IN THE MATTER OF:	)	
	)	
BASF Catalysts LLC	)	EPCRA-04-2008-2001
	)	
Respondent.	)	
	)	

COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND MOTION IN LIMINE

Pursuant to 40 C.F.R. § 22.16, Complainant moves for an Order striking the Affirmative Defenses asserted by Respondent in its Answer for the above captioned matter. In addition, Complainant moves for an Order in Limine to Respondent's proposed evidence pertaining to Complainant's application of EPA's Audit Policy, entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (Audit Policy) to this matter. 65 *Fed. Reg.* 19618.

The grounds for striking Respondent's Affirmative Defenses are the following: the defenses are (1) insufficient as a matter of law; (2) impertinent; and, (3) immaterial to the issues remaining genuinely in dispute.

Complainant's Motion in Limine is grounded in the Audit Policy's express purpose, as described therein, to guide the Agency in the application of its enforcement discretion during pre-litigation settlement negotiations. As this matter has clearly entered into the litigation phase, the evidence which Respondent intends to offer contesting EPA's application of the Audit Policy is immaterial and not probative of the appropriate penalty for Respondent's violations of EPCRA § 313.

These Motions are based upon the pleadings and filings in this matter and the attached Memorandum.

Respectfully submitted,

Date: 6/1/09

Adam Dilts
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Atlanta, GA 30303

IN THE MATTER OF:	)	
	)	
BASF Catalysts LLC	)	
	)	EPCRA-04-2008-2001
Respondent.	)	
	)	

MEMORANDUM IN SUPPORT OF COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES AND MOTION IN LIMINE

Complaint, U.S. Environmental Protection Agency, Region 4, submits this memorandum in support of its Motion to Strike Affirmative Defenses[1] and its Motion in Limine.

I. INTRODUCTION

On October 1, 2008, EPA filed a Complaint against Respondent, BASF Catalysts LLC (BASF), for three violations of Section 313 of EPCRA, 42 U.S.C. § 11023. On or about October 31, 2008, Respondent submitted an Answer to the Complaint. The Answer included six (6) paragraphs in a section entitled "Affirmative Defenses." Following the pleadings, the Parties filed prehearing exchanges pursuant to 40 C.F.R. § 22.19. Respondent, through its Prehearing Exchange, admitted liability for the violations at issue but challenged the appropriateness of Complainant's proposed penalty. On or about May 19, 2009, Respondent filed a Supplemental Prehearing Exchange. Respondent's Exchange and Supplemental Exchange identify a number of exhibits which it intends to introduce as evidence during the Hearing. Three of these exhibits – Respondent's Exhibits 9 and 11 from the Prehearing Exchange, and Respondent's Exhibit 12 from the Supplemental Exchange – pertain solely to EPA's Audit Policy, entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations"[2] (Audit Policy),

[1] Respondent's Answer lists six paragraphs referred to as "Affirmative Defenses," however, EPA is of the opinion that these paragraphs together constitute a single asserted defense allegedly derived from EPA's application of the Audit Policy to BASF Catalysts' attempted self disclosure of its EPCRA violations. *See* Respondent's Answer at 2-3. However, for purposes of consistency with the pleading, this memorandum refers to Respondent's affirmative defense in the plural.

[2] *See* 65 Fed. Reg. 19618.

and the application thereof to Respondent's attempted self disclosure in this matter.[3] *See* Respondent's Prehearing Exchange at 2; Respondent's Supplemental Prehearing Exchange at 1. In addition, Respondent intends to call Ms. Michelle Nooney to testify, in part, to "the process whereby BASF disclosed [its EPCRA violations] pursuant to EPA's 'Audit Policy.'" *See* Respondent's Prehearing Exchange at 1.

II. ARGUMENT

A. Standard for Striking Affirmative Defenses

The Consolidated Rules of Practice (the "Rules"), at 40 C.F.R. § 22.16, authorize a party to make any written motion in any action. The Rules do not set forth any specific criteria as to what may appropriately be stricken from an Answer on a Motion to Strike. However, the Rules provide that questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Presiding Officer. *See* 40 C.F.R. § 22.01(c). In exercising this discretion, the Federal Rules of Civil Procedure may provide useful guidance. *See, In re Patrick J. Neman, d/b/a The Main Exchange*, 5 E.A.D. 450, 455 at note 2 (EAB 1994).

