of Opportunity for Hearing on April 16, 2012. Empire Lumber Co. ("Empire" or "Respondent") filed an Answer and Request for Hearing on May 17, 2012. Complainant filed a Motion to Amend the Complaint to Revise the Penalty Amount Sought on November 29, 2012. On December 26, 2012, Respondent filed an Answer to the Amended Complaint. On January 23, 2013, Complainant's Motion to Amend the Complaint to Revise the Penalty Amount Sought was granted.

On February 7, 2013, Respondent filed a Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss").[1] This is both Complainant's Response to Respondent's Motion to Dismiss and Complainant's Motion for Accelerated Decision Regarding Liability. Complainant respectfully requests that Respondent's Motion to Dismiss be denied and this Motion for Accelerated Decision as to Liability be granted because no genuine issue of material fact exists and Complainant is entitled to a finding of liability as a matter of law, and because none of Respondent's affirmative defenses constitute a basis for relief from liability.

II. RESPONSE TO RESPONDENT'S MOTION TO DISMISS

A. STANDARD OF REVIEW.

[1] At the same time, Respondent filed a Motion for Leave to File Out of Time; Complainant does not oppose that motion.

Respondent's Motion to Dismiss must be ruled upon in accordance with the standard established by § 22.20(a) of the Consolidated Rules of Practice ("CROP") at 40 C.F.R. Part 22 which govern this proceeding. This section provides, in pertinent part, that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional 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. 40 C.F.R. § 22.20(a)(1999).

A motion to dismiss under § 22.20(a) may be analyzed under the standards for a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 12(b)(6). In re Elementis Chromium, Inc., TSCA-HQ-2010-5022, 2011 EPA ALJ LEXIS 3, at *12 (Mar. 25, 2011). To resolve a motion to dismiss, a court assumes the veracity of all "well-pleaded factual allegations" in the complaint and "then determine[s] whether they plausibly give rise to an entitlement to relief." *Id.* at *13 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

In the instant case, Respondent has failed to establish that, if the factual allegations in the Complaint are true, that Complainant has failed to establish a right to relief. Furthermore, as demonstrated in Complainant's Motion for Accelerated Decision, even viewing the facts in the light most favorable to Respondent, there is sufficient evidence in the record to establish Respondent's liability for each violation alleged in the Amended Complaint, and none of Respondent's affirmative defenses constitute a basis for relief from liability.

B. THE 20% OPACITY LIMIT IN EPA'S REGULATIONS IS DIRECTLY ENFORCEABLE AGAINST EMPIRE.

Respondent's framing of the legal issue in this case reflects a gross mischaracterization of the allegations in EPA's Amended Complaint and a gross misunderstanding of the applicable legal requirements. Respondent describes the relevant legal issue as "[w]hether EPA may amend Empire's Air Permit by the unilateral incorporation of subsequently enacted rules and thereafter seek to impose those rules, as enforceable permit conditions against Empire, without first re-opening or reissuing Empire's Air Permit." Resp't's Mot. to Dismiss at 3. Respondent argues that, because EPA has not revised the terms of Empire's Title V air operating permit to include the provisions of a 20% opacity limit that was promulgated after EPA issued the Title V permit, the 20% opacity limit cannot be enforced against Respondent. EPA's Amended Complaint, however, does not allege a violation of Empire's Title V permit, but rather, a violation of the 20% opacity limit. Moreover, as demonstrated below, both the language of the Title V regulations, as well as statements in the preambles promulgating the Title V regulations and the 20% opacity limit make clear that the 20% opacity limit is, in this case, independently enforceable against Empire and that Empire's Title V permit does not shield Empire from an enforcement action for violation of the 20% opacity limit. Therefore, Respondent's Motion to Dismiss should be denied.

1. Respondent is Subject to Both a Title V Permit and the 20% Opacity Limit.

Respondent, which does business as Kamiah Mills, owns and operates a lumber mill at Highway 12 and Railroad Street in Kamiah, Idaho (the "Facility"). Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 3.1. The Facility is located within the exterior boundaries of the 1983 Nez Perce Indian Reservation. *Id.* at ¶ 3.2. Because no tribe has submitted programs to regulate air pollution sources within the exterior boundaries of the Nez Perce Reservation under

the CAA to EPA for approval, Empire is subject to the requirements of the CAA programs administered and enforced by EPA. *See* Federal Implementation Plans Under the Clean Air Act for Indian Reservations, 70 Fed. Reg. 18,074, 18,076 (Apr. 8, 2005); Indian Tribes, Air Quality Planning and Management, 63 Fed. Reg. 7253, 7262-63 (Feb. 12, 1998); Federal Operating Permits Program, 61 Fed. Reg. 34,202, 34,206 (July 1, 1996). There are two such programs relevant in this case. First, Respondent is subject to the Title V air operating permit program; specifically, Empire must comply with the Title V air operating permit originally issued to it by EPA on August 8, 2001, for a five year term.[2] Resp't's Ex. 3. Respondent submitted a timely and complete permit renewal application on July 8, 2005, prior to the date of expiration of its Title V permit, and EPA has not yet reissued the permit. Resp't's Ex. 4. By operation of law, Respondent's Title V permit is therefore administratively continued.[3,4] 40 C.F.R. § 71.7(c)(3).

