

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
MINNESOTA METAL FINISHING, INC.,) **Docket No. RCRA-05-2005-0013**
)
Respondent)

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

I. Procedural History

This action was initiated on August 26, 2005, by the filing of a five count Administrative Complaint and Compliance Order charging Respondent, Minnesota Metal Finishing, Inc. (MMF), with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.*, and certain federal and state regulations promulgated to implement RCRA, codified as 40 C.F.R. Parts 260 through 279, and Minn. R. 7045.0292 and 7045.0450 through 7045.0551. Respondent filed an Answer thereto on October 4, 2005, and subsequently, the parties each filed Prehearing Exchanges. On March 23, 2006, upon motion granted, Complainant, the U.S. Environmental Protection Agency Region 5 (EPA), filed an Amended Complaint, to which Respondent filed an Answer. On September 1, 2006, with leave of this Tribunal, Complainant filed a Second Amended Complaint (“Complaint”). The Complaint asserts that MMF owns and operates a facility in Minneapolis, Minnesota which generates, treats, stores and disposes of hazardous waste. In regard thereto, EPA further alleges, in brief, that Respondent failed to:

- (1) adequately train certain of its employees, as well as maintain records of such training and employee job titles and descriptions, in violation of Minn. R. 7045.0558, Subparts 1-3, 5, 6.A-D (40 C.F.R. §§ 265.16(a)(1)-(3), (b), (c), (d)(1)-(4)) (Count 1);
- (2) include in its facility’s Contingency Plan an evacuation plan, a named primary emergency coordinator, office telephone numbers for emergency coordinators, arrangements agreed to by local emergency responders, and identification of

emergency equipment capability, in violation of Minn. R. 7045.0572, Subparts 4.C-F (40 C.F.R. §§ 265.52(c)-(f)) (Count 2);

(3) maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned release of hazardous waste, in violation of Minn. R. 7045.0292, Subparts 1.G and 7045.0566, Subpart 2 (40 C.F.R. §§ 262.34(a)(4) and 264.31) (Count 3);

(4) provide its employees with immediate access to an internal alarm or emergency communication device, and a device to summon external emergency responders, in violation of Minn. R. 7045.0566, Subparts 3.B and 5 (40 C.F.R. §§ 265.32(b) and 265.34(a)) (Count 4); and

(5) obtain a permit from federal or state authorities for the storage of hazardous waste, in violation of Minn. R. 7001.0030 and 7001.0520, Subpart 1.A (Count 5).

The Complaint proposes an aggregate civil penalty of \$300,000 for the violations and requests issuance of a Compliance Order.

Respondent filed an Answer to the Complaint on or about September 13, 2006, denying the violations and raising numerous affirmative defenses.

Prior thereto, on June 23, 2006, Complainant filed a Motion for Accelerated Decision on Liability as to all five counts of the (first) Amended Complaint and an extensive Memorandum of Law in support thereof (“C’s Memo.”) along with the Affidavits of Michael Risse, Howard Caine, and Michael Valentino. On July 7, 2006, Respondent filed an extensive Memorandum of Law in Response to Complainant’s Motion for Accelerated Decision on Liability (“R’s Resp.”) supported by the Affidavits of Jack Logan, William Ludwig, Dana Wagner and Rochelle Rougier-Maas, submitting that there are genuine issues of material fact with respect to each count of the Complaint and that the Motion should therefore be denied. On July 21, 2006, Complainant filed a Reply Memorandum of Law in Support of the Motion for Accelerated Decision (“C’s Reply”) to which it attached an Affidavit from Matthew Petersen along with additional Affidavits from Howard Caine, Michael Valentino and Michael Risse¹. The parties have not withdrawn, supplemented or revised these pleadings in response to the subsequent filing of the Second Amended Complaint and therefore it is assumed that they intend the arguments made therein to be equally applicable to the allegations contained in the Second Amended Complaint.²

¹ Also attached to Complainant’s Reply was an unsigned “corrected version” of Michael Risse’s earlier (June 22, 2006) Affidavit.

² As indicated by Complainant in its Motion for Leave to File Second Amended
(continued...)

II. Standards for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Rules of Practice”). Section 22.20(a) of the Rules of Practice authorizes an Administrative Law Judge to “render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.” 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75, 2000 App. LEXIS 9, *34 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, *8 (ALJ, Order Granting in Part and Denying in Part Complainant’s Motion for Accelerated Decision on Liability, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See CWM Chemical Service*, 6 E.A.D. 1, 95 EPA App. LEXIS 20, *25 (EAB 1995).³

Rule 56(c) of the FRCP provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.” Thus, summary judgment is to be decided on the “pleadings, depositions, answers to interrogatories, and admissions on file, together with []

²(...continued)

Complaint, the purpose thereof was merely to alter Counts 1 through 4 so as to plead that Respondent violated Minnesota’s “interim status” operating standards rather than that state’s “new facility” operating standards which were pled in the (first) Amended Complaint. *See*, n. 6 *infra*. Complainant represented that the interim status standards were “substantively identical” to the new facility standards and thus the Second Amended Complaint made no substantive changes to the factual and/or legal allegations contained in the prior (first) Amended Complaint. Respondent did not object to this characterization and did not oppose the Motion for Leave to File the Second Amended Complaint.

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

affidavits” (FRCP 56(c)), but in addition, a court may take into account any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir 1993)(citing, 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2d ed. 1983)); *Pollack v Newark*, 147 F. Supp. 35 (D.N.J. 1956)(In considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavit, or otherwise made admissible in evidence), *aff’d*, 248 F.2d 543 (3rd Cir. 1957), *cert. denied*, 355 U.S. 964 (1958). Such material may include documents produced in discovery. *Hoffman v. Applicators Sales & Service, Inc.*, 439 F.3d 9, 15 (1st Cir., Feb. 22, 2006)(citing, 11 James M. Moore, *et al.*, Moore’s Federal Practice § 56.10 (Matthew Bender 3rd ed.)(courts generally accept use of documents produced in discovery as proper summary judgment material)).

A motion for summary judgment puts a party to its proof as to those claims on which it bears the burdens of production and persuasion. For the EPA to prevail on a motion for accelerated decision on an affirmative defense, as to which Respondent ultimately bears such burdens, EPA initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). If the EPA makes this showing, then Respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.* Respondent cannot "meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000). While submissions must be viewed in light most favorable to the nonmovant, including one who bears the burden of persuasion on the issue, and such evidence is to be taken as true, Respondent must provide "more than a *scintilla* of evidence on a disputed factual issue to show [its] entitlement to a trial or evidentiary hearing; the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Moreover, "[s]ummary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up." *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 n. 24 (EAB 1997); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1978). "In countering a motion for summary judgment, more is required than mere assertions of counsel. The non-movant . . . must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial." *Pure Gold, Inc.*, 739 F.2d at 627 (Fed. Cir. 1984). It has been held that an issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under FRCP 56); *Ricker v. American Zinser Corp.*, 506 F. Supp. 1, 2 (E.D. Tenn. 1978)(affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial), *aff’d, sub nom. Ricker v. Zinser Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980).

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

III. Factual Background

Respondent MMF is a Minnesota corporation which began operating a facility located at 909 Winter Street, N.E., Minneapolis, Minnesota in 1983. Compl. ¶¶ 11, 12, Ans. ¶¶ 5, 6; Complainant's Prehearing Exchange Exhibits ("C's Exs.") 10, 39. At this facility Respondent engages in the business of plating steel with zinc and anodizing aluminum. C's Exs. 1, 16. In the course of its operations, Respondent generates, treats, stores and disposes of over 1,000 kilograms per month of hazardous waste consisting, *inter alia*, of wastewater treatment sludges from its electroplating operations and including trichloroethylene, sulfuric acid, and nitric acid.⁴ Compl. ¶ 31, Ans. ¶ 9; C's Exs. 21, 34. Such waste exhibits characteristics of corrosivity and toxicity. C's Exs. 21, 34.

Officials at various levels of government have periodically inspected Respondent's facility for compliance with federal, state and county regulations applicable to hazardous waste generation, treatment, storage and disposal. *See e.g.*, C's Exs. 1, 3, 4, 14, 16, 29, 43 & 44; Respondent's Prehearing Exchange Exhibits ("R's Exs.") 7, 8, 13, 14, 20, 26, 27, 29, 31, 36, 37, 46, 47, 52, 53, 58, 61, 73, 80, 89 & 92; Affidavit ("Aff.") of Mr. Risse, and attachments thereto. The record indicates, for example, that EPA, Hennepin County, and/or Minnesota Department of Environmental Services (MDES) inspected MMF's facility on April 27, 2000; May 17, 2001; June 12, 2001; August 7, 2001; November 3, 2002; November 26, 2002; April 2, 2004; and April 29, 2005, and in regard thereto issued to MMF Notices of Inspection (NOI) or other documentation advising the company of various violations allegedly found during such inspections and the measures which purportedly needed to be implemented to come into

⁴ MMF's Answer to the Second Amended Complaint denied the allegation that "[f]rom on or about September 1, 1998, to August 25, 2005, the Facility generated during each calendar month more than 1,000 kilograms of hazardous waste," which would qualify it as a "large quantity generator" under state regulations. *See*, Compl. ¶ 34, Ans. ¶ 12, Minn. R. 7045.0206 (large quantity generator defined as generating over 1000 kg/mo.). However, it appears to be a scrivener's error, as Respondent admitted the identical allegation in its Answer, dated April 14, 2006, to the (first) Amended Complaint, and in response to EPA's Section 3007 information request, it explicitly acknowledged that "MMF has always been a large quantity generator," documentary evidence in the record for that time period evidences that to be the case, and Respondent does not argue in its Response that it is not properly classified as a "large quantity generator" of hazardous waste. *See*, C's Exs. 12; 61; R's Resp. at 18.

compliance with regulatory requirements. *See e.g.*, R's Exs. 61, 68, 80; C's Exs. 19, 20, 29. In addition, in 2001 and then again in 2002, EPA issued to MMF a formal Request for Information (RFI) pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, seeking information regarding MMF's operations and regulatory compliance efforts. C's Exs. 8, 10.

Respondent alleges and the record suggests that it responded to the inspectors' requests for compliance and/or information over the years. *See e.g.*, C's Exs. 9, 12, 18, 21, 23, 28 & 30; R's Exs. 3, 4, 69 & 82. Respondent denies the allegations of violations charged in the Second Amended Complaint and challenges the penalty proposed in regard thereto.

IV. Federal & State Regulatory Requirements

RCRA, 42 U.S.C. §§ 6901-6992k, was enacted in 1976. Its hazardous waste provisions are contained in Subtitle C, as amended in 1984 and 1986. 42 U.S.C. §§ 6921-6939e. Those provisions provide extensive operating standards covering hazardous waste generators, transporters, and waste treatment, storage and disposal sites, commonly pronounced as a "cradle to grave" system for dealing with such waste. 42 U.S.C. §§ 6922-6924. The key element of the law is the permit requirement. RCRA generally requires that any facility which treats, stores or disposes of hazardous waste have a permit.⁵ 42 U.S.C. § 6925(a). Further, the statute authorizes EPA to administer and enforce the permit program through its own duly promulgated regulations (40 C.F.R. Parts 260-279) and/or authorizes states to do so "in lieu of the Federal program." 42 U.S.C. § 6926(b). As indicated above, Respondent is located in Minnesota. EPA approved Minnesota's hazardous waste regulations effective as of May 22, 1984 and granted Minnesota final authorization to administer its own RCRA program on February 11, 1985. *See*, 50 Fed. Reg. 3756 (Jan. 28, 1985). Minnesota's hazardous waste regulations are codified in Minn. Rules Chapters 7001 and 7045.0001 *et seq.* Violation of either promulgated federal or state regulations constitutes a violation of RCRA, subject to the assessment of civil penalties and/or compliance orders. 42 U.S.C. § 6928.

Minnesota's hazardous waste regulations largely mimic the federal regulations providing that, for example, no person may *store* hazardous waste without a permit issued by the Minnesota Pollution Control Agency (MPCA). Minn. R. parts 7001.0030, .0050 1.A, .0530, and .0450.

⁵ RCRA section 3005(e) provides that a facility otherwise covered by RCRA's permit requirement, *in existence on November 19, 1980*, can obtain "interim status," *i.e.* be treated as if it had been issued a permit, until final disposition of its permit application. 42 U.S.C. § 6925(e). In that Respondent's facility did not come into existence until 1983, it did not qualify for "interim status" under federal regulations and thus, for federal purposes, at all times relevant hereto the regulations applicable to it as a generator of hazardous waste are those in 40 C.F.R. Part 262 and 264 as an owner or operator of a facility which treats, stores or disposes of hazardous waste, except to the extent that it might fall within the permit exemption of 40 C.F.R. § 262.34. As to MMF's status for state purposes, *see n. 6 infra*.

Both the federal and state hazardous waste regulations afford *generators* of hazardous waste a conditional exemption from the statutory prohibition against storage of hazardous waste without a permit. Specifically, Minnesota’s regulations provide that a large quantity generator of hazardous waste with interim facility status under state regulations,⁶ may accumulate such waste for less than 90 days without a permit *if* the generator complies with the conditions for a storage permit exemption as set forth in Minn. R. 7045.0292, subparts 1 & 8. Minn. R. 7045.0292. *See also*, 40 C.F.R. 262.34(a) and (c). Thus, a large quantity generator may lawfully operate without a permit, *i.e.* qualify for the exemption by, among other things, complying with the hazardous waste personnel training, maintaining training records, establishing a contingency plan, and meeting preparedness and prevention requirements in Minn. R. parts 7045.0558, .0572, .0566. *See*, Minn. R. 7045.0292. *See also*, 40 C.F.R. 265.16, 40 C.F.R. part 265, subparts C and D. If it fails to fulfill these requirements, however, it is deemed a hazardous waste generator subject to Minnesota’s interim facility operating standards set forth in Minn. R. 7045.0552-.0650.⁷

In this case, Complainant alleges that Respondent both violated specific regulatory requirements it was obliged to comply with involving personnel training, training records, contingency plan, and preparedness and prevention requirements, constituting violations of state and federal requirements under RCRA (Counts 1-4), and, by failing to meet those requirements and thus not qualifying for an exemption under state regulations, violated RCRA by operating without a permit (Count 5).⁸

⁶ In that Respondent’s facility came into existence in 1983, it was an existing facility at the time Minnesota’s regulations became effective on July 16, 1984, and therefore falls within Minnesota’s “interim facility” performance standards (Minn. R. 7045.0552-.0650) to the extent it is not otherwise exempt from them, rather than “new facility” performance standards (Minn. R. 7045.0450-.0551). *See*, Minn. R. 7045.0552.

⁷ This interpretation of the state and federal requirements is set forth by EPA in its Motion for Leave to File Second Amended Complaint and Motion for Accelerated Decision, which Respondent did not challenge in its Response to the Accelerated Decision Motion.

⁸ Complainant has submitted evidence to the effect that MMF never applied for nor obtained from EPA or the state *a permit* for the treatment, storage, or disposal of hazardous waste at its Winter Street facility. *See*, Affidavit of Michael Valentino ¶ 9 attached to Complainant’s Motion. Respondent does not appear to contest the accuracy of this representation in its Response. However, the record indicates that MMF has obtained a hazardous waste *generator license* from the Hennepin County Department of the Environment and Energy. Compl. ¶ 30, Ans. ¶ 8.