The Federal Rules of Civil Procedure directly address motions to strike. Rule 12(f) states that "[u]pon motion made by a party... a court may order stricken from any pleading any insufficient defense or any... immaterial [or] impertinent... matter."[4]

"Weeding out legally insufficient defenses at an early stage" in the proceeding can prove

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[3] Respondent's Exhibits 9 and 11 are letters from Respondent to EPA challenging the Region's determination that BASF Catalysts LLC had failed to meet the requirements of EPA's Audit Policy. Respondent's Exhibit 12 is EPA's Audit Policy.

[4] Rule 12(f) also provides that motions to strike are to be made within 20 days following the service of a pleading (such as Respondent's Answer in this case). However, resort to Federal Rules of Civil Procedure on the issue of timing is inappropriate here because the matter is addressed by the Consolidated Rules at § 22.16, which impose no restriction on when motions may be filed. Indeed, § 22.16(c) provides that the Presiding Officer "shall rule on all motions filed or made after an answer is filed and before an initial decision has become final...."

to be extremely valuable to all concerned" – including the Court – by avoiding "'the needless expenditures of time and money' in litigating issues which can be foreseen to have no bearing on the outcome." *Narragansett Tribe of Indians v. Southern Road Island Land Dev. Corp.*, 418 F. Supp. 798, 801 (D.R.I. 1976) (quoting *Purex Corp., Ltd. v. General Foods Corp.*, 318 F. Supp. 322, 323 (C.D. Cal. 1970)). Although motions to strike affirmative defenses are not favored, such a motion may be granted if it "'appears to a certainty that the [Complainant] will succeed despite any state of the facts which could be proved in support of the defense.'" *In the Matter of Lackland Training Annex San Antonio*, RCRA VI-311-H, at 5 (May 12, 1995) (quoting *William Z. Salcer, et al. v. Envicon Equities, Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), vacated on other grounds, 478 U.S. 1015 (1986)).

Striking clearly insupportable affirmative defenses, such as those raised by Respondent and discussed below, further supports the administration of justice by avoiding defenses which, if pled, would only serve "to confuse the issues" and create the possibility that extraneous considerations could enter into the judicial decision making process. *Sun Ins. Co. of New York v. Diversified Eng'rs, Inc.*, 240 F. Supp. 606, 612 (D. Mont. 1965). Such a result could skew the proceeding in an unreasonable and unjust direction, thereby causing significant prejudice to the Movant.

An affirmative defense is insufficient as a matter of law when it would not, under any facts proved in support of the allegation, constitute a valid defense. *See, Narragansett Tribe*, 418 F. Supp. at 801. Such a defense can have no possible bearing the subject matter of the litigation, and should be stricken. When the defense, at first glance, is clearly invalid as a matter of law, it may be characterized as "patently frivolous" and promptly stricken. *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fl. 1976).

An "immaterial" affirmative defense is a defense that bears "no essential or important relationship to the claim or relief," *Gilbert v. Eli Lilly & Co. Inc.*, 56 F.R.D. 116, 120 note 5 (D. PR 1972), or is simply "outside the scope of the action." *American Sheet Metal, Inc. v. Em-Kay Engineering*, 478 F. Supp. 809, 815 (E.D. Ca. 1979) (citing Sheppard's MANUAL OF FEDERAL PRACTICE, 2nd ed. 345). An "impertinent" defense is any defense that is neither responsive nor relevant to the issues involved in the action and which could not be put in issue or given in evidence between the parties. *Gilbert*, 56 F.R.D. at 120, note 6.

In summary, litigating legally insufficient, immaterial and impertinent defenses causes needless expenditures of time and money and deflects the attention of the parties and the Court from the true issues at hand.

B. Respondent's Affirmative Defenses Are Insufficient as a Matter of Law, Immaterial and Impertinent and Should be Stricken.