Second, recognizing that states generally lack the authority to regulate air quality in Indian country and that no tribe in Region 10 had requested EPA approval of a set of basic air quality regulations that would serve a function similar to State Implementation Plans ("SIPs") that are adopted by states and approved by EPA under the CAA in order to attain and maintain

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[2] Title V of the CAA calls for the creation of a federal air operating permit program. It requires EPA to establish regulatory standards governing minimum program requirements for state air operating permit programs, which have been implemented at 40 C.F.R. Part 70. EPA has also created a complementary set of requirements at 40 C.F.R. Part 71 for a federal air operating program that applies in areas, such as on the Nez Perce Reservation, where there is not an approved Part 70 permitting program. Empire's Title V permit was issued by EPA pursuant to 40 C.F.R. Part 71.

[3] The Part 71 regulations specifically address the status of entities such as Respondent which have a Title V permit whose original term expires prior to re-issuance. 40 C.F.R. § 71.7(c)(3) provides that "[i]f a timely and complete application for a permit renewal is submitted, consistent with § 71.5(a)(2), but the permitting authority has failed to issue or deny the renewal permit before the end of the term of the previous Part 70 or 71 permit, then the permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to § 71.6(f) may extend beyond the original permit term until renewal; or all the terms and conditions of the permit including any permit shield that may be granted pursuant to § 71.6(f) shall remain in effect until the renewal permit has been issued or denied."

[4] Respondent's Motion to Dismiss inconsistently references its Title V permit as "expired" (Resp't's Mot. to Dismiss at 5) and "administratively continued" (*Id.* at 13). It is Complainant's position that Respondent's Title V permit is administratively continued.

the National Ambient Air Quality Standards ("NAAQS"),[5] EPA Region 10 promulgated a set of basic air quality regulations to protect air quality on Indian Reservations in Idaho, Oregon, and Washington. These requirements, which are codified at 40 C.F.R. Part 49, Subparts C and M, are known as the Federal Air Rules for Indian Reservations in Region 10 ("FARR"), and they include a Federal Implementation Plan ("FIP") for the Nez Perce Tribe of Idaho that applies on the Nez Perce Reservation ("Nez Perce FIP"). *See* 40 C.F.R. §§ 49.10401-49.10411. As explained in more detail in Section III.B.1., below, one requirement of the FARR and the Nez Perce FIP is a regulation limiting visible emissions from air pollution sources to 20% opacity (the "Rule"). *See* 40 C.F.R. §§ 49.124 and 49.10406(b). This 20% opacity limit is designed to control emissions of particulate matter, to detect the violation of other requirements under the FARR, and to indicate whether a source is continuously maintained and properly operated. *See* 40 C.F.R. § 49.124(a).

2. Title V Permits Do Not Shield a Pollution Source from the Obligation to Comply with Regulatory Requirements that become Effective Subsequent to Permit Issuance.

The Part 71 regulations that implement Title V specifically provide that a permittee is not shielded through its compliance with its Title V permit from the duty to comply with otherwise applicable regulatory requirements that become effective after a Title V permit was issued.[6] Part

[5] Under Section 110(a)(1) of the CAA, 42 U.S.C. § 7410(a)(1), each state must adopt a SIP to implement, maintain, and enforce NAAQS.

[6] Furthermore, Title V contemplates a permit program that incorporates and ensures compliance with the substantive emission limitations established under other provisions of the Act, but that does not independently establish its own emission standards. *See* Ohio Pub. Interest Research Group, Inc. v. Whitman, 386 F.3d 792, 794 (6th Cir. 2004) ("Title V does not impose new obligations; rather, it consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, record-keeping, and reporting of the source's compliance with the Act." (citing 42 U.S.C. §§ 7661c(a) and (c); and 40 C.F.R. §§ 70.6(a)(3) and (c)(1))). The Environmental Appeals Board has consistently affirmed the position that CAA operating permits are not themselves the source of regulatory requirements for air pollution sources. *See* In re Peabody Western Coal Company, CAA Appeal No. 04-01, 2005 EPA App. LEXIS 2, at *15 (EAB Feb. 18, 2005).

71 provides that a permit may expressly include a provision stating that compliance with the conditions of the Title V permit shall be deemed compliance with any applicable requirements as of the date of permit issuance provided that such applicable requirements are included and are specifically identified in the permit or the permitting authority determines in writing that other requirements specifically identified are not applicable to the source. *See* 40 C.F.R. § 71.6(f)(1). Furthermore, a part 71 Title V permit that does not expressly state that a permit shield exists is presumed to not to provide such a shield. *See* 40 C.F.R. § 71.6(f)(2).

The rulemaking record makes clear that EPA intentionally adopted "a 'narrow' interpretation [of the CAA's statutory permit shield] under which a source cannot be shielded from applicable regulations, standards, implementation plans, or other requirements promulgated after issuance of a title V permit." 57 Fed. Reg. 32,250, 32,277 (July 21, 1992) (emphasis added). In fact, the Agency specifically considered and rejected, through the rulemaking process, a "broad" permit shield that would have implemented the interpretation that Respondent advocates in its Motion to Dismiss—whereby a source is shielded from applicable requirements promulgated after the permit is initially issued until such time as the permit is re-opened or reissued.[7] The Agency reasoned that the "narrow" permit shield was demanded by both the text of the CAA as well as Congress' underlying intent. First, the Agency evaluated the text of the statute and found that it "cannot be the basis for mounting a shield against later-enacted

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[7] EPA described the "broad permit shield" as follows: "... a source would be protected from enforcement for noncompliance with any applicable requirement of the Act as long as the source was in compliance with all requirements of the source's Title V permit. If the permit had misinterpreted applicable requirements, the source would not be obligated to comply with the correctly interpreted requirements. The source would also be shielded from any newly promulgated Federal requirements until the Title V permit was reopened and the requirement(s) were incorporated into the permit." 57 Fed. Reg. 32,250, 32,277 (emphasis added). This broad shield was specifically rejected by the Agency as incompatible with Congressional intent in providing for a permit shield under the CAA. *Id.*

requirements, since such requirements, having not been in existence at the time the permit was issued could not, perforce, have been included in it. A permit cannot contain "applicable requirements" that have not been adopted." *Id.* EPA also found that a "narrow" shield, limited to provisions that had been specifically considered in the permitting process, was necessary to achieve the air quality improvement goals of the CAA, as well as Congress' intent to facilitate public involvement in the Title V permitting process.[8,9]