V. Analysis of Liability

Count 1 - Personnel Training and Training Records Violations

Count 1 alleges that Respondent failed to adequately train certain of its employees, and *also*, that it failed to maintain records of such training, employee job titles, and job descriptions, in violation of Minn. R. 7045.0558, Subparts 1, 2, 3, 5, 6.A-D (40 C.F.R. §§ 265.16(a)(1)-(3), (b), (c), (d)(1)-(4)).⁹

A. Insufficient Training

The Complaint alleges, in sum, that beginning on or about August 26, 2000¹⁰ until August 25, 2005, Respondent did not provide certain named unsupervised employees having hazardous waste management responsibilities with hazardous waste personnel training to teach them to perform their duties in a manner so as to minimize the possibility of releases of hazardous waste. Compl. ¶¶ 57-89. Complainant alleges that Respondent's failure to properly train these employees violated Minn. R. 7045.0558, Subparts 1, 2, 3, and 5. *Id.* ¶ 106. For its part, Respondent's Answer to the Complaint admits no more than that the named persons were its employees. Ans. ¶ 19.

⁹ Including in a single count claims of violations of two different regulatory requirements, each having unique factual elements of proof, indicates a lack of artful drafting. *See, Gulf Ins. Co. v. Skyline Displays, Inc.*, 2003 U.S. Dist. LEXIS 26509 (D. Minn. 2003) (A "claim" designates a particular group of facts or occurrences that gives rise to a right enforceable in the courts; counts based on different claims should be pled separately); FRCP 10(b). The initial factual allegations of Count 1 also cite to both the requirements of 40 C.F.R. Part 264 (new owner standards) as well as those in Part 265 (interim owner standards) (*see* Compl. ¶¶ 49-54); however, the concluding paragraphs of the Count only allege MMF violated the requirements of Part 265. *See*, Compl. ¶¶ 106-110. In that it appears that for federal regulatory purposes, MMF did not qualify for interim status (*see*, n. 5 above) under Part 265 of the federal regulations, it is only the Part 264 regulations which would apply here, although in substance the regulations are the same. In view of these inconsistencies, this Tribunal will focus its determination of violations upon the applicable Minnesota regulations, specifically those applicable to facilities with interim status.

¹⁰ The Complaint actually dates the beginning of the alleged violations back to August 23, 1993, twelve years before the original complaint was filed. This led to Respondent filing a challenge to the allegations based upon the applicable five year statute of limitations (28 U.S.C. § 2462). In response, Complainant acknowledged that it was not seeking to hold MMF liable or penalize it for violations preceding the statutory period, *i.e.* those prior to August 26, 2000. *See*, Order on Motion for Leave to Amend Complaint.

Minn. R. 7045.0558, entitled “PERSONNEL TRAINING,” Subparts 1, 2, 3, and 5, provide as follows:

Subpart 1. In general. Hazardous waste facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this chapter. The owner or operator shall ensure that this program includes all the elements described in the document required by subpart 6, item C.

Subp. 2. Program director. This program must be directed by a person trained in hazardous waste management procedures.

Subp. 3. Minimum program requirements. The training program must include instruction which teaches facility personnel hazardous waste management procedures relevant to the positions in which they are employed, including contingency plan implementation procedures. The training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems, including, where applicable:

- A. procedures for using, inspecting, repairing, and replacing facility emergency and monitoring equipment;
- B. key parameters for automatic waste feed cutoff systems;
- C. communications or alarm systems;
- D. procedures for response to fires or explosions;
- E. procedures for response to ground water contamination incidents; and
- F. procedures for shutdown of operations.

* * *

Subp. 5. Training review. Facility personnel shall take part at least once per calendar year in a review of the initial training required in subparts 1 to 3.

Minn. R. 7045.0558.¹¹

In its Memorandum, Complainant asserts that its allegations of violation in Count 1 in this regard are supported by the various inspections conducted by federal and county personnel from August 2000 through April 29, 2005 which found spills of hazardous waste on the facility's floor, that the floor had been “severely corroded and compromised” by exposure to hazardous waste, and that there were areas on the floor where hazardous waste could pool and could drain through, citing in support thereof Complainant's Exhibits 3-5, 19, 29 and the Affidavits of Hennepin County inspector Mr. Risse and EPA inspector Mr. Caine, attached to its Memorandum. Further, Complainant points out that Respondent admitted in its response to EPA's 2002 RFI that the

¹¹ “The purpose of the training requirement is to reduce the potential for mistakes that might threaten human health or the environment by ensuring that facility personnel are knowledgeable in the areas to which they are assigned.” 66 Fed. Reg. 52192, 52209 (Oct. 12, 2001).

named employees were employed in its facility in unsupervised positions involving hazardous waste management responsibilities, citing to its Exhibit 12. Additionally, Complainant notes that MMF's description of its training program does not mention instruction for cleaning up spilled hazardous waste as quickly as possible as required by Minn. R. 7045.0275, inspecting or repairing the floor, or preventing release of spilled hazardous waste through the floor, citing its Exhibit 21 in support of those allegations and the fact that MMF only developed a cleaning schedule and log regarding the floor after the April 2, 2004 County inspection.

In Response, MMF represents that its employees were trained initially and annually as required by Minn. R. 7045.0558, citing the Ludwig, Wagner, and Rougier-Maas Affidavits submitted with its Response as well as its Exhibits 8, 21, and 22. Further, Respondent states that various government officials evaluated its training program and found it compliant, citing the Caine and Rougier-Maas Affidavits as well as Complainant's Exhibit 1. MMF affirmatively claims that its training program contained all elements required by regulations, including how to clean up spills and conduct inspections, referring to the Rougier-Maas Affidavit which states –

From 1995 to 2005 I provided introductory training to new employees and annual refresher training to existing employees . . . Consistent with the requirements of Minn. R. parts 7045.0454 and 7045.0558, this training included instruction relevant to their positions . . . one of the topics at these annual reviews was a review of the Contingency Plan and specifically the use of floor dry and other equipment, including squeegees, shop vacuums and hoses, as a means to contain spills and drips in the pretreatment area and also in the area of the process lines.

Rougier-Maas Affidavit ¶ 15 (italics added).

It appears from the Affidavit of Ms. Rougier-Maas and other records identified by Respondent that there is a contested issue of fact as to exactly what was included in the hazardous waste training MMF's employees received, specifically as it relates to maintenance of the floor and responding to spills of hazardous waste thereon.¹² Therefore, it is not appropriate at this point to grant accelerated decision as to this issue of Count 1.

¹² It is noted that there is a difference between not providing employees with the requisite training and adequately trained employees simply not invariably performing consistently with their training. In this case, it appears that Complainant has alleged in this Count only that the employees were not adequately trained. Thus, evidence of spills of hazardous waste on the facility's floor having been found would not alone be determinative of whether the requisite training was provided.

B. Failure to Maintain Records

Under Count 1 Complainant also alleges that from October 30, 2000 to August 2005, Respondent did not have and/or did not maintain at its facility all the records which it was required to have and maintain there, including records of the job titles and the names of the employees filling each position related to hazardous waste management, a written job description for each position related to hazardous waste, and a description of the type and amount of training given to each person employed in a position related to hazardous waste. Compl. ¶¶ 90, 95, 98-101. Complainant alleges MMF's failure to have and maintain such records at its facility violated Minn. R. 7045.0558 Subpart 6.A-6.D. In response, Respondent's Answer indicated a lack of information which would allow it to respond other than to admit that the identified persons were its employees.

Minn. R. 7045.0558 provides in relevant part –

Subp. 6. Personnel records. The following documents and records *must* be maintained *at the facility*:

A. The *job title* for each position at the facility related to hazardous waste management and the name of the employee filling each job.

B. A written *job description* for each position at the facility related to hazardous waste. This description may be consistent in its degree of specificity with descriptions for other similar positions in the same company location or bargaining unit, but must include the requisite skill, education, or other qualifications, and duties of employees assigned to each position.

C. A *written description* of the type and amount of both introductory and continuing *training* that will be given to each person filling a position described in item A.

D. *Records that document that the training or job experience required under subparts 1 to 5 has been given to, and completed by, facility personnel.*

Minn. R. 7045.0558, Subpart 6, sections A-D (emphasis added). As to record retention, Subchapter 7 of this regulation provides that “[t]raining records on current personnel must be kept until closure of the facility. Training records on former employees must be kept for at least three years from the date the employee last worked at the facility.” Minn. R. 7045.0558, Subpart 7.

In its Memorandum and Reply, Complainant identifies the following instances of missing records:

- a. On May 17, 2001, Respondent could not produce, *at its facility*, in response to the EPA inspector's request, records evidencing the job title and job description for each position at the facility related to hazardous waste management and a written description of the type and amount of initial and continuing training that was given to each person in a position related to hazardous waste management. C's Memo. at 13-14; C's Reply at 17 (citing in support C's Ex. 1 (Inspection report of May 17,

2001 inspection) and the Affidavits of Mr. Caine (7/21/06) and Ms. Rougier-Maas). EPA notes that Inspector Caine was advised by MMF at that time that such records were being kept at the home of MMF's employee Ms. Rougier-Maas and that she has acknowledged removing the records from the facility on or about October 30, 2000 and maintaining them at her home from then until August 2001. *Id.* In addition, Complainant cites MMF's response to its 2001 RFI (C's Ex. 12) indicating that all such required records were maintained off-site from October 31, 2000 to August 1, 2001, specifically at the home of Ms. Rougier-Maas. C's Memo. at 13-14.

- b. "Until September 20, 2002" MMF did not have a written job description or records of the type and amount of training provided to its hazardous waste trainers - Michelle Rougier-Maas and William Ludwig.¹³ C's Reply at 17 (citing C's Ex.12, MMF's Resp. to 2002 RFI, pp. 15-16).
- c. On November 13 and 26, 2002, MMF did not have at its facility records identifying the names of employees fulfilling each job title related to hazardous waste nor training records for those jobs. C's Reply at 18 (citing C's Ex. 16 (report of County inspection conducted on November 13 and 26, 2002)). *See also*, Peterson Aff. ¶ 6.
- d. On April 2, 2004 Respondent could not produce at its facility records indicating that it had provided hazardous waste annual review training for any of its employees during the year 2003 and could not subsequently locate any such records. C's Memo. at 14; C's Reply at 17 (citing C's Ex. 21 (Letter dated May 31, 2004 from MMF to Hennepin County responding to deficiencies and requests made in response to April 2, 2004 inspection) and Rougier-Maas' Affidavit). *See also*, Peterson Aff. ¶ 7.
- e. On April 2, 2004, Respondent's records regarding job descriptions for each job title for employees with hazardous waste responsibilities did not specify employees that maintain emergency equipment or do manifesting. C's Memo. at 14 (citing C's Ex. 19 (NOI dated April 27, 1994) relating to County inspection conducted on April 2, 2004).

¹³ The Affidavit of William Ludwig, dated July 6, 2006 (attached to MMF's Reply) indicates that he was the owner of MMF from 1981 to 2001 and that in the 1980s and 1990s, before Rochelle Rougier-Maas was hired, he served as the company's "Hazardous Waste Trainer." Ms. Rougier-Maas' Affidavit, executed on July 6, 2006, indicates that she is currently employed by MMF and has been so employed "since May 1994," that after receiving her training she became MMF's Training Program Director, and that from 1995 until 2005 she provided introductory and annual training to other MMF employees.

A review of the evidence cited by Complainant appears to support its allegations regarding the missing records. Respondent did not address the allegations regarding its failure to have and maintain the requisite documentation at its facility in its Response to Complainant's Motion, except to include with its Response the Affidavit of Ms. Rougier-Maas, wherein she acknowledged that "In November, 2000 . . . I decided to take the personnel training records for all MMF employees to my home . . . I neglected to return the personnel training records to MMF and they were not available for review on the day of the EPA inspection [May 17, 2001]," and that "[u]nfortunately, I have not been able to locate the documentation related to training completed in 2003." Rougier-Maas Aff. ¶ 17.

Thus, there does not appear to be any disputed fact that: (a) from approximately November 2000 until August 2001, a period of about 9 months, Respondent did not maintain at its facility records evidencing the job title and job description for each position at the facility related to hazardous waste management and a written description of the type and amount of initial and continuing training that was given to each person in a position related to hazardous waste management (C's Ex. 1, p.5; Caine Aff. ¶ 17 ; Rougier-Maas Aff. ¶ 38); (b) that from the beginning of the statute of limitations period, August 26, 2000, until approximately September 20, 2002, about 2 years, MMF did not have or maintain at its facility a written job description or records of the type and amount of training provided to its hazardous waste trainers (Rougier-Maas or Ludwig) (C's Exs. 1, 4, 12);¹⁴ (c) that on November 13 and 26, 2002, MMF did not have at its facility records identifying the names of employees filling each job title related to hazardous waste nor training records for those jobs (C's Ex. 16; Peterson Aff. ¶ 6)¹⁵; (d) that on April 2, 2004, Respondent had no records indicating that it provided hazardous waste annual review training for any of its employees during the year 2003 and it could not subsequently locate such records (C's Exs. 19, 21; Rougier-Maas Aff. ¶ 17, Peterson Aff. ¶ 7; and (e) on April 2, 2004,

¹⁴ Complainant's Ex.12 is MMF's Response to EPA's 2002 RIF dated September 20, 2002 in which the company indicated that its employees William Ludwig and Rochelle Rougier-Maas provide hazardous waste training, that Mr. Ludwig trained Ms. Maas but that "we could find no specific date." There are no documents attached memorializing Mr. Ludwig's job description or training, nor the training he provided to Ms. Rougier-Maas. However, attached to the response was a certificate indicating that Ms. Rougier-Maas attended and completed a County Hazardous Waste Generator Training Program on January 15, 1999, although it is unclear whether that training included instruction on training others. No job description for Ms. Rougier-Maas is provided with the response.

¹⁵ A review of C's Ex. 16 indicates at page 7 of the report that the inspector did not check "yes" on the checklist with regard to whether MMF's personnel training records identify the "names of employees filling each job title;" include "training descriptions for each job title including amount and frequency of classroom and on the job training;" and address "emergency coordinator(s) responsibilities and duties," "record keeping requirements," and "emergency equipment inspections and maintenance." Instead, the inspector circled the alphabetical identification of those items apparently as a negative indication. See, Peterson Aff. ¶ 6.

Respondent's records regarding job descriptions for each job title for employees with hazardous waste responsibilities were incomplete in that they did not specify which employees were tasked with maintaining emergency equipment or manifesting hazardous waste (C's Exs. 19, 21).¹⁶ MMF was required to maintain these records at its facility by Minn. R. 7045.0558, Subpart 6, sections A-D. Therefore, Respondent is found liable on Count 1 in regard to violating Minn. R. 7045.0558, Subpart 6, for failure to maintain the aforementioned requisite personnel records at its facility.

Count 2 - Contingency Plan Violations

Count 2 of the Complaint alleges that from August 26, 2000¹⁷ to September 7, 2001, essentially a twelve month period, Respondent's Contingency Plan did not include all the information required to be included in it by Minn. R. 7045.0572. Compl. ¶¶ 111-133. EPA seeks a penalty in the nominal amount of \$263.00 on this Count.