Paragraphs 22 through 27 of the Answer filed by Respondent are labeled as "Affirmative Defenses" to the violations of EPCRA Section 313, 42 U.S.C. § 11023, admitted therein. *See* Respondent's Answer at 2-3. Paragraphs 22 through 24 provide Respondent's narrative characterization of the events surrounding their alleged discovery and subsequent attempted disclosure to EPA of the Section 313 violations at the company's Savannah facility. In paragraphs 25 through 27, Respondent asserts that EPA's determination that BASF had failed to comply with the Audit Policy was "contrary to the intent of the Audit Policy," thus entitling Respondent to full mitigation of the penalties for its violations. *See* Respondent's Answer at 2-3.

EPA does not contest Respondent's right to argue that the attempted disclosure of violations at its facility may be relevant to the determination of an appropriate penalty under the statute. However, EPA strongly contests Respondent's right to litigate the Agency's application of the Audit Policy in this forum. Respondent's assertions with respect to the application of the

Audit Policy, even if true, would be insufficient as an affirmative defense as a matter of law. An affirmative defense is defined as an "assertion of fact and arguments that, if true, [would] defeat the plaintiff's or prosecution's claim." BLACKS LAW DICTIONARY 451 (8th ed. 2004). The Audit Policy upon which Respondent relies affords no such protection.

The Audit Policy expressly states that it only "applies to *settlement* of claims for civil penalties..." and that it "is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States." 65 *Fed. Reg.* 19618, 19626-27 at § II.G(1), and II.G(3) (emphasis added). The Audit Policy goes on to state that it is "not intended for use in pleading, at hearing or at trial." *Id.* at 19627, § II.(G)(4). As such, regardless of the manner in which the Agency applied its enforcement discretion, the Audit Policy establishes no rights or protection upon which the Respondent can rely as a basis for an affirmative defense. The Courts which have examined this issue are unanimous in so holding.

EPA's Environmental Appeals Board (EAB or the Board) first considered the applicability of the Audit Policy[5] to litigated penalty disputes in the case *In re Harmon Electronics, Inc.* 7 E.A.D. 1 (1997) (reversed on other grounds). In *Harmon*, Respondent appealed a Presiding Officer's penalty determination based upon the fact that the penalty was not completely mitigated pursuant to EPA's Audit Policy. Although Harmon conceded that it did not meet the requisite criteria for penalty mitigation under the policy, it alleged that the company's disclosure nonetheless satisfied the intent of the policy. *Harmon* at 45, note 47.

The EAB flatly rejected this argument. First, the Board noted that Complainant "correctly [pointed] out that the [Audit Policy was] specifically intended as a guidance in a settlement context and never meant for use in an adjudicatory context." *Id.* at 46. Second, the

[5] The self-disclosure policy discussed in *Harmon*, 60 *Fed. Reg.* 66706, was a predecessor to the current Audit Policy. However, for purposes of the applicability of the Policies to litigated penalty disputes, the Policies are analogous.

Board rejected Harmon's contention that it had complied with the intent or spirit of the Audit Policy. According to the EAB, a significant aspect of the Audit Policy is that it encourages settlements as opposed to allowing cases to run their full course through expensive and time-consuming litigation. *Id.* at 46-47. If parties were allowed to litigate the application of the Audit Policy such that its terms were applied in full to litigated penalty disputes, this important aspect of the Audit Policy would be undermined. The EAB concluded by indicating that the "settlement-encouraging features of a penalty policy are to be respected and should not be undermined by an adjudication that would allow full credit for mitigating conduct properly considered only within the context of settlement." *Id.* at 47.

In the case of *In re Bollman Hat Company*, the EAB again considered the applicability of the Audit Policy to litigated penalty disputes. *See, In Re Bollman Hat Company* at 8 E.A.D. 177 (1999). *Bollman Hat* also involved violations of EPCRA § 313 reporting requirements, however, unlike the present matter, EPA, and not the Respondent, initially attempted to apply the Audit Policy to a litigated penalty assessment.[6] EPA subsequently acknowledged that this use of a settlement policy in litigation was "ill-advised." *Id.* at 184. Notwithstanding this ill-advised use, the Presiding Officer elected to hold EPA to its misuse of the Audit Policy and to mitigate the litigated penalties accordingly.