Respondent's proffered interpretation of the Part 71 regulations directly conflicts with the language of 40 C.F.R. § 70.6(f), as well as EPA contemporaneous statements on the scope of the permit shield afforded by a Title V permit.[10] EPA clearly communicated to air pollution sources subject to Title V permits—both in the applicable regulations as well as in statements made at the time the regulations were promulgated—that compliance with a Title V permit would not shield a source from liability for non-compliance with applicable requirements of the CAA that were not specifically identified in the permit at the time the permit was issued, including requirements that became effective after permit issuance and before the permit is re-opened or

[8] EPA found that a broad permit shield would not serve the CAA's air quality improvement goals. "Compliance with new requirements designed to meet NAAQS progress and attainment deadlines would also be haphazard and completely dependent on the happenstance of individual permit issuance. It is inconceivable that Congress, with its overwhelming concern for the timing of requirements in Title I, would, with no discussion and no explicitness, have placed such a roadblock in the path of State planning. A permit system that undermines the enforceability of other provisions of the Act would not vindicate Congressional purposes." *Id.*

[9] EPA found that an approach by which a permit shield could be afforded with respect to requirements not specifically addressed during the permitting process, such as requirements that had not been in effect at the time of permit issuance "would be inconsistent with the intent of providing for public review of determinations of inapplicability. The public could not review a determination of inapplicability of a provision not yet enacted. Section 504(f)(2) of the Act is designed to set down in an authoritative and public fashion the way in which existing legal requirements apply to a source. Section 504(f)(2) is, therefore, not intended to prevent later-enacted requirements from being fully applicable to the source." *Id.* (emphasis added).

[10] This Response to Respondent's Motion cites preamble statements from both the Part 70 and Part 71 regulations. The Part 70 and 71 provisions at issue in this case have comparable rationales in all material respects and EPA explicitly cross-referenced the rationale provided in the Part 70 rulemaking in the Part 71 rulemaking process: "[m]any of the proposed provisions of § 71.6 follow the provisions of 40 C.F.R. § 70.6, which were described and discussed at length in the proposed and final preambles to 40 C.F.R. Part 70, and in the recently proposed revisions to Part 70. This notice incorporates the rationale provided in the Part 70 notices by reference, as appropriate." 60 Fed. Reg. 20,804, 20,815 (Apr. 27, 1995).

reissued. This is precisely the situation presented in this case because Respondent's Title V permit was issued in 2001, before the FARR, the Nez Perce FIP, or the Rule, was promulgated. Since Empire's Title V permit has not been reissued since those requirements were promulgated, Empire cannot argue that compliance with its Title V permit shields it from the obligation to comply with a subsequently promulgated FIP requirement, such as the Rule.

3. The Rule is Directly Enforceable as a FIP Requirement.

The requirements of a federal implementation plan, such as the Nez Perce FIP, are directly enforceable by EPA, and do not need to be incorporated into any permit, including a Title V permit, in order to be enforceable against a source. EPA derives its enforcement authority from CAA Section 113, which provides on its face that EPA may directly enforce an implementation plan's requirements regardless of whether it has been incorporated into an air operating permit. CAA Section 113(a)(1)(A) and (B) authorize the EPA Administrator to "issue an order" requiring compliance with, or payment of a civil penalty for violations of, "the requirements or prohibitions of such [applicable implementation] plan or permit" (emphasis added). There is nothing in the language of Section 113 to suggest in any way that EPA only has authority to enforce requirements included in a permit. Indeed, if Congress had intended to so limit EPA's enforcement authority to only requirements identified in a source's permit, the word "or" would not appear throughout Section 113.

Moreover, Empire had fair notice that the requirements of the Nez Perce FIP were effective on June 7, 2005, and that its obligation to comply with the FIP was not dependent on whether the requirements were included in its Title V permit. The effective date of the Nez Perce FIP and the Rule, which creates the 20% opacity limit, (40 C.F.R. § 49.124) was clearly

identified in EPA's rulemaking when the Nez Perce FIP was finalized. EPA stated that "[t]he effective date of the final rules is June 7, 2005. Air pollution sources within the exterior boundaries of an Indian reservation in Idaho, Oregon, or Washington, as set forth in 40 C.F.R. part 49, subpart M, will be required to comply with the requirements in the final rules beginning on the effective date." 67 Fed. Reg. 18,074, 18,082 (Apr. 8, 2005).

In addition, the FARR preamble specifically addressed the interplay between Title V permitting and the FARR regulations. Indeed, Respondent identified language from the preamble in its Motion to Dismiss but failed to include the final and most relevant sentence in that discussion. The preamble provides in full that:

> [p]romulgation of the FARR will compel 'reopening for cause' of the Part 71 air operating permits that EPA has already issued on the covered reservations to include FARR requirements. The procedures for re-issuing such a permit are the same as for issuing initial and renewed permits. Because some permits will have less than three years remaining on their terms, they will not need to be reopened when the FARR becomes effective, but will be updated when their term naturally expires. The FARR requirements are effective for Part 71 sources upon the effective date of this rulemaking even though the requirements may not yet be incorporated in the Part 71 permit. 67 Fed. Reg. at 18,084-85 (emphasis added).