Specifically, as detailed in its Motion, Complainant alleges that MMF's Contingency Plan dated June 11, 2000 (C's Ex. 1), which was provided to EPA during its May 17, 2001 inspection of MMF's facility, was deficient in that absent from it were the following -

- a. a description of arrangements agreed to by local police departments, fire departments, hospitals, contractors, and state and local emergency response teams to coordinate emergency services as required by Minn. R. 7045.0572 Subpart 4.C;
- b. an explicit "list" of labeled "emergency coordinators," identifying one such person as the "primary emergency coordinator" and containing the office phone number of each such emergency coordinator as required by Minn. R. 7045.0572 Subpart 4.D;
- c. a brief outline of the capabilities of the facility's listed items of emergency equipment as required by Minn. R. 7045.0572 Subpart 4.E; and
- b. an evacuation plan that included primary and alternative evacuation routes as required by Minn. R. 7045.0572 Subpart 4.F.

¹⁶ Exhibit 21 is MMF's Response to the County NOI issued as a result of its inspection on April 2, 2004 (C's Ex. 19). MMF responded to this assertion of deficiency by including in its response completed MPCA forms evidencing job titles and job descriptions for hazardous waste management. C's Ex. 21.

¹⁷ The Complaint actually dates these alleged violations back to June 11, 2000; however, the statute of limitations limits the claim to violations on or after August 26, 2000.

C's Memo. at 14-16.

EPA further alleges that the copy of the Contingency Plan MMF provided to EPA on September 7, 2001, in response to EPA's 2001 RFI (C's Ex. 9), was similarly deficient except that attached to this Plan was a facility diagram indicating evacuation routes.

In response, MMF alleges that during the relevant time period its Contingency Plan did contain the allegedly missing information, citing to the Plan as contained in Complainant's Ex. 9 (Plan provided in response to 2001 RFI) and the Rougier-Maas Affidavit ¶¶ 24-27. Specifically, Respondent states that the Contingency Plan does describe the arrangements with local police and the fire departments by stating that the Police and Fire departments have a copy of the Plan and hazardous materials on site; it does identify a primary emergency coordinator by listing William Ludwig and Rochelle Rougier-Mass above the listed "Alternatives" identified in sequential order, and includes the company's office number in bold on the Plan's first page; it does identify the capabilities of emergency equipment by indicating that all of the listed equipment is capable of being used with corrosives and states that fire extinguishers should be used to disable small and contained fires; and it does contain an evacuation plan which indicates that all exits are clearly labeled, that maps of evacuation routes are posted (and attached to the Plan itself), and that supervisors are responsible for notifying employees, and which indicates how employees are to proceed in response. In addition, MMF states in its defense that in 1997 County authorities raised the issue of the sufficiency of its Plan, specifically with regard to arrangements with local public safety agencies and in response MMF satisfied the County's concerns. Further Respondent states that EPA's own inspector Howard Caine concluded after his May 17, 2001 inspection that MMF's Contingency Plan contained the elements EPA now asserts as missing, citing Complainant's Ex. 1. R's Resp. at 8-11.

In Reply, EPA acknowledges that when MMF's facility was inspected in May 17, 2001, EPA Inspector Howard Caine and Hennepin County Inspector Michael Risse found MMF in compliance with regard to many of the deficiencies it now alleges exist in the Contingency Plan. However, EPA states that the checklists the inspectors used did not provide for consideration of each individual element involved in regulatory compliance and thus it argues that the inspectors made no specific findings in regard to those elements. Furthermore, EPA states that upon review in 2002, and prior to filing the Complaint in 2005, the prior inspectors' findings were found to be erroneous and violations were noted as a result of which MMF revised its Plan "to satisfy the noted deficiencies," evidencing that the 2000 Plans were insufficient. C's Reply at 20-23.

Upon consideration of the various arguments of the parties, it is determined that it is inappropriate to grant accelerated decision on this Count at this point for the following reasons:

First, as a threshold matter, it is noted that this Tribunal cannot determine from the record as it now exists, with sufficient certainty, *exactly what* MMF's Contingency Plan consisted of during the relevant time period so a proper evaluation of its regulatory compliance can be made. Complainant alleges that MMF's Plan in effect during the relevant period is that provided to the County inspectors on May 17, 2001 (which is contained in Complainant's Ex. 1). However, in its

Response, Respondent indicates that the Plan actually in effect was the one with the diagram attached which it provided to EPA on September 7, 2001 with its response to the 2001 RFI (contained in Complainant's Ex. 9).

In its Reply, Complainant challenges MMF's assertion in this regard, pointing out that Respondent has not provided an explanation of why the copy of its Plan with the diagram provided with its RFI response was not provided to the inspectors on May 17, 2001. Reply at 20. While this appears to be technically true, the evidence Complainant itself has proffered does contain a possible explanation which, unfortunately, only clouds the issue further. Specifically, the Affidavit of EPA Inspector Howard Caine (dated June 23, 2006) attached to Complainant's Motion indicates that MMF's photocopying machine was not working on the day of the inspection (May 17, 2001) and the inspectors received from MMF "a *copy* of the narrative of their Contingency Plan, but *not a photocopy* of the Contingency Plan," and it is that "narrative" which is included in Ex.1. *See*, Caine Aff. 6/23/06 ¶¶ 41-43 (italics added). Such statements suggest that at the time of the inspection on May 17, 2001, the EPA inspector was aware that he was not being provided with exact photocopy of the current Plan nor the *complete* Plan and particularly was not being provided with some "non-narrative" portion of the Plan, *i.e.*, possibly a diagram of the facility with evacuation routes similar to that attached to the Plan contained in C's Exhibit 9.

This statement in Mr. Caine's Affidavit would appear therefore to support MMF's assertion that the copy of its Contingency Plan actually in effect during the relevant period is the one it provided to EPA with its Response to the RFI (attached to Complainant's Exhibit 9), which contains the diagram. However, a comparison of the narrative portions of the copies of the two Plans evidences that they are not the same and there is reason to suspect that the copy of the Plan included in Complainant's Exhibit 9 may be an *earlier* draft of the Plan and not the one actually in effect during the relevant period. Specifically, while both copies of the Plan are marked on the cover page as "Revised 2000," the Plan contained in Exhibit 9 bears a handwritten and/or typewritten date of "January 27, 2000" in three separate places (Plan pgs. 2, 4, 5), while the Plan in Exhibit 1 contains no handwritten date, but evidences two typewritten dates on page 5 of "6-11-00." On the other hand, the Plan in Exhibit 1 is unsigned, while the Plan in Exhibit 9 is signed, indicating that perhaps the document in Exhibit 1 was only a "draft" of a revised Plan and not a final revision in effect at the time and so Respondent is correct that Exhibit 9 is the "live" version of the Plan. In addition, it is noted that Exhibit 1 incorporates in typewritten form the handmarked change to the telephone number of the State Duty Officer on page 2 of the Plan attached to Exhibit 9. The record reflects that MMF was requested to make this change to the telephone number, *and only this change*, by Hennepin County in a Notice of Inspection dated May 11, 2000 (*see*, R's Ex. 61), thus, suggesting that Exhibit 1 was representative of MMF's Plan in effect during the relevant period.

In any event, without further testimony or stipulation of the parties clarifying this matter, this Tribunal does not feel it is appropriate to make any rulings with regard to the compliance of MMF's Contingency Plan during the relevant period.¹⁸

Further, as pointed out by Respondent, the record contains contemporaneous findings made by EPA's own inspector Howard Caine and Hennepin County Inspector Michael Risse that MMF's Contingency Plan in effect during the relevant period (August 26, 2000 to September 7, 2001) met the regulatory standards at issue here, directly contradicting EPA's current position in this case. Specifically, the evidence shows that MMF's Contingency Plan was reviewed for regulatory compliance by Mr. Risse on April 27, 2000, shortly before the period of violation allegedly began, and then again the following year on May 17, 2001, during the alleged period of violation, by both Mr. Risse and Mr. Caine.¹⁹ In both 2000 and 2001, Mr. Risse found MMF's Plan sufficiently compliant in terms of providing the business phone numbers for emergency coordinators, arrangements with emergency responders, evacuation routes and emergency equipment capability. R's Ex. 61. During his 2001 inspection, Mr. Caine found MMF's Plan fully compliant except as to the issue of evacuation routes. In addition, the record indicates that the County subsequently conducted other inspections of MMF on June 12, 2001 and August 7, 2001, and during neither of those inspections (both of which occurred during the alleged period of violation) was any issue raised regarding the sufficiency of MMF's Contingency Plan. See, C's Exs. 3, 5.

EPA argues in its Motion that this Tribunal should accord little or no weight to the findings by the County inspectors contradicting its current position, suggesting that the inspectors' evaluations were not comprehensive and/or were only "preliminary." However, rulings on accelerated decision are made solely upon "uncontested facts," and thus, the existence of the findings of the inspector supporting MMF's claims of compliance make it inappropriate at this time to enter accelerated decision on this Count.²⁰

¹⁸ In that the Plans are similar with regard to the provisions at issue (except as to the diagram providing evacuation routes) it may seem at first glance that determining which Plan was actually in effect is not material. However, it is noted that the allegations of violation in the Complaint with regard to MMF's Contingency Plan only go through *September 7, 2001* (see, Compl. ¶¶ 119-129), implicitly suggesting that the Plan *provided to EPA on September 7, 2001* in response to the RFI and any and all plans thereafter sufficiently *met* the regulatory standard.

¹⁹ Mr. Risse's Affidavit of June 22, 2006 (¶¶ 2-4) indicates that he has conducted hazardous waste investigations and/or inspection since 1984, a period of over 20 years.

²⁰ Based upon admittedly only preliminary review of the record in connection with the instant Motion, it appears that even if MMF's Contingency Plan is found to have not technically met each and every regulatory requirement during the relevant period, it is difficult to imagine such violations being deemed under the circumstances of this case to be sufficiently egregious as to warrant imposition of a penalty, even the nominal penalty of 263 dollars suggested by the

(continued...)

Count 3 - Preparedness and Prevention Violations - Risk Minimization

Complainant alleges in Count 3 of the Complaint that Respondent failed to maintain and operate its facility to minimize the possibility of any unplanned release of hazardous waste or hazardous waste constituents which could threaten human health or the environment, in violation of Minn. R. 7045.0292, Subparts 1.G and 7045.0566, Subpart 2. Specifically, Complainant alleges that from May 17, 2001 through August 25, 2005 the floor of Respondent's facility in proximity to its sulfuric acid anodizing tanks, nitric acid tanks and nickel acetate seal tank, was corroded, cracked and compromised, which created the possibility of a release to land of hazardous waste, and thus MMF did not maintain and operate its facility to minimize the possibility of an unplanned release. Compl. ¶¶ 134-186. EPA seeks a penalty in the amount of \$240,402 on this Count.

In support of Accelerated Decision on this Count, EPA alleges in its Memorandum that MMF's facility floor was inspected three times in 2001, twice in 2002, then again in 2004 and 2005, and on each occasion the inspectors observed the floor was not coated with a corrosion resistant impermeable coating, that it exhibited cracks, corrosion, peeling floor coating, and/or holes, and also observed on the floor spilled hazardous waste, citing to the attached Affidavit of Michael Risse, C's Exs. 1, 19. C's Memo. at 16-17. As apparently an additional or alternative basis for liability on this Count, EPA argues that Respondent failed to have schedules, instructions for, and implementation of waste cleanup or floor inspection and maintenance, which also evidences that it did not maintain and/or operate its facility to minimize the possibility of a release of hazardous waste, citing again to the Risse Affidavit submitted with its Motion. C's Memo. at 17-18.

²⁰(...continued)

Agency. C's Ex. 40. The record suggests that MMF's Contingency Plan stayed essentially the same for many years before and after the period of violation and was reviewed on a yearly basis by governmental inspectors and consistently found to be essentially fully compliant. *See*, Rougier-Maas Aff. Exs. 1, 4, 7, 9. To any extent the Plan was deemed noncompliant by the inspectors in any given year, MMF voluntarily undertook to modify the Plan and submitted the revised Plan to the County. *Id.* The fact that MMF altered its Plans after the alleged period of violation to bring it "into compliance," as requested after subsequent inspection, does not indicate that MMF had any notice that the prior inspectors' findings of compliance were erroneous or that it acted in bad faith with regard to writing or maintaining its previous Plans. In that this case falls within the purview of *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999), discussed *infra*, where the Eighth Circuit generally found that EPA could not proceed with a penalty action where state authorities *found a violation* but chose not to penalize the company because it came into compliance, the ability of the Agency to sustain a penalty under these circumstances, where the inspectors contemporaneously found no violations, seems even less persuasive.

In Response, MMF states that, contrary to EPA's claim, the evidence shows that "the capacity of the flooring to contain hazardous waste has not been compromised and that there was not a potential for release to the soil under the floor," citing in support the Affidavits of Logan and Rougier-Maas to the effect that EPA is in error as to certain cracks or holes it alleges existed in the floor and that in any event in certain areas the floor was multilayered. R's Resp. at 12. Additionally, MMF proffers in support of its position on this Count the Affidavit of Dana Wagner of Liesch Associates, a "Certified Hazardous Waste Manager" specializing in regulatory compliance. Dana Wagner's affidavit indicates that an assessment of MMF's floor was undertaken at some point as a result of which it was determined that it was not compromised as alleged by EPA in paragraphs 144, 145, 160-162, 164-170, 176 of the Complaint and therefore created no potential for the release of hazardous waste. R's Resp. at 12-13. Additionally, with regard to EPA's claim regarding MMF's lack of schedules, instructions, and maintenance evidencing that it did not undertake sufficient measures to minimize the possibility of a release, Respondent notes that the Complaint does not allege these facts as a basis for liability under this Count and in any event the assertions are untrue, citing the Rougier-Maas Affidavit to the effect that MMF provided training and had procedures in place for floor maintenance. Finally, MMF asserts that the law recognizes that routine spills occur at manufacturing plants and such spills are not prohibited, and argues that manufacturers are not required to minimize likelihood of such spills, citing 45 Fed. Reg. 76628 (Nov. 19, 1980).²¹ R's Resp. at 15.