EPA appealed the Administrative Law Judge's (ALJ's) Initial Decision alleging that the Court had clearly erred by applying the Audit Policy. EPA argued that application of the Audit Policy to litigated cases was inconsistent with the express terms of the Policy, which clearly states that it does not create any rights in third parties, nor was it intended for use in pleading, at hearing or at trial. *Id.* at 187. The EAB agreed that use of the Audit Policy at trial was improper, and noted that it was self-evident that the improper "application of the policy in a context where

[6] EPA improperly relied upon the Audit Policy to calculate the proposed penalty provided in its Complaint.

it expressly was not intended to apply does not promote, but instead undercuts, the general policy favoring consistency." *Id.* Such use also does harm to the Policy's overall effectiveness. *Id.* Although the Court in *Bollman Hat* ultimately upheld the Presiding Officer's penalty figure due to EPA's initial misuse of the Audit Policy, the EAB declined to uphold the lower court's penalty rationale because the express terms of the Audit Policy state that it should not be used in litigation. *Id.* at 190. Instead, the EAB arrived at the penalty figure by applying the statutory penalty factors consistent with the "unique circumstances of [the] case." *Id.* at 190, 190-91, note 11.

Following these cases, the EAB has consistently held that Audit Policy should not be applied to litigated penalty assessments. *See, e.g., In re: Steeltech, Ltd.*, 8 E.A.D. 577, 588 (1999) (noting that Agency settlement policies, including specifically the Audit Policy, should not be applied in litigated penalty assessments); *In re: Donald Cutler*, 11 E.A.D. 622, note 22 (2004) (noting that the EAB disfavors the use of settlement penalty guidance in the settlement context).

Likewise, EPA ALJ's have also consistently ruled that the use of the Audit Policy by Respondents in litigated penalty assessments is improper. *See, e.g., In re: Palm Harbor Holmes, Inc.*, Docket No. EPCRA-4-99-54, Order Denying Respondent's Motion for Additional Discovery (Dec. 22, 2000) (ruling that Respondent's request for additional discovery to determine whether EPA had previously discovered violations it allegedly self-disclosed was irrelevant to the resolution of a litigated penalty assessment); *In re: RM Oil & Gas Co. Drumright*, Docket No. CWA-6-00-1615, Default Order and Initial Decision (May 1, 2001) (rejecting Complainant's use of a settlement policy in a litigated penalty assessment).

In this matter, Respondent is seeking to litigate EPA's application of the Audit Policy

under the guise of Affirmative Defenses. As with the Respondent in *Harmon*, BASF alleges that EPA incorrectly applied the conditions of its own Audit Policy, and as such, has acted contrary to the Policy's intent. Respondent also asserts that because it allegedly complied with the terms of the Audit Policy, it is entitled to complete mitigation of the proposed penalties for its violations.

As is clear from the express provisions of the Audit Policy, and the above-described precedent, Respondent's reliance upon the Audit Policy as a basis for Affirmative Defenses is legally insufficient as a matter of law. The Audit Policy is a settlement policy which conveys no rights upon which Respondent may now rely in litigation of EPA's proposed penalty. *See*, *Bollman Hat* at 187. Thus it affords Respondent no valid defense to the proposed penalty at issue in this Matter.

In similar fashion, the application of EPA's Audit Policy is immaterial to this matter as it bears "no essential or important relationship" nor is it "responsive or relevant" to the determination of a litigated penalty assessment that is guided by the statutorily prescribed factors. As has been made clear by the foregoing case law, any evidence seeking to contest EPA's determination under the Audit Policy is neither responsive nor relevant to litigated penalty assessments. Consequently, BASF's Affirmative Defenses are insufficient as a matter of law, immaterial and impertinent and should be stricken from the pleading.