Respondent's interpretation of the Part 71 operating permit program proffered in its Motion to Dismiss is clearly incompatible with the plain text of the preamble cited above and, therefore, simply incorrect. In conclusion, while EPA has not yet reissued the facility's Part 71 permit, the facility is, nonetheless, obliged to comply with the applicable requirements of the Nez Perce FIP, including the Rule, and has been required to do so since the FIP's June 7, 2005, effective date.

C. CONCLUSION.

Empire's arguments that it is not subject to, and therefore EPA is foreclosed from directly enforcing, the requirements of the Nez Perce FIP are clearly contradicted by the applicable statutory and regulatory language, as well as contemporaneous statements made by EPA when the Title V regulations and the Nez Perce FIP at issue in this case were promulgated. Respondent has provided no legal or factual basis for a contrary conclusion. Therefore, EPA respectfully requests that Respondent's Motion to Dismiss be denied.

III. COMPLAINANT'S MOTION FOR ACCELERATED DECISION REGARDING LIABILITY

A. INTRODUCTION.

Pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a) of the CROP, Complainant moves for accelerated decision regarding liability. For the reasons set out below, EPA submits that there are no genuine issues of material fact in dispute regarding whether Respondent owned or operated an air pollution source that emitted visible emissions in excess of 20% opacity and, therefore, accelerated decision regarding liability is appropriate in this matter.

B. STATEMENT OF CASE.

1. Statutory and Regulatory Framework.

As discussed in Section II.B.1. above, the Rule, 40 C.F.R. § 49.124, is incorporated into the FIP for the 1863 Nez Perce Indian Reservation at 40 C.F.R. § 49.10410(b). The Rule applies to any person who owns or operates an air pollution source that emits, or could emit, particulate matter or other visible air pollutants into the atmosphere, unless the source category is listed as exempt in 40 C.F.R. § 49.124(c). Exemptions under 40 C.F.R. § 49.124(c) include open burning, agricultural activities, forestry and silvicultural activities, non-commercial smoke houses, sweat houses or lodges, smudge pots, furnaces or boilers used exclusively to heat

residential buildings with four or fewer dwelling units, fugitive dust from public roads, and emissions from fuel combustion in mobile sources. The term "person" is defined by Section 302(e) of the CAA as including "an individual, corporation, partnership, association...and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e) (1977). The term "air pollution source" is defined by the FARR as "any building, structure, facility, installation, activity, or equipment, or combination of these, that emits, or may emit, an air pollutant." 40 C.F.R. § 49.123(a) (2005). An "air pollutant" is defined by the FARR as "any air pollution agent...including physical substance...that is emitted into or otherwise enters the ambient air." 40 C.F.R. § 49.123(a).

The Rule prohibits the operation of an air pollution source that emits, or could emit, particulate matter or other visible air pollutant to the atmosphere unless the air pollution source meets the opacity requirements of 40 C.F.R. § 49.124(d)(1). 40 C.F.R. § 49.124(d)(1) provides that the visible emissions from an air pollution source must not exceed 20% opacity, averaged over any consecutive six-minute period, unless paragraph (d)(2) or (d)(3) of that section applies to the air pollution source. 40 C.F.R. § 49.124(d)(2) provides that the visible emissions from an air pollution source may exceed the 20% opacity limit if the owner or operator of the air pollution source demonstrates to the Regional Administrator's satisfaction that the presence of uncombined water, such as steam, is the only reason for the failure of an air pollution source to meet the 20% opacity limit. 40 C.F.R. § 49.124(d)(3) provides that the visible emissions from an oil-fired boiler or solid fuel-fired boiler that continuously measures opacity with a continuous opacity monitoring system may exceed the 20% opacity limit during start-up, soot blowing, and

grate cleaning for a single period of up to 15 consecutive minutes in any eight consecutive hours, but must not exceed 60% opacity at any time.

The purpose of the CAA is "to protect and enhance the quality of the nation's air resources." 42 U.S.C. § 7401(b)(1). The CAA imposes strict liability on those in violation of the Act. United States v. B&W Inv. Props., 38 F.3d 362, 364 (7th Cir. 1994). Whether an owner or operator believes, or is led to believe, that the requirements of the CAA have been met is not relevant to the establishment of liability. United States v. Anthony Dell'Aquilla Enterps. & Subsidiaries, 150 F.3d 329, 332 (3rd Cir. 1998) (holding that plaintiff's belief that asbestos had been properly removed and that correct permits were obtained was not relevant to the analysis of liability). Furthermore, EPA does not need to show that the alleged violator acted with knowledge of the CAA violation in order to prove liability. United States v. Ben's Truck & Equip., Inc., Civ. No. S-84-1672-MLS, 1986 WL 15402, at *2 (E.D. Cal. May 12, 1986).

To establish liability for violating the Rule, EPA must establish that the Rule applies to Respondent, and that Respondent is (1) a person (2) who owns or operates an air pollution source that emits, or could emit, particulate matter or other visible air pollutants to the atmosphere (3) which is not subject to exemptions in 40 C.F.R. § 49.124(c), and (4) that opacity readings of visible emissions from said air pollution source exceeded 20% opacity, averaged over any consecutive six-minute period, and (5) that the exceptions under 40 C.F.R. § 49.124(d)(2) and (3) do not apply. As set forth in detail below, the Rule applies to Respondent, and the five elements of liability are satisfied here.