Complainant in its Reply suggests that the opinions set forth in Dana Wagner's Affidavit about the floor not being compromised as alleged by EPA in the Complaint is contrary to other evidence in the record including certain admissions made by Respondent. C's Reply at 31-35. Further, EPA points out that Dana Wagner's Affidavit does not indicate when the evaluation of the flooring was performed, that Respondent has not offered the photographs allegedly taken by Dana Wagner in connection therewith, and that Respondent's exhibits related thereto (R's Exs. 2, 3, and 4) all suggest that such evaluation was not made until March of 2006, which is more than five years after the period of violations began. C's Reply at 55-56. On this basis, Complainant suggests that the Affidavit fails to provide the "specific facts" necessary to determine if Dana Wagner's findings have any relevance to the period of violations in the Complaint. This Tribunal understands EPA's argument with regard to the unstated timing of Dana Wagner's assessment of the floor, particularly in light of the fact that Mr. Logan's Affidavit indicates that he undertook certain repairs to the flooring at some point after he purchased the business in 2001 (which could potentially have occurred prior to Dana Wagner's evaluation). However, the Affidavit of Mr. Logan wherein he denies that the floor contained holes or was disintegrated based upon a survey

²¹ This Tribunal is not making any definitive evaluation of the validity of this legal assertion by Respondent at this point. However, it is noted that the reference cited by Respondent indicates that a "spill" is defined as an "accidental" release. 45 Fed. Reg. 76628 (Nov. 19, 1980). An accident is commonly understood to be an unplanned or unexpected event. If a release frequently, routinely, or periodically occurs at a manufacturing plant then one might conclude that the release is not "accidental," but it is simply part of the manufacturing process and must be dealt with as such by providing a method of containment, treatment and/or storage.

he conducted “after he purchased the company,” and/or his undertaking of repairs after his purchase in 2001, and Ms. Rougier-Maas’ Affidavit similarly denying the existence of cracks, peeling, holes and asserting that “epoxy” was reapplied, by themselves create a contested issue of material fact regarding the condition of the flooring from May 17, 2001 through August 25, 2005, the period at issue here, and thus as to MMF’s liability on this Count. Logan Aff. ¶¶14; Rougier-Maas Aff. ¶¶ 39-41.

Count 4 - Preparedness and Prevention Violations: Communication Devices

Complainant alleges in Count 4 that from May 17, 2001 to August 17, 2001, a period of about *three months*, Respondent failed to equip its facility with “a device, such as a telephone . . . which is immediately available at the scene of operations and which is capable of summoning emergency assistance” from police, fire departments or emergency response teams, and failed to provide its employees with “immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee,” in violation of Minn. R. 7045.0566, Subparts 3.B and 5. Compl. ¶¶ 187- 198.

Specifically, Complainant alleges that, from May to August 2001, MMF employed personnel in the processing area of the facility in metal finishing operations that involved the spilling and handling of hazardous waste, and that during that time did not provide those employees with immediate access to an internal alarm or have immediately available to them an external emergency communication device such as a telephone, citing C’s Ex. 9, Caine and Risse Affidavits. EPA further states that while the company had an intercom system, the intercom only transmitted from the office to the processing area and not from the processing area elsewhere. Additionally, EPA cites the Affidavit of EPA Inspector Howard Caine to the effect that on May 17, 2001 he observed MMF’s processing area and found there was no communication device in the area where hazardous waste is handled. Caine Aff. (6/23/06) ¶¶ 34-37; Caine Aff. (7/21/06) ¶¶ 42-45. The nearest telephone was in the office area which was separated from the processing area by doors. Ludwig Aff. ¶ 12. Mr. Caine further observed that immediate visual or voice contact between employees in the processing area to the office would not be possible with the office doors closed. Caine Aff. (6/23/06) ¶ 37; C’s Reply at 35-36.

In its Response, MMF asserts that EPA has not submitted sufficient probative evidence to establish the critical elements of liability for the alleged violations. Citing to the Rougier-Maas and Ludwig Affidavits, MMF states that the plant area at issue, containing its plating lines and pretreatment systems, is a confined area about the size of a basketball court, and argues that “there was convenient and immediate access between the office and the plant area” and that all employees in this area had unobstructed voice and visual contact with other employees, and thus the internal communication devices were adequate to alert employees in the event of an emergency. As to external communications, MMF states the office telephone is “literally steps away from the shop floor.” R’s Resp. at 16-17.

More importantly, MMF also notes that prior to EPA's May 17, 2001 inspection, MPCA and Hennepin County inspectors had, going back some ten years, once or twice per year inspected its facility for RCRA compliance and had *never* indicated that it lacked the requisite internal and external alarms, citing R's Exs. 8, 60 and Rochelle Rougier-Maas' Affidavit. R's Resp. at 17. In fact, on occasions both MPCA and Hennepin County inspectors reviewed in detail the description, location and capabilities of MMF's internal and external communications equipment and found the facility regulatory compliant, citing R's Ex. 8 and the Rougier-Maas Affidavit. *Id.* Based upon this, Respondent argues that "due process mandates that before penalizing a party for violating a rule, the agency must provide adequate notice of the conduct required or prohibited by the rule," citing *CWM Chemical Services*, 6 E.A.D. 1 (EAB 1995). Therefore, MMF concludes that it "cannot be penalized for not having a phone on the shop floor before it was notified of this requirement." R's Resp. at 18. MMF states that after EPA notified it of the new requirements based upon its May 17, 2001 inspection, it complied and installed an additional telephone in the plant area on August 17, 2001, within three months after the inspection.

In its Reply, Complainant asserts that Respondent's argument is essentially that of estoppel, which requires a showing of affirmative misconduct on the part of the government, and that Respondent has not made this showing. C's Reply at 58. Complainant points out that prior to EPA's own inspector citing this violation in May 2001, Hennepin County inspector Michael Risse had erroneously and inadvertently failed to find a violation of the communication device requirements during his inspections of the facility conducted in 1995, 1996, 1997, and 2000.²² C's Reply at 36. However, Complainant argues that, as acknowledged by Mr. Risse in his Affidavit, EPA was correct in noting the violation when it did. *Id.*, Risse Aff. ¶¶ 34, 42. As to Respondent's due process argument, Complainant simply states that the regulations provide clear notice of the nature and extent of the communication device requirements. C's Reply at 58.

Indeed, Respondent asserted in its Second Affirmative Defense equitable estoppel, yet in its Prehearing Exchange, Respondent does not refer to the defense as to Count 4, but merely asserts that MPCA and Hennepin County inspectors "approved" of its equipment for emergency communication and that "these past approvals should bar the EPA from seeking a penalty or should reduce the penalty amount." R's Prehearing Exchange statement at 10. Assuming that Respondent is asserting the equitable estoppel defense as to Count 4, the elements of the defense as applied to the Government are that it "reasonably relied upon its adversary's actions to its detriment," and that the government "engaged in some affirmative misconduct." *BWX Technologies, Inc.*, 9 E.A.D. 61, 80 (EAB 2000)(citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). "When equitable estoppel is asserted against the government, as here, a party bears an especially heavy burden" and "[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.'" *BWX*, 9 E.A.D. at 80 (quoting *Board of County Comm'rs of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). "At a minimum, the

²² Mr. Risse accompanied EPA during its May 17, 2001 inspection of MMF's facility and did not notice this violation at that time either. *See*, Risse Affidavit ¶ 36.

[government] official must intentionally or recklessly mislead the estoppel claimant.” *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). “The erroneous advice of a government agent does not reach the level of affirmative misconduct.” *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994)(citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981)). A finding of affirmative misconduct may be particularly unlikely when the respondent asserts estoppel against the Federal government based on erroneous advice from an official of a state government. “Allowing state representatives to estop the federal government in this case would provide the states with a mechanism for going below the federal floor of regulation required by RCRA.” *Marine Shale Processors*, 81 F.3d at 1349. MMF has not pointed to any evidence that state or county inspectors intentionally or recklessly misled it, and therefore Respondent has not carried its burden on the affirmative defense of equitable estoppel as to Count 4.

As to the due process argument, the regulation uses the terms “immediately available,” “immediate access,” and “directly or through visual or voice contact with another employee” with regard to the internal and/or external communication devices. These terms do not clearly provide the regulators or the regulated community with certain objective measurable standards as to exactly what is required of it to be in compliance.²³ Rather, the meaning of those phrases is left open to interpretation as to what is required in a particular facility with its particular layout.

However, this does not mean that the terms are unenforceable on their face. Courts have held that the terms “immediate” and “immediately” are not impermissibly vague when construed in at least some contexts. *M & Z Cab Corp. v. City of Chicago*, 18 F. Supp. 2d 941, 949 (N.D. Ill. 1998)(term “immediately” is defined in the dictionary as “without delay,” and is within the grasp of a person of ordinary intelligence, and when viewed in context of municipal code, means as quickly as possible in the particular case, and therefore is not impermissibly vague in all applications of the term); *American Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin*, 46 F. Supp. 2d 143, 158-159 (D. Conn. 1999)(interpretation of the phrase “in immediate proximity” is not necessarily difficult), *aff’d*, 205 F.3d 1321 (2nd Cir. 2000); *Becker v. Lockhart*, 971 F.2d 172 (8th Cir. 1992)(interpretation of term “immediately” as reasonable time under the facts and circumstances of the case did not render statute as void for vagueness); *Nova Chemicals, Inc.*, EPA Docket No. CERCLA-01-2005-0051, 2006 EPA ALJ LEXIS 28 (ALJ, Aug. 2, 2006)(the meaning of the term “immediately” in the requirement of Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to immediately notify the National Response Center as soon as owner has knowledge of release of reportable quantity of a hazardous substance, is dependent on the circumstances of each case); *B.F. Goodrich*, EPA Docket No. CERCLA/EPCRA-002-95, 1998 EPA ALJ LEXIS 28 *14-15

²³ For example, instead of using the term “immediate access,” the regulation could have been written to state that the communication device had to be within a certain number of feet of the processing equipment, or specify that the average time it would take an employee to reach the equipment could be no more than a certain number of minutes. Each of these standards could be objectively tested and measured by both the regulating Agency and the regulated entity to determine compliance.

(ALJ, March 31, 1998)(same); *Everwood Treatment Co.*, EPA Docket No. RCRA-IV-92-15-R, 1995 EPA ALJ LEXIS 109 *78-79 (ALJ, July 7, 1995)(respondents may fairly be held to notice that meaning of “immediate response” for responding to a spill under 40 C.F.R. § 264.1(g)(8)(iii) does not include a time long after a reasonable opportunity to obtain containers to clean up the spill has elapsed), *penalty reassessed*, 6 E.A.D. 589 (1996).

The question is whether the terms “immediately available,” “immediate access,” and “directly or through visual or voice contact with another employee” are enforceable as applied to the particular facts of this case. “The application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited.” *Phelps Dodge Corp. v. Fed. Mine Safety and Health Review Comm’n*, 681 F.2d 1189, 1192 (9th Cir. 1982). “If the violation of a regulation subjects private parties to . . . civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.”²⁴ *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). That a regulation is subject to differing interpretations does not render its application a violation of due process. “The question is not whether a regulation is susceptible to only one possible interpretation but rather whether the particular interpretation advanced by the regulator was ascertainable by the regulated community.” *Tennessee Valley Authority*, 9 E.A.D. 357, 412 (EAB 2000), *appeal dismissed for lack of jurisdiction*, 336 F. 3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004). An agency has “fairly notified” a regulated party of what conduct is required or prohibited “[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform.” *General Electric Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); *Harpoon Partnership*, TSCA App. No. 04-02, 2005 EPA App. LEXIS 31 (EAB, May 19, 2005)(quoting *Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, slip op. at 29 (EAB, May 6, 2003).

An agency is permitted to interpret its validly promulgated rules, and courts will uphold the interpretation, even defer to it, provided the interpretation is “reasonable” and “supported by the regulation’s text and the overall structure of the regulations.” *CWM*, 6 E.A.D. at 16, 1995 EPA App. LEXIS *20 (EAB 1995)(quoting *Shalala v. Guernsey Memorial Hospital*, 63 U.S.L.W. 4205, 4207 (Mar. 6, 1995)). The EAB in *CWM* recognized that there is nothing to prevent an Agency from developing an interpretation of regulatory language for the first time in an enforcement adjudication. *CWM*, 6 E.A.D. at 16, 1995 EPA App. LEXIS *20 (EAB 1995). However, before the Agency can impose a penalty as a direct consequence of its interpretation, it “must provide the regulated community with adequate notice of conduct required by the agency.” *Id.*; *see also, Martin v. OSHRC*, 499 U.S. 144, 158 (1991)(decision to use a citation as initial means for announcing a particular interpretation may bear on adequacy of notice to regulated

²⁴ The Administrative Procedure Act provides that “[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.” 5 U.S.C. § 552(a)(1).

parties and reasonableness of the agency's position); *General Electric v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995)("in the absence of notice - for example, when the regulation is not sufficiently clear to warn a party about what is expected of it - an agency may not deprive a party of property"). "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *CWM*, 6 E.A.D. at 16 (quoting *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)). In *CWM*, the regulation at issue required proper disposal of polychlorinated biphenyls (PCBs) above a certain concentration, and EPA interpreted it as requiring concentration to be measured on a dry weight basis, but neither the regulation nor *CWM*'s landfill approval document embodied or gave fair notice of any such requirement. The language of the regulation "offer[ed] no clue that concentrations are to be measured on other than 'as is' or wet weight basis." *CWM*, 6 E.A.D. at 18. Therefore, the EAB held that the company was under no legally enforceable obligation to determine PCB weight on such basis.

If a regulation is ambiguous and the government agency provides a person with one interpretation, he may claim that he lacked fair notice of the agency's later contrary interpretation. For example, where a company has been informed by an inspector that its procedures or processes are compliant with the regulations, and is cited for the same procedures at a later inspection, the company may claim it did not have fair notice of the agency's interpretation of the regulation. *Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 431 (5th Cir. 2001). In *Trinity*, the company had a fair expectation that the agency found its practice satisfactory when the agency cited the company's predecessor and then later withdrew the citation. The agency's failure to specifically warn the company thereafter that its facility was not compliant constituted implicit approval of the facility's practice, and with such inconsistent interpretation, the agency's position of imposing a penalty was held unreasonable. On the other hand, an agency's simple failure to cite a company during a past inspection, that is, past silence of agency officials, cannot be construed as a sign of approval and thus "does not, standing alone, constitute a lack of fair notice." *Daniel v. OSHRC*, 295 F.3d 1232, 1238 (11th Cir. 2002)(no evidence that inspectors said or did anything that would have induced the company to believe it did not need to take action to comply).

For many years prior to the EPA's May 17, 2001 inspection, state and/or county inspectors conducted inspections of MMF's facility and did not point out to Respondent any violation of the requirement of Minn. R. 7045.0566, Subparts 3.B and 5, to provide its employees with immediate access to an internal alarm or emergency communication device either directly or through visual or voice contact with another employee, and an immediately available device to summon external emergency responders. Michael Risse's Affidavit dated June 22, 2006 (¶ 32) states that he, an inspector since 1984, conducted inspections of MMF's facility for Hennepin County on August 9, 1995, October 20, 1995, August 3, 1996, September 3, 1997, January 7, 1999, and April 27, 2000, and he acknowledged that he had never cited MMF for noncompliance with Subparts 3.B and 5 of the regulation (*Id.* ¶¶ 34, 42). He states that in these prior inspections, he "never saw" an external communication device capable of summoning emergency assistance or an internal emergency communication device in the area where hazardous waste was being handled, that only employees in the office had immediate access to an external communication

device, that the closed doors made it impossible for immediate visual or voice contact to occur from the process area to office workers, and that he inadvertently failed to recognize this impediment. *Id.* ¶¶ 35, 36, 38, 39, 42. He does not say in his Affidavit whether or not he communicated to MMF anything about these requirements.