C. Standard for Granting a Motion in Limine

The Rules provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value...." 40 C.F.R. § 22.22(a)(1). Motions in limine, however, are not specifically addressed by the Rules, and as such, resort to the Federal Rules of Civil Procedure may provide useful guidance on such

motions. In Federal court practice, motions in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored and where evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

The parties to this matter have stipulated that Respondent is liable for the violations at issue. The only remaining question before the Court is the appropriateness of EPA's proposed penalty for those violations. Therefore, only evidence that is relevant and of probative value to the question of penalties under EPCRA § 325, 42 U.S.C. 11045, is admissible for purposes of this hearing. Unlike other penalty provisions of EPCRA, Section 325(c) does not enumerate criteria that must be considered by EPA when calculating penalties. In the absence of such criteria, EPA relies upon the statutory factors set forth in Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et. seq., as referenced in EPCRA § 325(b)(2).[7] The TSCA penalty criteria are: the nature; circumstances; extent; and, gravity of the violations; and, with respect to the violator: ability to pay; effect on ability to continue to do business; any history of prior violations; culpability; and, such other matters as justice may require. *See* TSCA § 15, 15 U.S.C. § 2615(B).

[7] This reliance has been implicitly approved by the EAB, as well as by federal district courts. *See, In re Catalina Yachts, Inc.*, 1999 WL 198912 (EAB, Mar. 24, 1999); *Steeltech, Ltd. v. United States EPA*, 105 F. Supp. 2d 760 (W.D. Mich. 2000).

D. Argument in Support of Complainant's Motion in Limine

Complainant moves for an Order in Limine with respect to the evidence and testimony intended to be introduced by Respondent on the subject of EPA's prior application of the Audit Policy to this matter. By this Motion, EPA is not contesting Respondent's right to introduce evidence pertaining to its disclosure of the violations following EPA's inspection of the Savannah facility. But as has been discussed above in the arguments above supporting EPA's Motion to Strike Affirmative Defenses, any attempt by Respondent to litigate EPA application of the Audit Policy is improper in this forum. Moreover, EPA's application of its enforcement discretion during settlement is irrelevant and immaterial to the determination of an appropriate penalty for BASF's violations. As such, this Court is clearly able to determine that evidence pertaining to solely the Audit Policy and its application should be excluded from the proceeding. Complainant therefore requests the Court grant its Motion in Limine to exclude Respondent's Exhibits 9, 11, and 12, as well as any testimony by Ms. Nooney regarding the Audit Policy or EPA's application thereof.

Respondent's Exhibits 9 and 11 are letters submitted by BASF to EPA seeking reconsideration of EPA's determination that Respondent failed to qualify for credit under the Audit Policy. In both letters, BASF contests the grounds upon which EPA determined that the Company failed to meet the conditions of the Audit Policy. Exhibit 11 also alleges that EPA's determination was "completely contrary to the Audit Policy's stated intent...." Respondent's Exhibit 11 at 1. Respondent is also seeking to introduce the Audit Policy itself into evidence as Exhibit 12.

The EAB has consistently rejected use of the Audit Policy during litigated penalty assessments. By extension, the evidence offered by Respondent relating to EPA's application of

the attempted disclosure letters themselves other than to litigate EPA's application of the Audit Policy. *See* Respondent's Exhibits 4 and 6.

The Audit Policy and its application are not relevant to this proceeding, and facts concerning the application of that policy are immaterial and have no significant probative value herein. Therefore, Complainant moves to exclude Respondent's Exhibits 9, 11 and 12. Furthermore, to the extent that Respondent is seeking to offer evidence as to EPA's application of the Audit Policy through the testimony of Ms. Nooney, Complainant requests that such testimony also be excluded.

III. CONCLUSION

WHEREFORE, as authorized by 40 C.F.R. § 22.16(a), Complainant respectfully requests that the Court ORDER that Respondent's Affirmative Defenses be stricken, and that Complainant's Motion in Limine be GRANTED.

Respectfully submitted,

Date: 6/1/09

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In the Matter of BASF Catalysts LLC, Respondent
Docket No. EPCRA-04-2009-2001

CERTIFICATE OF SERVICE

I certify that a true copy of Complainant's MOTION TO STRIKE AND MOTION IN LIMINE, dated June 1, 2009, was sent this day in the following manner to the addressees listed below:

An Original and one Copy of the above MOTIONS were hand delivered to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA – Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303

Copies of the above MOTIONS by Regular Mail and Facsimile were sent to:

Judge William B. Moran
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6/1/09
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