2. Factual and Procedural Background.

As discussed above, Respondent owns and operates the Facility within the exterior boundaries of the 1983 Nez Perce Indian Reservation. *Id.* at ¶¶ 3.1 and 3.2. Respondent operates two planers (Planer #1 and Planer #2) at the Facility. *Id.* at ¶ 3.11. Planer by-products (lumber chips, shavings, and fines) are transferred by a pneumatic system from the planers to truck bins (for waste removal) or to the boiler (for use as fuel). *Id.* at ¶ 3.13.

Respondent performs regular visible emissions inspections through the use of a visible emissions certified onsite employee. Complainant's Ex. 4. Respondent uses EPA Method 9 to monitor visible emissions, by observing opacity every 15 seconds for 6 minutes, and records the results on Visible Emissions Surveys. Complainant's Ex. 4.

Visible emissions from Planer #1 are monitored at three emissions points, called P-10, P-11, and P-18. Complainant's Ex. 16. The following readings were taken by Respondent, at the Facility, and recorded on its Visible Emissions Surveys. On February 2, 2009, the opacity reading for P-11 was 34%. On March 16, 2009, the opacity reading for P-11 was 51%. On May 15, 2009, the opacity reading for P-11 was 58%. On June 12, 2009, the opacity reading for P-11 was 53%. On July 20, 2009, the opacity reading for P-11 was 95% and the opacity reading for P-10 was 88%. On August 31, 2009, the opacity reading for P-18 was 65%. On September 15, 2009, the opacity reading for P-11 was 69%. On October 23, 2009, the opacity reading for P18 was 43%. Complainant's Ex. 4.

Visible emissions from Planer #2 are monitored at P-8, P-9, and P-19. Complainant's Ex. 16. The following readings were taken by Respondent, at the Facility, and recorded on its Visible Emissions Surveys. On May 15, 2009, the opacity reading for P-8 was 31%. On July 20, 2009, the opacity reading for P-8 was 71%. On August 31, 2009, the opacity reading for P-8

was 28% and the opacity reading for P-19 was 59%. On October 23, 2009, the opacity reading for P-19 was 27%. Complainant's Ex. 4.

The following reading was taken by Respondent, at the Facility, and recorded on its Visible Emissions Survey. On September 25, 2010, the opacity reading for P-18, where visible emissions for Planer #1 are measured, was 27%. Resp't's Ex. 16.

On December 16, 2010, Complainant provided Respondent with a Notice of Violation, citing the above violations for exceeding the opacity limit of the Rule. In the Amended Complaint, EPA alleged: one violation for exceeding the opacity limit for visible emissions for Planer #1 from February 2, 2009 through October 23, 2009; one violation for exceeding the opacity limit for visible emissions for Planer #2 from May 15, 2009 through October 23, 2009; and one violation for exceeding the opacity limit for visible emissions for Planer #1 in September 2010.

3. Standard of Review for Accelerated Decision.

The standard of review for accelerated decision is provided in § 22.20(a) of the CROP. It reads, in relevant part:

> 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, if no genuine issue of material facts exists and a party is entitled to judgment as a matter of law.

C. ARGUMENT.

1. There is No Genuine Issue of Material Fact that the Rule Applies to Respondent and that Respondent Owns and Operates the Facility that Emitted Visible Emissions in Excess of 20% from Two Planers in 2009 and One Planer in 2010, in Violation of the Rule.

Complainant moves for accelerated decision as to Respondent's liability for violation of the Rule. For the reasons set forth below, there are no genuine issues of material fact which should preclude entry of an order granting accelerated decision as to liability.

a. The Rule Applies to Respondent.

The FIP for the Nez Perce Tribe of Idaho applies within the 1863 Nez Perce Indian Reservation. 40 C.F.R. § 49.10401(2010). The Rule, 40 C.F.R. § 49.124, is incorporated into the FIP for the 1863 Nez Perce Indian Reservation at 40 C.F.R. § 49.10410(b). Respondent admits that the Facility, which it owns and operates, is located within the exterior boundaries of the Nez Perce Reservation. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶¶ 3.1 and 3.2. Therefore, the FIP for the Nez Perce Reservation, including the Rule, applies to Respondent and its Facility.

b. Respondent is a "Person" as Defined by the CAA.

Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines the term "person" as including "an individual, corporation, partnership, association...and any officer, agent, or employee thereof." Respondent is a company, doing business as Kamiah Mills. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 3.1. Therefore Respondent meets the definition of a "person" under the CAA, satisfying the first element of liability under the Rule.

c. Respondent Owns and Operates the Facility, an Air Pollution Source, which Emits Particulate Matter or Other Visible Air Pollutants to the Atmosphere.

The Rule applies to any person who "owns or operates an air pollution source that emits, or could emit, particulate matter or other visible air pollutants to the atmosphere." 40 C.F.R. § 49.124(d)(1). An air pollution source is "any building, structure, facility, installation, activity, or

equipment, or combination of these, that emits, or may emit, an air pollutant." 40 C.F.R. § 49.123(a). An "air pollutant" is defined as "any air pollution agent...including physical substance...that is emitted into or otherwise enters the ambient air." *Id.* The planers at the Facility emit particulate matter, as evidenced by Respondent's own visible emissions readings. Complainant's Ex. 4. Therefore, Respondent owns and operates an air pollution source that emits an air pollutant into the atmosphere. Respondent satisfies the second element of liability under the Rule.

d. The Facility is Not Exempt from The Rule.

The Rule exempts visible emissions from certain types of sources: open burning, agricultural activities, forestry and silvicultural activities, non-commercial smoke houses, sweat houses or lodges, smudge pots, furnaces or boilers used exclusively to heat residential buildings with four or fewer dwelling units, fugitive dust from public roads, and emissions from fuel combustion in mobile sources. 40 C.F.R. § 49.124(c). The Facility is a lumber mill. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 3.1. Therefore, the Facility is not exempt from the Rule, and Respondent satisfies the third element of liability under the Rule.

e. Readings of Visible Emissions from the Facility Exceeded 20% Opacity on Multiple Occasions.