Ms. Rougier-Maas states in her Affidavit that Mr. Risse reviewed MMF's Contingency Plan in August 1994, August 1995, and requested revisions, including a description of the internal communications and alarm systems, and how it would respond to a fire, but did not express any concerns or note any deficiencies. Rougier-Maas Aff. ¶¶ 19, 21. She states further that in his inspection of August 1996, he "[o]nce again . . . approved the use of an intercom system as an appropriate means of internal communications and noted that the existing office telephone was a sufficient means of external communications." *Id.* ¶ 24. Mr. Risse's Notice of Inspection letter, dated August 19, 1996, does not refer to the communications. *Id.*, Exhibit 4. In regard to his September 3, 1997 and January 7, 1999 inspections, she states that he raised no objection or concerns with the communication systems. *Id.* ¶¶ 26, 28. As to his December 31, 1998 inspection, she states that his inspection report reflects that he raised no concerns with the content of the Contingency Plan, "again noting that internal and external communications devices were satisfactory." *Id.* ¶ 27. The Annual Inspection Report checklist for the 1998 inspection does not, however, appear to *note* that the devices were satisfactory. It merely indicates that the Contingency Plan lists available emergency equipment, describing and indicating locations of, *inter alia*, internal and external communications, but the checklist notably leaves blank the space for the section regarding 7045.0566, which states "An internal alarm or communication device is available at each location waste is . . . handled." *Id.*, Exhibit 6. It is noted that the space for that section on the Inspection Checklist is similarly blank for the county inspection on August 13, 1996. R's Ex. 46. It is further noted that, for the MPCA inspections on January 14, April 22, and June 24, 1991, and on February 12, 1992, the spaces are checked "yes" for the much more general requirements of "Internal communications or alarm system which can provide immediate emergency instruction to all facility personnel" and "emergency telephone or device." R's Exs. 8, 16, 20, 25.

Taking as true Ms. Rougier-Maas' uncontested assertions that Mr. Risse "approved the use of an intercom system as an appropriate means of internal communications and noted that the existing office telephone was a sufficient means of external communications" (Rougier-Maas Aff. ¶ 24), the evidence indicates that the county inspector was not merely silent on the issue, but that he communicated to MMF that it was in compliance with the requirements at issue. Indeed, it is noted that Mr. Risse's Affidavit dated July 20, 2006 does not address the communication systems or devices except with regard to the May 17, 2001 inspection, and therefore does not contest Ms. Rougier-Maas' statements in her Affidavit as to MMF's communication systems. Complainant does not contest her statements in its Reply Brief. *See*, C's Reply at 39-40, 57-58.

The evidence suggests that it was only EPA, at the time of its May 17, 2001 inspection, that opined that the communication devices at the facility would not meet its interpretation of the regulatory requirements and so notified the company. Caine Aff. (6/23/06) ¶¶ 33-37. EPA has not alleged that the violation occurred prior to its inspection of the facility on May 17, 2001,

despite the fact that Mr. Risse stated in his Affidavit that during his inspections prior to August 17, 2001, the interior structure of the MMF facility was the same with respect to the office, doors and process area. Risse Aff. ¶¶ 32, 37 (6/22/06). In the circumstances of this case, it suggests an acknowledgment on the part of EPA that MMF should not be held liable during the time when prior inspectors' interpretation and application of the regulation to MMF's facility resulted in no finding of violation. Furthermore, the Agency has not alleged that MMF had any idea that the state and county inspectors' interpretation of the regulation was in error.

Thus, it appears that the Agency's legal position in this case is that, regardless of the state inspectors' actions, the regulations at issue were sufficiently clear such that MMF had fair notice *prior to* the May 17, 2001 inspection of the regulatory requirements regarding communication devices so as to know that its existing systems were non-compliant, but as a matter of discretion the Agency has chosen not to charge a violation for any period prior thereto based upon the inspectors' failure to cite such violations prior to May 17, 2001. Respondent on the other hand is alleging that prior to May 17, 2001 it had no such notice in that the regulations themselves are ambiguous as to the requirements and that both it and the state inspectors fairly read the regulations as indicating MMF's existing communications systems were compliant. The issue of whether MMF should have known on or before May 17, 2001 that its existing communications systems were noncompliant is fact dependent. The parties have not established the facts as to the exact location and distance of the office phone in relation to the processing area, as to whether the doors were kept locked, or open or closed and other facts which may bear on the availability and accessibility of the internal and external communication devices. Therefore, it is inappropriate at this point to grant accelerated decision either way on this Count.

Count 5 - Permitting Violations

Count 5 of the Complaint alleges that from August 26, 2000²⁵ to August 25, 2005 MMF failed to qualify for a storage permit exemption under Minn. R. 7045.0292 because it failed to fulfill the requirements of the Minnesota Regulations regarding personnel training and record retention, preparedness and prevention, contingency planning, *etc.* as alleged in Counts 1 through 4, and therefore, it was required to obtain a permit from federal or state authorities for the storage of hazardous waste and failed to do so in violation of Minn. R. 7001.0030 and 7001.0520, Subpart 1.A (Count 5).

EPA has alleged that MMF never obtained a hazardous waste permit from EPA or the state and supports its allegation by Affidavit. Compl. ¶¶ 207-209; Valentino Aff. ¶ 8, 9; Risse Aff. ¶ 93, 94; C's Reply at 37. MMF does not appear to deny the accuracy of these allegations in

²⁵ The Complaint actually alleges this violation back to May 22, 1984. However, as EPA acknowledges in its Reply, as a result of the applicable statute of limitations, the viable period of violations date back only to August 26, 2000. Reply at 59.

its Answer or Response. Ans. ¶ 47; R's Resp.²⁶ Further, both parties recognize that finding of liability on this Count is contingent upon such fact and upon a finding of liability on at least one of the first four Counts. R's Reply at 1; C's Reply at 59. In that, as indicated above, Respondent is found liable on Count 1 in regard to record retention, it is hereby found liable on this Count as well.

VI. Analysis of Respondent's Affirmative Defenses

In its Answer and in its Response to Complainant's Motion for Accelerated Decision on Liability, Respondent raises a series of affirmative defenses. As indicated above, for EPA to prevail on its motion for accelerated decision it initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corp.*, 275 F.3d at 1103. If the EPA makes this showing, then Respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.* Respondent cannot "meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence" but instead must clearly proffer "substantial and probative evidence" from the record in support of its defense. *BWX Technologies, Inc.*, 9 E.A.D. at 75-76; *Northwestern Nat'l Ins. Co. v. Balthes*, 15 F.3d 660, 662-63 (7th Cir. 1994)(noting that judges "are not archaeologists. They need not excavate masses of papers in search of revealing tidbits -- not only because the rules of procedure place the burden on the litigants, but also because their time is scarce."). As stated by the Supreme Court, "one of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-324 (1986). The motion for summary judgment puts the opposing party on notice to come forward with all of its evidence in opposition thereto. *See, id.*

Complainant has established that as to the elements of liability for the training requirements alleged in Count 1 and for Count 5, there are no genuine issues of material fact, so the next step is to determine whether there is evidence in the record supporting any of Respondent's affirmative defenses or whether Respondent has identified specific facts which would support an affirmative defense and which could bar findings of liability in this case.

²⁶ MMF's only response to the factual assertions contained in the Complaint (¶¶ 207-209) regarding lack of a permit was to "allege that no response is required . . . as they contain legal conclusions [or it] is without sufficient information to admit or deny and therefore denies the same." Ans. ¶ 47. Such a response hardly meets the requirements of Rule 22.15(b) (40 C.F.R. § 22.15(a)).

A. 42 U.S.C. § 6928 Defense (Lack of Adequate Pre-filing Notice to State)

In its Answer, Respondent set forth as its First Affirmative Defense that the Complaint fails to state a claim on the basis that EPA failed to give prior notice of the alleged violations to the State of Minnesota, as required by RCRA Section 3008(a)(2) (42 U.S.C. § 6928(a)(2)). This defense was the subject of an Order of this Tribunal issued on March 15, 2006 wherein it was held that EPA *had provided* the requisite notice to the State of Minnesota of the violations alleged in the Complaint. *See*, March 15, 2006 Order on Respondent's Motion for Accelerated Decision. On the basis of this Order, Complainant generally alleges in its Memorandum that there are no genuine issues of material fact with regard to this defense precluding issuance of accelerated decision on liability.²⁷ C's Memo. at 27-28.

In its Response, Respondent re-raises and focuses its arguments as to this defense on the factual allegations in regard to Count 3 *raised in Complainant's Memorandum*, which was filed after issuance of this Tribunal's Order regarding its Section 6928 defense, that MMF failed to train its employees with regard to cleaning up hazardous waste spills on the floor and inspecting the floors in regard thereto in violation of 40 C.F.R. § 264.16, and failed to have schedules and instructions for such cleanup and inspections in violation of 40 C.F.R. § 264.31. R's Resp. at 20. MMF states that these two specific factual bases for liability under Count 3 are "new requirements" "not expressly supported by the allegations in the Amended Complaint"²⁸ and as to which EPA did not provide pre-filing notice to the State. However, it does acknowledge that the alleged lack of training instructions and schedules was pled in the Complaint as part of the training violations set forth in Count 1. R's Reply 13-15.

²⁷ While EPA does not so state, its argument in this regard is based upon the doctrine that prior rulings of a Tribunal become the "law of the case" and may not be relitigated in subsequent stages of a proceeding except to prevent "plain error," defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process." *See*, Black's Law Dictionary 563 (7th ed. 1999); *J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States*, 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001) (citing JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 404[1] & 404[10](2d ed. 1991)) (a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation).

²⁸ As indicated above, Count 3 of the Complaint only alleges as the factual basis for MMF's liability under Minn. R. 7045.0292 that, from May 17, 2001 through August 25, 2005, the floor of its facility was corroded, cracked and compromised, which created the possibility of a release to land of hazardous waste and thus MMF did not maintain and operate its facility to minimize the possibility of an unplanned release. Compl. ¶¶ 134-186.

In Reply, EPA simply reiterates MMF's acknowledgment that notice of training violations was given to the State and generally alleges that MMF has failed to meet its burden as to this defense. C's Reply at 60.

In that judgment is not being entered at this time on *any basis* for liability under Count 3, this limited affirmative defense is simply not material at this point.²⁹

B. 42 U.S.C. § 6926 Defense (Overfiling after *Harmon*)

Respondent's Second Affirmative Defense to this action includes a defense based upon 42 U.S.C. § 6926 as interpreted by the Eighth Circuit Court of Appeals in *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999). *Harmon* held that EPA's right to "overfile," defined therein as the "process of duplicating enforcement actions" by "filing its own enforcement action against suspected environmental violators even *after the commencement of a state-initiated enforcement action*," is inconsistent with Congress' intent under RCRA to delegate the primary enforcement of EPA-approved hazardous waste programs to the states, and that the potentially contradictory result of such competing actions "runs afoul of the principles of comity and federalism so clearly embedded in the text and history of RCRA." *Id.* at 898, 902 (italics added). While other courts have held contrary opinions³⁰ and EPA has not acquiesced to the holding of the *Harmon* decision nationwide, the Environmental Appeals Board (EAB) has recognized that *Harmon* is controlling precedent for cases within the Eighth Circuit's jurisdiction. *See, Bil-Dry Corp.*, 9 E.A.D. 575, 590, 2001 EPA App. LEXIS 1, 32-33 (EAB 2001). This case, involving a facility situated in Minnesota and thus, within the geographical expanse of the Eighth Circuit's jurisdictional parameters, would be one of those cases potentially falling within the sphere of the holding in *Harmon*.

²⁹ This Tribunal notes, however, that while its prior ruling did not explicitly address the factual basis of Complainant's claim of liability under Count 3 raised in its recent Memorandum regarding insufficient training as to floor maintenance and inspection, the prior ruling did hold that EPA had given the State sufficient notice of the training violations set forth in Count 1 and the violations with regard to the flooring alleged in Count 3. *See*, March 15, 2006 Order on Respondent's Motion for Accelerated Decision at 14-16. Respondent has not alleged in its Response that the previously issued decision of this Tribunal on these issues or any others constitutes "plain error." R's Resp. at 20.

³⁰ *See e.g., United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 1050, 1088-92 (W.D. Wisc. 2001); *United States v. Power Eng'g, Co.*, 125 F. Supp 2d 1050, 1065-67, *aff'd* 303 F.3d 1232 (10th Cir. 2002).

1. *The Harmon Case*

The *Harmon* case involved a company which independently discovered and reported to the Missouri Department of Natural Resources (MDNR), the state agency with RCRA hazardous waste program authorization, that it had been improperly disposing of hazardous waste behind its plant. *Harmon*, 191 F.3d at 896-97. MDNR conducted an investigation and concluded that the disposal practices posed no threat to human health and the environment and with the company created “a cleanup plan,” which the company implemented. *Id.* at 897. When the EPA learned of the incident, it advised MDNR that an enforcement action seeking monetary penalties for the violations should be instituted. When MDNR commenced its own administrative enforcement action, EPA filed one seeking \$2,343,706 in penalties. *Id.* While the EPA administrative action was pending, the state and the company entered into a consent decree which was approved by a state court judge. In the decree, the state acknowledged full accord and satisfaction and released Harmon from any claim for monetary penalties based upon the fact that the company promptly self-reported and cooperated in all aspects of the investigation. *Id.* Despite the state judicial settlement, the EPA continued to pursue its claim against the company and after hearing, an administrative penalty of \$586,716 was imposed for the violations. The EAB affirmed the penalty on appeal. The company then took the case to the federal district court and prevailed. The EPA then appealed to the Eighth Circuit. *Id.* See also, *Harmon Indus. v. Browner*, 19 F. Supp. 2d 988 (D. Mo. 1998).

In its decision, the Eighth Circuit held that the “in lieu of” and “same force and effect” language of 42 U.S.C. § 6926(d)³¹ regarding state authorized RCRA programs generally precluded EPA overfiling *except* in limited circumstances which it identified as follows –

Without question, the EPA can initiate an enforcement action if it deems the state's enforcement action inadequate. Before initiating such an action, however, the EPA must allow the state an opportunity to correct its deficiency and the EPA must withdraw its authorization³². . . . EPA also may initiate an enforcement action after providing written notice to the state *when the authorized state fails to initiate any enforcement action*. . . . The EPA may not, however, simply fill the perceived gaps it sees in a state's enforcement action by initiating a second enforcement

³¹ Section 6926(b) entitled “Authorized State hazardous waste programs” provides in relevant part that –

(b) . . . Any State which seeks to administer and enforce a hazardous waste . . . program . . . may . . . submit to the Administrator an application . . . for authorization . . . Such State is authorized to carry out such program *in lieu of* the Federal program under this subtitle in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 3012(d)(1)) unless . . . , within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subtitle, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) *such program does not provide adequate enforcement of compliance with the requirements of this subtitle*. . . .

* * *

(d) Effect of State permit. Any action taken by a State under a hazardous waste program authorized under this section shall have the *same force and effect* as action taken by the Administrator under this subtitle

42 U.S.C. § 6926(b)(italics and bold added).

³² Under 42 U.S.C. § 6926(e), EPA can withdraw a state's RCRA authorization if it finds that (1) the state program is not equivalent to the federal program, (2) the state program is not consistent with federal or state programs in other states, or (3) the state program is failing to provide adequate enforcement of compliance in accordance with the requirements of federal law. Before withdrawing a state's authorization to administer a hazardous waste program, the EPA must hold a public hearing and allow the state a reasonable period of time to correct the perceived deficiency.

action without allowing the state an opportunity to correct the deficiency and then withdrawing the state's authorization.