The Rule requires that visible emissions from an air pollution source must not exceed 20% opacity, averaged over any consecutive six-minute period. 40 C.F.R. § 49.124(d)(1).

Visible emissions from Planer #1 are observed at P-10, P-11, and P-18. Complainant's Ex. 16. The opacity readings, as observed and recorded by Respondent at the Facility, for P-11 in February, March, May, June, July, and September, 2009, were 34%, 51%, 58%, 53%, 95%, and 69%, respectively. The opacity reading for P-10 in July, 2009, was 88%. The opacity

readings, as observed and recorded by Respondent at the Facility, for P-18 in August and October, 2009, were 65% and 43%, respectively. Complainant's Ex. 4. Visible emissions from Planer #2 are observed at P-8, P-9, and P-19. Complainant's Ex. 16. The opacity readings, as observed and recorded by Respondent at the Facility, for P-8 in May, July, and August, 2009, were 31%, 71%, and 28%, respectively. The opacity readings, as observed and recorded by Respondent at the Facility, for P-19 in August and October, 2009, were 59% and 26%, respectively. Complainant's Ex. 4. As stated, visible emissions for Planer #1 are observed at P-18. On September 25, 2010, the opacity reading, as observed and recorded by Respondent at the Facility, for P-18, was 27%. Resp't's Ex. 16.

All of these opacity readings exceed 20% opacity. Therefore Respondent satisfies the fourth element of liability under the Rule.

f. Exceptions to the Rule Do Not Apply to the Opacity Exceedances at the Facility.

Under the Rule, opacity readings in excess of 20% are not considered violations if (1) the owner or operator of the air pollution source demonstrates to the Regional Administrator's satisfaction that the presence of uncombined water, such as steam, is the only reason for the failure of an air pollution source to meet the 20% opacity limit, 40 C.F.R. § 49.124(d)(2); or (2) the source is an oil-fired boiler or solid fuel-fired boiler that continuously measures opacity with a continuous opacity monitoring system, and the opacity exceedance occurred during start-up, soot blowing, or grate cleaning for a single period of up to 15 consecutive minutes in any eight consecutive hours, as long as it did not exceed 60% opacity at any time, 40 C.F.R. § 49.124(d)(3). Respondent has neither claimed nor demonstrated that the readings from Planer's #1 and #2 above 20% opacity are due to the presence of uncombined water. Planer's #1 and #2

are also not oil-fired boilers or solid fuel-fired boilers with a continuous opacity monitoring system. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 3.13. Therefore, neither of the exceptions for readings exceeding 20% opacity applies at the Facility. Accordingly, Respondent satisfies the fifth, and final, element for liability under the Rule.

2. Respondent Has Failed to Establish Any Affirmative Defenses to Liability for the Alleged Violations of the CAA.

Respondent asserted nine affirmative defenses in its Amended Answer. Under § 22.24(a) of the CROP, "[t]he respondent has the burdens of presentation and persuasion for any affirmative defenses." Only one of its defenses, denial of due process, was raised in Respondent's Motion to Dismiss, and has been addressed above in Complainant's Response to Respondent's Motion to Dismiss. Respondent has failed to meet its burdens of presentation and persuasion and therefore the asserted affirmative defenses do not negate liability.

a. Complainant Obtained the Required Joint Determination For Cases Where the First Alleged Violation Occurred More than 12 Months Before the Complaint Was Filed.

Respondent argues that the Amended Complaint fails to document the joint inter-agency determination as required by 42 U.S.C. § 7413(d)(1). Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.1. The EPA Administrator's authority to file an administrative enforcement case under Section 113, 42 U.S.C. § 7413, is limited to where "the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action," unless "the Administrator and the Attorney General jointly determine that a matter involving a... longer period of violation is appropriate for administrative penalty action." 42 U.S.C. § 7413(d)(1).

Complainant provided, in its prehearing exchange: (1) an EPA Office of Compliance and Enforcement ("OECA") memorandum requesting concurrence from the EPA Office of Civil Enforcement for the OECA determination that an administrative penalty is appropriate in the instant matter, (2) a letter from OECA to the U.S. Department of Justice requesting a waiver of the twelve-month limitation on EPA's authority to initiate an administrative case pursuant to 42 U.S.C. § 7413(d)(1), and (3) the response letter from the Department of Justice to OECA expressing the Department of Justice's agreement that the waiver is appropriate in the instant matter. Complainant's Ex. 13. In the letter from the EPA OECA delegated official to the Department of Justice, dated May 18, 2011, EPA finds "that an administrative penalty order would be an appropriate enforcement response in this case," and requests, "that a waiver of the twelve-month limitation on EPA's authority to issue an administrative penalty order be granted." Complainant's Ex. 13. The response letter from the Department of Justice's delegated official, dated June 3, 2011, states, "I hereby determine that the matter is appropriate for an administrative penalty action." Complainant's Ex. 13.

Therefore, Respondent's claim that Complainant failed to document the determination has no merit and the affirmative defense is unavailing.

b. "Equitable Factors" are Not Relevant to a Determination of Liability for Violations of the CAA.

Respondent argues that Complainant has failed to take into consideration "equitable factors," including "environmental justice," and that this constitutes an affirmative defense to liability. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.2. Respondent asserts that EPA seeks to "impose unfair and unreasonable burdens on Respondent, its employees and

the Indian tribal community within which it operates." Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 6.1.2.