Id. at 901-902 (citations and footnotes omitted, italics added)

Thus, the Court in *Harmon* held that, unless it withdraws a State's RCRA authorization beforehand, EPA may only overfile, if and when "the authorized state fails to initiate *any enforcement action*."³³ The mere fact that EPA finds the state enforcement action "inadequate" is simply not sufficient legal justification for overfiling without authorization withdrawal.³⁴

2. *The Bil-Dry Case*

The EAB subsequently had an opportunity to address the parameters of the *Harmon* decision and the phrase therein regarding when "the authorized state fails to initiate any enforcement action" in *Bil-Dry Corp.*, 9 E.A.D. 575, 2001 EPA App. LEXIS 1 (EAB 2001). *Bil-Dry* involved a company to whom a State (Pennsylvania), with its own authorized RCRA program, had sent a Notice of Violation of state hazardous waste provisions. In response, the company offered to take certain actions and otherwise come into regulatory compliance. The State then took no further action on its own against the company. However, EPA subsequently notified the state agency of its intent to file an administrative action against Bil-Dry and then did so, alleging violations of federal and state regulations and seeking (and eventually obtaining) a compliance order and monetary penalty. *Id.* at 584-86. On appeal to the EAB, *Bil-Dry* argued that the state Notice of Violation constituted state "enforcement action" and that therefore EPA was prohibited under *Harmon* from initiating its own action (because it had not withdrawn the state's RCRA authorization). The EAB disagreed with Bil-Dry's argument that the NOV constituted an enforcement action, stating as follows:

The NOV issued by [the State] to Bil-Dry, **by its express terms**, was not the first step in an enforcement action. The NOV was merely a notice to Bil-Dry of the

³³ Further, under the facts of *Harmon*, it appears that EPA's right to *maintain* any such enforcement action once instituted is conditioned upon the state and the violator not "reach[ing] an agreement through negotiations," regarding the violations. *Harmon*, 191 F.3d at 902.

³⁴ *See, United States v. Flanagan*, 126 F. Supp. 2d 1284, 1289 (D. Cal. 2000) ("Put simply, [Harmon] is not about if, but about when, the United States can bring a civil enforcement action in federal court after it has authorized a state program;" "The position of the Eighth Circuit in [Harmon] is not that the federal government loses its civil enforcement power after a state program is authorized. The Eighth Circuit concludes only that the federal government loses its primary role in enforcing hazardous waste regulations" and that "[RCRA] manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered...if the state fails to initiate an enforcement action.").

violations [the State] had observed during its inspection of Bil-Dry's facility. . . . Specifically, the NOV provided that:

This letter *does not impose any obligation* upon Bil-Dry Corporation and shall not be construed as an appealable decision or adjudication of the Department of Environmental Protection.

. . . Moreover, the NOV was written in **discretionary language**, which underscored its **non-coercive** nature:

The Department *suggests* that Bil-Dry Corporation submit to the Department within fifteen (15) days of receipt of this Notice of Violation a written report addressing the circumstances under which these violations occurred . . .

. . . Furthermore, the NOV provided that:

This Notice of Violation does not waive, either expressly or by implication, the power or authority of the Commonwealth of Pennsylvania to prosecute for any and all violations of law arising prior to or after the issuance of this letter or the conditions upon which the letter is based. *This letter shall not be construed so as to waive or impair any rights of the Department of Environmental Protection, heretofore or hereafter existing.*

Bil-Dry, 9 EAD at 592-93 (emphasis added).

The EAB also distinguished *Bil-Dry* from *Harmon* on the basis of “[the State’s] **agreement that the [EPA] Region should assume the lead enforcement role in the enforcement action** against Bil-Dry, and its subsequent cooperation with the Region in those efforts, rather than proceeding independently.” In support, the EAB pointed out that “the record contains evidence that after the RCRA and Pennsylvania HWM violations were discovered at the facility, the Region and [the State] began communicating with each other and coordinated their investigatory and enforcement action,” . . . [The State] **did not propose a formal agreement with, file a complaint against, or initiate an enforcement action against Bil-Dry. . . .** To the contrary, [the State] after being provided notice by the Region . . . agreed that the Region would file an enforcement action against Bil-Dry.” *Bil-Dry*, 9 EAD at 593 (emphasis added). The EAB summarized, “The situation that troubled the court in *Harmon* -- that of two potentially “competing” enforcement actions -- is simply not present in this case. Consequently, the Eighth Circuit's *Harmon* decision is not a bar to the action. *Id.*

3. Arguments of the Parties

In its Memorandum, Complainant summarily argues that the facts of this case render the *Harmon* decision irrelevant and thus a defense based upon it cannot prevent entry of accelerated decision on liability in its favor. Specifically, it notes that *Harmon* involved an instance where the state entered into a consent decree with a RCRA violator regarding cleanup of volatile discarded solvents. In that there has been *no state enforcement action* initiated to resolve the violations alleged in this case, *and* no resolution of such state action by consent decree or otherwise (citing to the Risse Affidavits and Dullinger Affidavit (C's Ex. 48)), Complainant asserts this case cannot represent an instance of prohibited "overfiling" under *Harmon*. C's Memo. at 31-32.

On the other hand, in support of the applicability of *Harmon* here, Respondent argues in its Response that "[i]n the present case, the State of Minnesota [MCPA] and its authorized agents/subdivisions [Hennepin County] have previously acted on the exact same issues cited . . . in the Complaint [and therefore] [p]ursuant to 42 U.S.C. § 6926, the EPA is now precluded from seeking penalties because of this prior action." R's Resp. at 20-21. As an example of this, Respondent cites the fact that Hennepin County authorities inspected its facility on January 7, 1999 to "determine compliance with all applicable County and State hazardous waste regulations" (quoting the Rougier-Maas Affidavit), found MMF in compliance in regard to personnel training and records kept on site, its contingency plan, and internal and external communication devices, and also found some deficiencies, and ordered certain actions taken in response. *Id.* at 21-22. Respondent acknowledges that MCPA and the County's enforcement actions taken to date in regard to the violations have been "non-judicial" and no penalty demands were made; however, it argues that EPA's own regulation (40 C.F.R. § 271.16)³⁵ suggests that there are many types of authorized state actions barring EPA overfiling including issuing administrative cease and desist orders and that Mr. Risse has admitted that the County's Notices of Inspection were "enforcement actions." In addition, Respondent argues that the State's action

³⁵ 40 C.F.R. § 271.16 provides in relevant part that state agencies administering RCRA programs "shall have" as part of their enforcement authority various remedies for addressing violations, including obtaining through their state courts restraining orders, injunctions, and civil and criminal penalties. It further provides that states are "highly recommended" to have other enforcement options including procedures for administrative assessments of penalties. A Note in the Regulation, added at the time of amendment in 1983 (*see*, 48 Fed. Reg. 39622 (Sept. 1, 1983)) provides that -

NOTE: To the extent the State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, *when authorized by the applicable statute*, may commence separate actions for penalties.

40 C.F.R. § 271.16(c)(italics added).

in this case meets the four factor test for constituting “enforcement action” under section 42 U.S.C. § 6926(d) enunciated by the EAB in *Bil-Dry*. R’s Resp. at 20-26.

Relying on the EAB’s decision in *Bil-Dry*, MMF lists what it states are the four factors to be used under *Harmon* to determine whether a state has taken an “enforcement action” under RCRA so as to preclude EPA overfiling. As identified by Respondent, those factors are:

1. Does the notice impose any obligation upon the regulated party;
2. Was the notice in discretionary language, underscoring its non-coercive nature;
3. Does the notice reserve the right to file an enforcement action at a later date; and
4. Did the state agency agree that the EPA would assume the lead enforcement role in the enforcement action?

R’s Resp. at 24.

MMF argues that applying the four *Bil-Dry* factors here shows that the Notices of Inspection issued to it by Hennepin County *do rise* to the level of state enforcement action precluding overfiling. As to the first two factors, MMF points out that the Notices Hennepin County issued to it (unlike the NOV issued to *Bil-Dry*) were not couched in discretionary, non-coercive language, but rather clearly indicated that MMF was obliged to take certain action, within a set time frame. For example, MMF notes the May 6, 2006 Notice of Inspection it received stated, in bold, that “action is required . . . by June 7, 2004.” R’s Resp. at 24.³⁶

As to the third factor, MMF notes the NOIs issued by Hennepin County to it contain no general formal reservation of rights provision, unlike the NOV at issue in *Bil-Dry*. At most, the NOIs advise MMF with regard to a group of violations that “it is our understanding, through recent discussions with representatives of USEPA that they will be sending out administrative orders citing similar concerns in the near future. It is our understanding that moving forward with the above requirements will not conflict with their requirement for corrective actions . . . “ R’s Resp. at 25 (quoting from C’s Ex. 20). Further, MMF argues that when EPA failed to issue such an order in a timely manner, Hennepin County took over and did so, citing C’s Ex. 29. *Id.*

MMF does not discuss the fourth factor in its Response.

³⁶ The record indicates that Notices state similarly, often in bold and/or larger size font, as follows: “**ACTIONS THAT MUST BE TAKEN IN RESPONSE TO THIS LETTER;**” “DOCUMENT IN A LETTER . . . THAT THE FOLLOWING CHANGES IN YOUR WASTE STREAM DISCLOSURES ARE CORRECT AND SUBMIT ALL REQUESTED INFORMATION TO MY ATTENTION BY THE DUE DATE INDICATED IN THIS LETTER;” and each notice provides a “**RESPONSE DUE DATE.**” See e.g. C’s Ex. 20.

In its Reply, Complainant does not explicitly address *Bil-Dry*, but argues that Hennepin County did not have any legal authority to bring an action for civil penalties under RCRA and instead specifically requested EPA to act, never intending its own actions would preclude those to be taken by EPA, citing to the Risse Affidavit. Further, EPA states that the actions Respondent refers to are annual inspections of the facility and the County intended that EPA take the lead in any “enforcement action” brought based upon those annual inspections. C’s Reply at 60-61.

4. Discussion of Factors Militating for or Mitigating Against Overfiling

The record suggests that the fourth factor listed by Respondent would support overfiling in that, similar to the facts of *Bil-Dry*, it appears that here the State agency (Hennepin County) understood, consented to and cooperated with the EPA in initiating an administrative penalty action against MMF based upon the violations and “did not propose a formal agreement with or file a complaint against” the company on its own. See, June 22, 2006 Affidavit of Michael Risse. Specifically, in his Affidavit, Michael Risse, an official with Hennepin County Department of Environmental Services who was involved in the inspections in this case, states that EPA took the lead on the May 17, 2001 inspection of MMF, merely giving the state the opportunity to accompany the federal inspector. He states further that following the inspection, EPA and the County “communicated” and “coordinate[d]” regarding the appropriate enforcement response to take as a result of the violations found, but it was EPA’s decision to make because it was the lead agency on the inspection. He explains that the County “refrain[s]” from taking enforcement action on the same violations where EPA intends to take enforcement action; that the County continues to conduct annual compliance inspections of hazardous waste generators while an enforcement action is pending and that it did so here, providing the findings of such inspections to EPA. He explains further that “the Department after such inspections often notifies a violator in writing, in a ‘Notice of Inspection,’ as to the nature of the violations and actions necessary to bring the violator back into compliance, and includes a due date for response,” that the Department’s NOIs “are not and were not in this case intended to preclude civil administrative penalty actions by either MPCA or the U.S. EPA for violations discovered at prior, current or subsequent inspections,” but are “intended to put the company on notice to correct its violations,” and “were deemed the appropriate minimum response by the Department to the violations,” given that it understood EPA was instituting an administrative action, and that had EPA not so acted, the County would have initiated a more serious enforcement response such as filing a misdemeanor or felony enforcement action, “given the seriousness of MMF’s violations.” *Id.* at ¶¶ 8-13, 25-27.

The other three factors identified by Respondent from the *Bil-Dry* opinion are only a list of facts from that case supporting the EAB’s finding that the NOV by its express terms was not the first step in an enforcement action. The EAB did not suggest that it was providing a comprehensive list of relevant factors to be considered under such circumstances nor did it provide any guidance as to the weight to be given the various factors or indicate whether its holding would have been the same had the case evidenced some but not all of the factors suggestive of permitting overfiling. As indicated above, in this case and *Bil-Dry*, the

State/County understood, consented to and cooperated in EPA filing the administrative action for a penalty and did not propose a formal agreement with nor file a complaint against the company on its own. The EAB specifically found in *Bil-Dry* that this factor overcame the main concern of the Eighth Circuit's *Harmon* decision of avoiding two potentially "competing" enforcement actions which could cause "[c]ompanies that reach an agreement through negotiations with a state authorized by the EPA to act in its place [to] find the agreement undermined by a later separate enforcement action by the EPA." *Harmon*, 191 F.3d at 902. Moreover, in this case the factor is even more significant in that the record suggests that the County could not have sought a monetary penalty on its own from MMF for the violations, even if it had wanted to, because it lacks authority to do so under its Regulations.³⁷ See, Risse Aff. (6/22/06) ¶¶ 7, 19.

Even considering the factors Respondent identified in *Bil-Dry*, they do not indicate that MMF's NOIs constitute an enforcement action. While the "obligatory language" contained in MMF's NOIs is not as gentle as the language contained in the NOV in *Bil-Dry*, it only advises MMF of its *already existing legal obligation* to be in compliance and stay in compliance with RCRA. Thus, the County's failure to have couched the NOI in more lenient language cannot be legally determinative in that the company's compliance obligation is not optional but mandatory regardless of the language used. Further, while the NOIs do not contain any explicit reservation of rights, they also do not make any representations as to the ramifications of MMF complying. Specifically the NOIs do not suggest that compliance will work a waiver, "accord and

³⁷ It appears that the State of Minnesota permits its counties to establish their own regulations relating to hazardous waste and to enforce those regulations if they wish by prescribing a misdemeanor criminal penalty or by bringing a civil action in district court or an administrative penalty order as *authorized under Minn. Stat. § 116.072*. See, Minn. Stat. § 473.811. However, Minn. Stat. § 116.072 limits such administrative penalties to \$10,000 for *all* violations identified during an inspection, and *inter alia*, further provides that such penalty *must be forgiven* if a compliance occurs within 30 days. Perhaps in recognition of the lack of teeth in such administrative penalty provisions, Hennepin County's regulations only provide for criminal penalties; it does not appear that the County ever adopted regulations for bringing a civil or administrative penalty action. See, Ordinance Number Seven Hazardous Waste Management Ordinance for Hennepin County, attached to Complainant's Memorandum as Risse Aff. 6/22/06 Attachment A; see also, Risse Aff. (6/22/06) ¶¶ 6, 7, 17, 19. The County regulations do, however, permit its Department of Environmental Services to inspect, investigate and "recommend that legal proceedings be initiated, "advise, consult and cooperate with other governmental agencies in furtherance of this ordinance;" and "issue orders as may be necessary for the enforcement of this ordinance." Ordinance Number Seven Hazardous Waste Management Ordinance for Hennepin County, attached to Complainant's Memorandum as Risse Aff. 6/22/06 Attachment A, ¶¶ 4.01, 4.03. In addition, the County regulations provide that "Any order or notice issued or served by the Department shall be complied with by the . . . person responsible," that "Every order or notice shall set forth a time limit for compliance," and that violations of any provision of the Ordinance can result in license revocation or suspension," pursuant to a notice and public impartial hearing process. *Id.*, ¶¶ 4.04, 4.07, 4.08, 4.10.

satisfaction,” or in any way stave off further punitive or enforcement action by the County or any other governmental authority for the violations previously found. Thus, they made no representations upon which MMF could have reasonably relied to think compliance would prevent imposition of a penalty. Certainly, such notices do not represent an “agreement after negotiations” regarding the violations and penalty to be imposed therefor. *Compare*, Risse Aff. Ex. C (NOIs dated May 11, 2000, January 11, 1999, September 11, 1997, August 19, 1996, August 11, 1995) to Ex. B (Hennepin County *post-filing letter* to MMF’s attorney dated April 12, 2006 stating “I am satisfied that we are in agreement as to measures necessary to address our mutual concerns about violations at MMF.”). Additionally, Mr. Risse states that when contacted by MMF on two occasions regarding entering into a stipulation agreement as to what the company thought was a separate pending enforcement action by the County against it, he explicitly advised MMF that there was only *one* pending enforcement action against the company, and that was EPA’s action, and that the County was “unwilling to do a parallel enforcement action, and that if MMF “satisfied U.S. EPA’s corrective action orders, that would satisfy the requirements of Hennepin County’s issued subsequent to the U.S. EPA’s May 17, 2001 inspection.” *Id.* at ¶¶ 29-30. Thus, MMF was not misled in this regard by the County.