There is no requirement in the enforcement provisions of the CAA that determinations of liability consider equitable factors. *See* 42 U.S.C. § 7413. Similarly, Complainant has no duty under the CAA or Executive Order 12,898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, to consider matters of environmental justice in determining a violator's liability for violations of the CAA. Executive Order 12,898, requires that each Federal agency, "to the greatest extent practicable and permitted by law...make achieving environmental justice part of its mission." Exec. Order 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994). The Executive Order also requires each Agency to adopt an Agency-wide plan to, among other goals, "promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations." *Id.*

EPA, in compliance with Executive Order 12,898, created an Agency-wide plan for integrating environmental justice into its activities. U.S. Envtl. Prot. Agency, EPA Plan EJ 2014 (Office of Environmental Justice, Sept. 2011). Nothing in this plan states that EPA will not bring enforcement actions against facilities, such as Empire's, operating within the boundaries of an Indian reservation. In fact, enforcement of the CAA within the boundaries of the 1863 Nez Perce Indian Reservation is entirely consistent with the language and the intent of the Executive Order, which specifically directs agencies to promote enforcement of environmental statutes in areas with minority populations and low-income populations. Exec. Order 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994). Therefore Respondent's claim that the Amended Complaint failed to

consider "equitable factors," including but not limited to matters of "environmental justice," is without merit.

c. Complainant's Amended Complaint is Not Barred by the Doctrine of Estoppel.

Respondent argues that the Amended Complaint is barred by the doctrine of estoppel. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.3. The elements of equitable estoppel, as applied to the federal government, are that Respondent "'reasonably relied upon its adversary's actions to its detriment" and that the government "engaged in some affirmative misconduct."' In re Minnesota Metal Finishing, Inc., RCRA-05-2005-0013, 2007 WL 1219963, at *17 (EAB Jan. 9, 2007) (quoting BWX Technologies, Inc., 9 E.A.D. 61, 80 (EAB 2000)). Traditionally, a litigant cannot assert the defense of equitable estoppel against the federal government. *See e.g.*, Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Office of Pers. Mgmt. v. Richmond, 496 U.S. 414 (1990); Schweiker v. Hansen, 450 U.S. 785 (1981). The Court in Schweiker implied that estoppel could be justified against the federal government, but did not articulate under which specific circumstances. 450 U.S. at 788. "When equitable estoppel is asserted against the government, as here, a party bears an especially heavy burden." BWX Technologies, Inc., 9 E.A.D. 61, 80 (EAB 2000). Furthermore, "[c]ourts have routinely held that 'mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government." *Id.*

Respondent does not even explain how Empire relied on the government to its detriment, much less meet its "heavy burden" to show affirmative misconduct. Therefore, the doctrine of equitable estoppel is not a valid defense to the alleged violations.

d. Complainant's Amended Complaint is Not Barred by 42 U.S.C. § 7413(d)(1)(C).

Respondent argues that the Amended Complaint is barred by 42 U.S.C. § 7413(d)(1)(C). Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.4. Under Section 7413(d)(1), 42 U.S.C. § 7413(d)(1), EPA may bring an enforcement action to assess a penalty upon finding that a person:

> (A) has violated or is violating any requirement or prohibition of an applicable implementation plan...; or
> (B) has violated or is violating any other requirement or prohibition of this subchapter...; or
> (C) attempts to construct or modify a major stationary source in any area...
> (emphasis added).

Under the clear language of the statute, Complainant may bring an enforcement action for *any one* of the three types of violation above.

The Amended Complaint seeks the assessment of a penalty for "violations of an applicable implementation plan" under the authority of subsection (A) of Section 7413(d)(1) of the CAA. Am. Compl. ¶ 2.3. The use of the word "or" between the three subsections in Section 7413(d)(1) makes it clear that EPA need not assert violations under subsections (B) and (C) when it brings a case under subsection (A). Respondent's argument is incorrect as a matter of law, and therefore this defense fails.

e. Complainant's Amended Complaint is Not Barred by the Doctrine of Laches.

Respondent argues that the Amended Complaint is barred by the doctrine of laches. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.5. The doctrine of laches applies when "unjustified delay" in bringing a lawsuit "resulted in severe prejudice to Respondent." In re Industrial Waste Cleanup, Inc., CAA-5-99-019, 2000 WL 1337415, at *5

(EAB 2000). In determining whether the doctrine of laches should bar a suit, particular circumstances of each case must be considered, "including the length of delay, the reasons for it, its effect on the defendant, and the overall fairness of permitting the plaintiff to assert his or her action." Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 806 (8th Cir. 1979). "[L]aches...is rarely if ever asserted against 'the federal government when it is acting in its sovereign capacity to protect the public welfare.'" In re Industrial Waste Cleanup, Inc., CAA-5-99-019, 2000 WL 1337415, at *7 (EAB 2000) (quoting United States v. California, 332 U.S. 19, 40 (1947)). Furthermore, "laches is not favored in environmental cases." Citizens & Landowners Against the Miles City/New Underwood Powerline v. United States Dep't of Energy, 683 F.2d 1171, 1175 (8th Cir. 1982).

Here, Complainant is an agency of the federal government, seeking to protect the public welfare in an action to enforce the CAA. Respondent does not assert particular circumstances demonstrating undue delay by EPA that would warrant dismissal of the case for laches. To the contrary, this court, in its favorable ruling on Complainant's Motion to Amend the Complaint, found that "[t]here is no undue delay, and the recalculation of the proposed penalty is not unduly prejudicial." Therefore the doctrine of laches does not apply in this case.

f. Complainant's Amended Complaint is Not Barred by the Doctrine of Waiver.

Respondent argues that the Amended Complaint is barred by the doctrine of waiver. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.6. The doctrine of waiver is designed to prevent the waiving party from "lulling another into false assurance that strict compliance...will not be required and then suing for noncompliance." 31 C.J.S. *Estoppel and Waiver* § 86 (2012).

Complainant has in no way waived its right to enforce the CAA against Respondent. Respondent has not alleged any facts that would prove waiver. In particular, Respondent does not allege that Complainant indicated to Respondent that compliance with the CAA was in any way optional or that EPA would forego enforcement if Empire later achieved compliance. Therefore, the doctrine of waiver does not apply in this case.

g. Complainant has Satisfied All Required Administrative Steps and Substantive Due Process Conditions Prior to Bringing this Matter before the Presiding Officer.

Respondent argues that Complainant has failed to satisfy all required administrative procedural steps and substantive due process conditions prior to bringing this matter before the Presiding Officer. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.7. Specifically, Respondent argues that Complainant has violated its due process rights by seeking to enforce the Rule against Respondent without first amending Respondent's Part 71 operating permit. For the reasons set forth above, in Complainant's Response to Respondent's Motion to Dismiss, Complainant is not barred from seeking to enforce the regulatory provisions that are a part of an applicable FIP for sources located within the exterior boundaries of the 1863 Nez Perce Indian Reservation. Accordingly, Respondent has not raised a valid defense to liability.

h. Whether Complainant Mitigated or Reduced Civil Penalty Against Respondent is Not Relevant to a Determination of Liability for Violations of the CAA.

Respondent argues that Complainant failed to mitigate or reduce the civil penalty against Respondent, based on consideration of factors set out in the CAA and applicable EPA policy. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.8. Application of penalty factors requires finding of fact at hearing, hence Complainant is not seeking Accelerated

Decision on penalty. Respondent's assertion that EPA failed to apply the factors set out in the CAA and applicable EPA policy is simply not a defense to liability.

Even if Respondent's assertion of failure to apply penalty failures were a valid defense, Complainant has adjusted the proposed civil penalty amount sought from Respondent in accordance with the CAA's stationary source penalty assessment factors. Section 7413(e) states that the Administrator shall, when determining a penalty, take into account the following factors, "the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence,...payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." EPA uses the Clean Air Act Stationary Source Civil Penalty Policy ("EPA Penalty Policy") as a guide in applying these factors, and to adjust the penalty amount based on the degree of willfulness or negligence, the degree of cooperation, history of noncompliance, environmental damage, ability to pay, and inflation. Clean Air Act Stationary Source Civil Penalty Policy, October 25, 1991, as amended by the 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340 (Dec. 11, 2008).

In a memorandum, dated November 21, 2012, Don Dossett, EPA Region 10, explained how he applied the statutory factors and the EPA Penalty Policy to calculate the proposed penalty in this case. Resp't's Ex. 10. The memorandum states that the gravity component of the penalty was reduced by 15% for cooperation during prefiling investigation and for correcting the violations after EPA inspected the Facility. *Id.* at 8. The memorandum sets forth the possible bases for mitigation or reductions, as provided for in Section 7413(e) and the EPA Penalty

Policy, and explains why EPA believes they do not apply in this case. Thus, the memorandum of November 21, 2012, clearly demonstrates that Complainant reduced the civil penalty against Respondent based on consideration of the factors set out in 42 U.S.C. § 7413(e).

i. Complainant Timely Amended Complaint, and the Timing of Amending the Complaint Did Not Cause Prejudice to Respondent.

Respondent argues that EPA failed to timely amend its Complaint, and its undue delay caused prejudice to Respondent. Resp't Empire Lumber Co.'s Answer to EPA's Am. Compl. ¶ 8.9. Under § 22.13(c) of the CROP, after an answer is filed, "the complainant may amend the complaint only upon motion granted by the Presiding Officer."

As explained above, after Respondent filed its Answer, Complainant filed a Motion to Amend Complaint to Revise the Penalty Amount Sought on November 29, 2012. In granting the motion, this court stated that "[t]here is no undue delay, and the recalculation of the proposed penalty is not unduly prejudicial, especially where the hearing in this matter is not yet scheduled." Thus, this court has already ruled that the Motion to Amend the Complaint was timely and did not cause prejudice to Respondent. Accordingly, Respondent's argument that it was prejudiced by the filing of the Amended Complaint fails.

D. CONCLUSION.

There is no material issue of fact disputing that Respondent is a person, as defined by the CAA, who owned or operated the Facility, an air pollution source, which emitted particulate matter to the atmosphere, as evidenced by opacity readings above 20%, averaged over a consecutive six-minute time period, at Planer #1 from February 2, 2009, through October 23, 2009, at Planer #2 from May 15, 2009, through October 23, 2009, and at Planer #1 on September 25, 2010. Furthermore, Respondent's asserted affirmative defenses are completely lacking in

merit. For the foregoing reasons, EPA respectfully requests that this Motion for Accelerated Decision be granted and that Respondent be found liable as a matter of law for violations of the Rule, 40 C.F.R. § 49.124(d).

DATED this 25th day of Feb, 2013.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **Complainant's Response to Respondent's Motion to Dismiss and Motion for Accelerated Decision Regarding Liability** in: **In the Matter of**: **Empire Lumber Co.**, Docket No. CAA-10-2012-0054, and one copy was filed with the Office of Administrative Law Judges Headquarters Hearing Clerk, and that one true and correct copy was mailed by UPS "Next Day Air" delivery on the signature date below to each of the following parties:

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
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and

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25 Feb 2013
Dated

Jennifer Eason
U.S. Environmental Protection Agency
Region 10