The EAB’s decision in *Bil-Dry* did not contain a discussion, comprehensive or otherwise, of what the Eighth Circuit meant when it used the phrase “state initiated enforcement action” as the precondition precluding overfiling. One can reasonably presume that the Eighth Circuit intended that phrase to have the meaning it would have under the statute [RCRA] it was interpreting. Unfortunately, “enforcement action” is not a defined phrase under RCRA, nor are the individual words making up the phrase defined therein.³⁸ However, various provisions of RCRA do use the term “enforcement action” and from such use one can generally derive its meaning under the statute. For example, 42 U.S.C. § 6961 states “The Administrator may commence an administrative *enforcement action* against any department . . . of the Federal

³⁸ It is also not a phrase explicitly used in RCRA Section 6926, the section which was the focus of Court in the *Harmon* decision and which discusses the effect of a state obtaining authorization for its hazardous waste program, although the individual terms or variations thereof are used separately therein. *See e.g.*, 42 U.S.C. §6926 (“Any state which seeks to administer and *enforce* a hazardous waste program . . .;” “*enforce* permits;” “provide adequate *enforcement* of compliance;” “*enforcing* a program;” “[a]ny *action* taken by the State under a hazardous waste program . . . shall have the same force and effect as *action* taken by the Administrator . . .;” “[authorization withdrawal possible if appropriate corrective action is not taken within a reasonable time.”). Furthermore, neither the term nor the individual words are used in the general provision regarding the EPA’s authority to respond to RCRA violations which is contained in 42 U.S.C. § 6928, except in the section’s caption entitled “Federal Enforcement.” That section indicates that the EPA Administrator is authorized to issue “an order assessing a civil penalty [and/or] requiring compliance” or “commencing a civil action” in District Court” in response to RCRA violations and notes the right to a public hearing before any order under the section becomes final.

Government. . . . The Administrator shall initiate an administrative *enforcement action* against such a department. . . in the same manner and under the same circumstances as an action would be initiated against another person.” *See also*, 42 U.S.C. § 6992f (“A State may conduct inspections . . . and take *enforcement actions* against. . . any person who has imported medical waste into a State in violation of [RCRA], to the same extent as the Administrator. At the time a *State initiates an enforcement action* . . . the State shall notify the Administrator in writing.); 42 U.S.C. § 6991b (“The Administrator shall use funds in the [UST] Trust Fund for . . . payment of costs incurred for corrective action . . .[and] *enforcement action* under subparagraph . . . Whenever costs have been incurred by the Administrator, or by a State . . . for undertaking corrective action or *enforcement action* . . . the owner . . . shall be liable to the Administrator or the State for such costs;” “A State may exercise the authorities . . . if [] the Administrator determines that the State has the capabilities to carry out effective corrective actions and *enforcement activities*.”); 42 U.S.C. § 6992f (“A State may conduct inspections . . . and take *enforcement actions* . . . against [any person] who has imported medical waste into a State in violation of [RCRA] . . . to the same extent as the Administrator. At the time a *State initiates an enforcement action* under section . . . against any person, the State shall notify the Administrator in writing.”); 42 U.S.C. § 6933(“Nothing in this section [regarding hazardous waste site inventory] shall be construed to provide that the Administrator or any State should . . . postpone undertaking any *enforcement* or remedial *action* with respect to any site at which hazardous waste has been treated, stored, or disposed of.”); 42 U.S.C. § 6991d (“for the purposes of . . . taking any corrective *action* or *enforcing* the provisions of this subtitle any owner or operator of an underground storage tank . . . shall upon request of . . . [EPA] or . . . a State . . . furnish information . . . For the purposes of developing or assisting in the development of any regulation, conducting any study, taking corrective *action*, or *enforcing* the provisions of this subtitle such [entities] . . . are authorized [to enter, inspect, obtain samples, monitor, and take corrective *action*.”).

Thus, it appears from the use of the term “enforcement action” in various provisions of RCRA, that an “enforcement action” would not include an “inspection” nor a “corrective” or “remedial” action, in that those terms are set forth separately and in series. Further, various provisions of RCRA suggest that a “state initiated an enforcement action” is a non-routine event, unlike conducting annual inspections and providing notice of results thereof, since, *inter alia*, the institution of such action triggers special requirements such as notification to EPA’s Administrator and/or the violator can be made liable for the costs thereof. This would be consistent with the common meaning of the term “enforcement” which has been defined as “[t]he act of putting something such as a law into effect, the execution of a law; the carrying out of a mandate or command” and the term “action” which “in usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law. The legal and formal demand of one’s right from another person or party made and insisted on in a court of justice.” Black’s Law Dictionary at 474, 26 (5th ed.1979).

The Eighth Circuit itself does not appear to have interpreted the term “*any enforcement action*” it used in *Harmon*. However, it has issued in various contexts other decisions which shed some light on its thinking in this regard. For example, the Eighth Circuit has implied that the

issuance of a notice of violation (as well as a Consent Administrative Order) *could* qualify as the commencement of an administrative enforcement action for the purposes of barring the subsequent filing of citizen suits under state Clean Water Act regulations because issuance of the notice of violation triggered certain notice and hearing procedures.³⁹ *See, Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 379-80 (8th Cir. 1994). In this case, it does not appear that the issuance of the NOIs triggered any such notice and hearing procedures under the County regulations which could qualify them as commencing an administrative enforcement action.⁴⁰

In addition, citing similar ideas as in *Harmon* regarding avoiding competing enforcement actions by two different entities, the Eighth Circuit in *Comfort Lake Ass'n v. Dresel Contr.*, 138 F.3d 351, 356 (8th Cir. 1998), *rehearing en banc and by panel denied*, 1998 U.S. App. LEXIS 8220 (8th Cir. 1998), declined to reconsider the District Court's holding that a non-compliance letter and Notice of Violation issued by MCPA *did not* "commence" an administrative enforcement action barring citizen suit.⁴¹ Similarly, the Eighth Circuit has held that MPCA's

³⁹ The Regulation at issue in *Arkansas Wildlife* provided in pertinent part that --

the Director shall not issue an order, except by consent, to any person for violation of the laws and regulations administered by the Department unless and until such person has been served with a Notice of Violation and had the opportunity to request an adjudicatory hearing thereon in accordance with the provisions of this Part.

Arkansas Wildlife Fed'n v. ICI Ams., 29 F.3d at 380 (quoting Arkansas Department of Pollution Control and Ecology Reg. No. 8, Part V, § 2(a)).

⁴⁰ In *Bil-Dry*, the EAB cited the state case of *Fiore v. Commonwealth Dep't of Env'tl. Res.*, 510 A.2d 880, 882-83 (Pa. Commw. Ct. 1986) for the proposition that issuance of a notice of violation detailing results of inspection and specific regulations being violated under the Solid Waste Management Act does not constitute an action or adjudication. It must be noted, however, that in that case the notice explicitly indicated that it was not to be construed as a final action of the state agency, which would trigger the right of appeal.

⁴¹ The District Court's decision is unpublished so the basis for its holding in this regard is unclear. Furthermore, in order to reach its decision, the Eight Circuit did not need to consider the issue because it found a stipulation agreement subsequently entered into by the state agency and polluter mooted the right to bring the citizens action. *See, Comfort Lake Ass'n*, 138 F.3d at 353. In this regard it noted that violators "will be disinclined to resolve disputes by such relatively informal agreements if additional civil penalties may then be imposed in pending citizen suits, thereby depriving MPCA of this resource-conserving enforcement tool. For these reasons, we conclude that an administrative enforcement *agreement* between EPA or MPCA and the polluter will preclude a pending citizen suit claim for civil penalties if the agreement is the result of a diligently prosecuted enforcement process, however informal." *Id.* at 357 (footnote (continued...))

Request for Information and related letter requesting a meeting do not constitute the initiation of an administrative proceeding for purposes of a state provision regarding the right of corporate creditors to file suit (Minn. Stat. § 302A.727, subd. 3(d)), characterizing these actions as simply “preliminary steps in the [] enforcement process.” *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1027 (8th Cir. 1998).

Based upon the statute and these cases, it does not appear that the Eighth Circuit would find the County’s mere issuances of the NOIs to MMF to constitute the initiation of state “enforcement action” precluding EPA overfiling, because the notices were informative, remedial, and corrective, and neither imposed nor threatened to impose any penalty for the violations found or to initiate an action where compliance could be “forced” and a penalty might be imposed. They were issued primarily after routine annual inspections and triggered no opportunity for notice and hearing.⁴² They were not filed with nor approved by a judicial officer. The NOIs represented no negotiated agreement or compromise on the substance of compliance activities required nor on penalty.

⁴¹(...continued)

omitted, italics added); *See also, Grandson v. Univ. of Minn.*, 272 F.3d 568, 574 (8th Cir. 2001) (“We construed these remedial provisions to mean that an informal administrative enforcement agreement precludes a citizen suit for inconsistent civil penalties.”).

⁴² This is not to say that there might not be some enforcement action short of formally filing a lawsuit of one type or another or entering into a court approved consent agreement, which could constitute a state “enforcement action,” precluding EPA overfiling. I merely find the County’s issuances of the NOIs in this case does not rise to the level of such action. Arguably, the fact that the County cannot institute an administrative penalty action means that whatever actions it takes could never rise to a level to preclude EPA overfiling. *See, Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 2004 U.S. App. LEXIS 18777, *25-26 (7th Cir. 2004)(an administrative action "commences" at the point when notice and public participation protections become available; because Wisconsin law does not authorize administrative penalty proceedings or fines by Wisconsin DNR, there are no administrative enforcement provisions "comparable" to those of the Clean Water Act; Wisconsin's permissive intervention statute is triggered only when the administrative enforcement advances to the stage at which a legal action is filed; thus, in Wisconsin, the "formal moment" at which an action is commenced is when the Wisconsin Department of Justice files a complaint with state or federal court, because "from this formal moment enforcement becomes public."). *See also, Wisconsin Env'tl. Law Advocates v. Wisconsin Power & Light Co.*, 03-C-0739-S, at 17 (W.D. Wis. May 3, 2004) (We conclude that the non-judicial actions taken by the State did not commence an administrative action barring the plaintiffs' suit under § 1319(g), because at no point prior to the filing of the Milwaukee County suit did the state's administrative enforcement procedures contemplate public notice and participation.). This fact does not mandate a more expansive interpretation of the term “enforcement action.”

Additionally, I am not persuaded by MMF's two other arguments against overfiling based upon the state and county actions taken in this case. MMF argues that there are "public policy reasons" why the state and county's prior non-judicial actions preclude EPA enforcement, specifically asserting that "requiring an authorized state to finalize its resolution of a violation by initiating a lawsuit and entering into a consent decree thwarts the 'public policy of early and non-judicial dispute resolution.'" *Id.* at 25, quoting *Harmon*, 19 F. Supp. 2d at 995-96. Further, MMF states that if a regulated party "cannot rely upon the binding effect of state inspections, directives and resolutions," then it would have to "insist that EPA be present at every inspection and sign off on all determinations and agreements made by the State . . ." R's Resp. at 25.

First, I simply do not see how permitting the possibility of EPA overfiling thwarts "early and non-judicial resolution" of state concerns. In fact, to the contrary, I think it encourages such resolution in that it provides a RCRA violator with an incentive to quickly and fully respond to the concerns of local enforcers in the hope that such actions will both satisfy the local entities and dissuade EPA from concluding that additional enforcement action is required. To hold otherwise would be to hamstring federal enforcement agencies in that each time the County issued a NOI, it would be prohibited from filing a penalty action regardless of whether the violator responded to the NOV and regardless of whether the County had authority to seek a penalty. I also do not agree that if overfiling after issuance of an NOI is permitted, then "a regulated party cannot rely on the binding effect of state inspections, directives and resolutions, [MMF], and all RCRA regulated parties in Minnesota, would have to insist that EPA be present at every inspection and sign off on all determinations and agreement made by the State of Minnesota or Hennepin County." *Id.* at 25-26. Under RCRA and *Harmon*, authorized states are given primary authority for enforcement. It is expected that in most instances, compliance with the state or county requirements will suffice for federal compliance purposes since state standards cannot be lower than federal standards. On the other hand, intermittent federal oversight assures fair application of compliance standards nationwide.

It is concluded that neither MPCA nor Hennepin County took any "action" that could preclude the present enforcement proceeding under 42 U.S.C. § 6926 as interpreted in *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999).

C. Accord and Satisfaction Defense

In regard to its affirmative defense of "accord and satisfaction," Respondent's Reply states in full as follows:

In this case, the government agencies in charge of enforcing RCRA sent many documents to Minnesota Metal that suggested that Minnesota Metal fully satisfied the requirements of the hazardous waste rules regarding training, recordkeeping, contingency plan, communication devices, preparedness and operations, including floor inspection and cleanup. Moreover, the government agencies handling these issues have not provided Minnesota Metal with all the

documents relevant to these issues. Many of the annual inspections, determinations and approvals are missing from the record. Because there are disputed issues of fact in regard to this defense, the EPA's motion should be denied.

R's Response at 26.

"Accord and satisfaction" is a method of discharging a claim whereby the parties agree to give and accept something *other than that which is asserted due* and to perform the agreement. An "accord" is the agreement, and "satisfaction" is its execution or performance. A valid accord and satisfaction completely discharges the obligor's existing duties and constitutes a defense to any attempt to enforce claims based on such duties. 1 Am. Jur. 2^d Accord & Satisfaction § 1 at 469-70 (1994)); *Richardson v. Missouri Pac. R.R.*, 186 F.3d 1273, 1277 (10th Cir. 1999). Thus, to prevail on this defense, Respondent must prove that all the elements of a contract (offer, acceptance, consideration) and that the government knowingly and intentionally accepted, new or different obligations from it than those it was otherwise entitled. 1 Am. Jur. 2^d, Accord & Satisfaction §§ 3, 4. Further, while an accord may be an express agreement or it may be implied from the circumstances surrounding the transaction, still Respondent must prove the offer and acceptance was "clear, full and explicit" and that the thing agreed to be given or done in satisfaction was offered and intended by it as "full satisfaction," and accepted *as such* by the government. *Id.* at §§ 13, 14.

With regard to this defense, it is noted that the Respondent fails to identify in its Reply even one of the "many documents" it alleges were sent to it by the government suggesting that it had "fully satisfied" the hazardous waste regulations. Further, MMF has not alleged that such documents rise to the requisite level of creating an accord by evidencing that the government agreed to accept something less than it was otherwise entitled - *i.e.* less than Respondent's full regulatory compliance, in satisfaction of their dispute. *Cf.*, *Harmon*, 191 F.3d at 896-97 (where state in Consent Decree explicitly acknowledged full accord and satisfaction and released Harmon from any claim for monetary penalties based upon its prompt voluntary compliance). Moreover, Respondent cannot avoid accelerated decision on this basis by asserting that some document supporting this defense may turn up at some point in the future. *See, Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 n. 24 (EAB 1997)(summary disposition cannot be avoided by merely alleging that "a factual dispute may exist, or that future proceedings may turn something up."); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1978)(In countering a motion for summary judgment, more is required than mere assertions of counsel.).

Therefore, Respondent has not adequately supported its burden of proof on this defense.

D. Equitable Estoppel Defense

To support a defense of equitable estoppel, the party claiming the defense "must have relied on its adversary's conduct in such a manner as to change his position for the worse, and

that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984)(quotation omitted); see also, 28 Am. Jur.2d Estoppel and Waiver § 35 (1966); *United States v. Aetna Casualty & Surety Co.*, 480 F.2d 1099 (8th Cir. 1973)(elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the misleading conduct or false representations of the party to be estopped; and (3) change in position based thereon to his injury, detriment or prejudice.) Reliance on a government employee's misstatement as to application of a law "will rarely be reasonable if a clear statute or regulation provided otherwise." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996). As noted above in the discussion as to Count 4, when equitable estoppel is asserted against the government, affirmative misconduct on the part of the government must be shown, which means that "[a]t a minimum, the [government] official must intentionally or recklessly mislead the estoppel claimant." *Marine Shale Processors*, 81 F.3d at 1350.

In support of this defense, MMF states that it "has presented evidence that Minnesota Metal relied on the governmental representations, determinations and approvals of Minnesota Metal's training, recordkeeping, contingency plan, preparedness, use of trenches, communications devices and operations, including floor inspection and cleanup." R's Resp. at 27. Specifically, Respondent cites as an example that, "[i]n 1983, when Minnesota Metal advised the MPCA that it planned to use a PVC line(d) trench to handle liquids, no objection was raised. [R's Ex. 97] Minnesota Metal was not aware that these representations, determinations and approvals were, according to the EPA, in hindsight, incorrect." *Id.* As to affirmative misconduct, Respondent argues, "it appears that there was misconduct on the part of the government in this case, for example it appears that Mr. Risse, after learning of EPA's interpretation of the training rules, either intentionally or negligently failed to notify Minnesota Metal of this interpretation for up to 4 years." *Id.* Respondent requests that the Motion be denied on the basis that there is a question of fact as to whether the estoppel defense "applies to the 25 years of representations, determinations and approvals." *Id.*

EPA asserts that there are no facts in the record that either it, Hennepin County or MPCA made any promises or inducements to MMF that would equitably estop the prosecution of this action. C's Memo. at 30.

Respondent cites no support in the record for claim that Mr. Risse "intentionally" mislead it with regard to its obligations under RCRA nor has it suggested any motive on Mr. Risse's part for doing so. Rather, the record contains what appears to be his honest admission that "I and other Department inspectors inadvertently failed" to find certain violations now being charged by EPA. Risse Aff. ¶ 42. While such a factor may be considered in determining an appropriate penalty, the circumstances of this case as proffered by Respondent do not rise to the level of creating a valid defense to liability based upon equitable estoppel.

E. Waiver Defense

As to this defense, Respondent states that “[i]n the present case, there are circumstances that suggest that the affirmative defense of waiver is viable. Numerous examples of governmental representations, determinations and approvals of training, recordkeeping, contingency plan, preparedness, communications devices and operations, including floor inspection and cleanup have been cited herein, and Minnesota Metal has only been provided with a small portion of these representations, determinations and approvals. Because there is a question of fact whether the government waived a possible right to seek monetary penalties for the violations cited and corrected over the past 1-25 years, the EPA’s motion should be denied.” R’s Resp. at 27-28.

Complainant did not direct its reply to this defense and in its Motion stated it could not find any cases raising a “settlement and waiver” defense but nevertheless argued that there are no facts of record that evidence that any governmental entity waived its right to pursue any of the claims presented in this case. C’s Mot at 29.

A waiver of enforcement of a statute or its requirements to protect public health and the environment is not easily construed against the Government. *See, United States v. Noble Oil Co.*, 1988 U.S. Dist LEXIS 11526 (D. N.J. 1988). Moreover, a right created by federal law may not be unintentionally waived. *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir. 1970). Though waiver may be implied from the Government's conduct, such conduct must be "clear, decisive and unequivocal of purpose." *Id.* Respondent has not proffered any evidence that any governmental Agency clearly, decisively and unequivocally “waived” its right to institute an enforcement action against MMF for violations alleged in this action, and in fact there is evidence in the record that the actions taken by Hennepin County were explicitly not intended to work a waiver. *See, Risse Aff.* ¶¶ 8-13 (“The Department’s [NOIs] are not and were not in this case intended to preclude civil administrative penalty actions by either MPCA of the U.S. EPA, for violations discovered at prior, current or subsequent inspections”). Therefore, waiver is not a viable defense in this case.

F. Res Judicata/Collateral Estoppel Defense

"Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action," while under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving the same parties". *Montana v. United States*, 440 U.S. 147 at 153 (1979). These doctrines apply to final judgments of administrative tribunals as well as those of courts. *See, United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966)(“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.”). *See also*, Restatement (Second) Judgments § 83; *Euclid of Virginia, Inc.*, EPA Docket Nos. RCRA-3-2001-5001& 5002, 2003 EPA ALJ LEXIS 36, *57-58 (ALJ, May 1, 2003).

In regard to these defenses, MMF alleges in its Response that -

In the present case, there are circumstances that suggest that the affirmative defenses of claim and issue preclusion are viable. Numerous examples of governmental decisions, determinations and approvals of training, recordkeeping, contingency plan, preparedness, communications devices and operations, including floor inspection and cleanup have been cited herein, and Minnesota Metal has only been provided with a small portion of these decisions, determinations and approvals. . . Moreover, Minnesota Metal has not been provided with the circumstances surrounding the agency meetings and forums that are typically held before the agency makes its decision. Because there are questions of fact related to these defenses, the EPA's motion should be denied.

R's Resp. at 28-29.

Respondent further notes that Minnesota courts have held that "administrative res judicata must be tempered with fairness and equity which is more important than finality of administrative judgments" and "when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice," at least implicitly acknowledging that the facts of this case, which do not include any prior final judgment by any court or administrative tribunal, may not fit perfectly within the elements of the defenses of res judicata or collateral estoppel. R's Resp. at 28.

Complainant did not respond to this defense in its Reply. However, in its Memorandum, EPA cited to Minnesota law with regard to the elements of the defenses of res judicata and estoppel as requiring an "adjudication" of a prior claim and/or issues, arguing that there is no evidence of such in this case. C's Memo. at 30-31.

While Respondent is correct that the record is replete with governmental findings regarding alleged violations or lack thereof at its facility resulting from years and years of inspections, it has not cited to any evidence that at any point any *tribunal* of any sort entered any judgment or determination, final or not, upon litigation, with regard to any issue in this case. *Cf.*, *Harmon*, 191 F.3d at 896-97 (where state court entered Consent Decree regarding compliance and waiver of penalty). Therefore, there is no basis for the application of the affirmative defenses of res judicata or collateral estoppel in this case. As to relaxing the requirements of those concepts to prevent injustice, it is noted that the factors raised by Respondent in support of this defense may be considered toward the reduction of a penalty, if any, to be imposed for the violations found.

G. Laches

In regard to its laches defense, Respondent's full argument is that --

“[i]n the present case, the EPA does not have a reasonable explanation why it waited until 2005 to bring training violations, communication device violations and permitting violations that could have been allegedly brought as early as 1981, the date William Ludwig allegedly became the emergency coordinator at the plant and the alleged date of the commencement of operations. Likewise, the EPA does not have a reasonable explanation why it waited until 2005 to bring the contingency plan and preparedness violations when these violations allegedly occurred many years later [sic]. Because there are genuine issues of material fact with regard to this defense, the EPA’s motion should be denied..”

R’s Resp. at 29.

Complainant’s Reply contains no response to this argument, but in its Motion Complainant states “[t]he circumstances of each particular case, including delay, the reasons for delay, the effect of delay on the respondent, and the overall fairness of permitting the action should be considered when determining whether the doctrine of laches should bar a lawsuit. . . . Respondent’s affirmative defense of laches is unsupported by any facts in the record demonstrating undue or unfair delay.” C’s Memo. at 30, *citing*, *Citizens v. U.S. Department of Energy*, 683 F.2d 1171, 1174 (8th Cir. 1982).

It has been repeatedly held that the affirmative defense of laches generally does not apply to the federal government when it is acting in its sovereign capacity to protect the public welfare or to enforce a public right. *See e.g., Nevada v. United States*, 463 U.S. 110, 141 (1983)(laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest); *FDIC v. Husey*, 22 F.3d 1472, 1490 (10th Cir. 1994) (the general rule is that the United States is not subject to the defense of laches); *Bostwick Irrigation Dist. v. United States*, 900 F.2d 1285, 1291 (8th Cir. 1990) (“We have recognized the long-standing rule that laches does not apply in actions brought by the United States.”).

Furthermore, even if the doctrine were applicable here, in order to prevail on it the Respondent would have to show that the Agency “delayed unjustifiably in filing and that *as a result the defendant was harmed, either by being hampered in his ability to defend or by incurring some other detriment.*” *United States v. Administrative Enters.*, 46 F.3d 670, 672 (7th Cir. 1995)(italics added). Respondent has not alleged, much less proffered, evidence supporting a finding that as a result of any delay in instituting this action it has been hampered in its ability to defend this case or incurred some other detriment. Respondent has provided no basis for application of the defense of laches to this case.

H. Statute of Limitations

As to its statute of limitations defense, in its Response, Respondent asserts that Count 1 alleges that it violated 40 C.F.R. § 264.16 by failing to provide certain employees hired in 1981, 1993, 1995, and 1997, with the requisite training within six months of their hiring date; that

providing such initial training is a discrete obligation, not a continuing one, citing *Lazarus, Inc.*, 7 E.A.D. 318, 366 (EAB 1997); and therefore, those claims made in this action initiated on August 26, 2005 are barred by the five year statute of limitations applicable to RCRA actions, citing *3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994) (noting there is no discovery rule tolling statute of limitations in regard to Agency enforcement actions).⁴³ R's Resp. at 29. Respondent suggests that these old violations are "prime examples of the type of stale claims that are barred by the rule established in *3M Co.* because of the 'faded memories, lost witnesses and discarded documents' that can be present in stale claims." R's Resp. at 29-31.

In its Reply, Complainant states Respondent's argument misinterprets the training violations being alleged in Count 1 and thus its defense in this regard is "frivolous." Specifically, Complainant states that this Count only -

. . . alleges a *continuing violation* during the period *from August 2000 to August 2005*, of Respondent's *duty to have a training program* that taught its employees to perform their duties in ways to ensure the facility's compliance with the requirements of Minn. R. 7045, and that met other specified "minimum" requirements for such program. It also alleges violations during that same period, of the requirement to provide *annual training* review that taught employees the same thing and met the same minimum requirements. The dates by which employees named in the affidavit and hired in the 1990s received initial training is irrelevant to any material issue in Count 1, except to demonstrate that long before the start of the five year limitations period (August 26, 2005)[sic], each of the named employees required training that met the general and minimal requirements of the training regulation, under the six month deadline for training after the employees' hiring dates.

C's Reply at 61-62 (italics added).

Paragraph 106 of the Second Amended Complainant contains the allegations as to the training violations and it provides in full that -

From November 24, 1981, to August 25, 2005, Respondent's failures to train its employees, as referenced in paragraph 57-89 above, violated Minn. R. 7045.0558, Subparts 1, 2, 3 and 5 {40 C.F.R. 265.16(a)(1)-(3), (b), and (c)}.

Thus, despite Complainant's assertion to the contrary, one can easily see how Respondent might reasonably interpret the Complaint as alleging violations dating in fact to some period of time prior to the start of the five year statute of limitations period on August 26, 2000. Moreover,

⁴³ On the other hand, MMF appears to concede that the regulations regarding annual refresher training *are continuing* in nature and not subject to a statute of limitations claim. See, R's Resp. at 31.

although the subparts of the state regulation allegedly violated do not include the section specifically covering the initial training requirement (subpart 4 of Minn. R. 7045.0558), the subparts of the corollary federal regulation cited do (subsection (b) of 40 C.F.R. § 265.16) and thus, one can also understand how Respondent may have construed the allegation as alleging a violation of a duty to provide initial training to those employees hired prior to the start of the limitations period.

It is noted that Respondent had previously challenged the allegations in Count 1 based upon the statute of limitations and in response, Complainant previously acknowledged that it was not seeking to hold MMF liable or penalize it for violations preceding the statutory period, *i.e.* those prior to August 26, 2000, a representation incorporated in this Tribunal's Order on Motion for Leave to Amend Complaint.

That being said, however, based upon Complainant's representations as to its intended allegations, the statute of limitations, and the applicable regulations, Complainant's remaining claims of violation in Count 1 regarding training are hereby deemed limited to any initial or annual training and/or training program MMF was required to have or provide to its applicable employees *on or after August 26, 2000*. With this limitation, Respondent's affirmative defense as to statute of limitations is deemed moot.

VII. ORDER

Upon consideration of Complainant's Motion for Accelerated Decision on Liability, it is hereby Ordered that:

- a. Complainant's Motion for Accelerated Decision on Liability is GRANTED as to the violations in Count 1 alleging that Respondent failed to maintain records at its facility as required by Minn. R. 7045.0558 Subparts 6.A through 6.D;
- b. Complainant's Motion for Accelerated Decision on Liability is GRANTED as to Count 5, and therefore Respondent is liable for failure to obtain a RCRA permit for storage of hazardous waste, as it failed to meet the requirements to qualify for an exemption under Minn. R. 7045.0292;
- c. Complainant's Motion for Accelerated Decision as to Liability is DENIED as to Counts 2, 3 and 4, and as to the violations in Count 1 alleging that Respondent failed to provide hazardous waste training to certain personnel as required by Minn. R. 7045.0558 Subparts 1, 2, 3 and 5.

Susan L. Biro
Chief Administrative Law Judge

Date: January 9, 2007
Washington, D.C.