UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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REPLY TO THE ATTENTION OF:

C-14J

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January 5, 2012

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, D.C. 20460

RE: In the Matter of Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist; Docket No. RCRA-05-2011-0009

Dear Chief Judge Biro:

Please find enclosed a copy of "Complainant's Reply to Respondents' Opposition to Complainant's Motion to Strike Respondents' Affirmative Defenses", filed on January 5, 2012, in the above-captioned matter.

Sincerely,

J. Matthew Moore
Assistant Regional Counsel

Enclosure

cc: Keven D. Eiber (w/ enclosure)
Lawrence M. Falbe (w/ enclosure)

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IN THE MATTER OF:	)	**Docket No. RCRA-05-2011-0009**
	)	
Carbon Injection Systems, LLC,	)	
Scott Forster,	)	
Eric Lofquist,	)	
	)	
Respondents.	)	
	)	

COMPLAINANT'S REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSES

In accordance with Sections 22.16(a) and (b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Consolidated Rules" or "Rules"), 40 C.F.R. § 22.16(a) and (b), Complainant offers this Reply to Respondents' Opposition to Complainant's Motion to Strike Respondents' Affirmative Defenses, respectfully requesting that the Presiding Officer enter an order striking Respondents' affirmative defenses.

In response to EPA's Motion, Respondents' raise several arguments: (1) Respondents' affirmative defenses are sufficient as a matter of law; (2) Respondents' affirmative defenses are not redundant; and (3) Complainant's Motion should be denied because the case is undeveloped. These arguments are unpersuasive for the reasons set forth below:

I. Respondents' Affirmative Defenses Are Insufficient as a Matter of Law

In support of their argument that Respondents' affirmative defenses are sufficient as a matter of law, Respondents' address only EPA's argument that Respondents' affirmative defenses were insufficiently pleaded. In so doing, Respondents' explain in detail that which was

already acknowledged by EPA in its initial Motion – that the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), have not yet been extended to affirmative defenses by an administrative court. *See In the Matter of San Pedro Forklift*, Docket No. CWA-09-2009-0006, 2010 EPA ALJ LEXIS 17, at *9 (Aug. 11, 2010). The Court in *San Pedro Forklift* determined that the Consolidated Rules provide a clear standard for the adequacy of affirmative defense pleading; therefore, reference to federal procedure is unnecessary. *Id.*

However, EPA asserts that Section 22.15(b) of the Consolidated Rules, 40 C.F.R. § 22.15(b), is ambiguous. Section 22.15(b) requires only that the respondents state the "circumstances or arguments which are alleged to constitute the grounds of any defense". Much like federal courts, which have found it necessary to interpret the language, "state in short and plain terms" in Federal Rule of Civil Procedure (FRCP) 8(b), EPA has identified the need to define the analogous phrase in Section 22.15(b) - "circumstances or arguments". Without further clarification, at what point has the respondent sufficiently stated the "circumstances" to have placed the complainant on notice as to the nature of its defense? Consideration of the Federal courts' significant struggle in defining the pleadings standards of affirmative defenses would shed valuable light on this question.

Moreover, even if this Court refrains for adopting the heightened pleading standards of *Twombly* and *Iqbal*, Respondents failed to satisfy the pre-*Twombly* pleading standards. Regardless of the holding in *Twombly*, administrative courts require that affirmative defenses provide the complainant with fair notice of the defense in order to allow the complainant an opportunity to prepare a response. *In the Matter of San Pedro Forklift*, 2010 EPA ALJ LEXIS 17, at *10. Respondents' failed to provide EPA with fair notice of several of their defenses.

With respect to Respondents' third affirmative defense, Respondents' failed to provide any factual support demonstrating that EPA acted with ill motive or any motive other than to enforce regulations against those who have failed to comply. Therefore, EPA is left guessing as to what facts give rise to this alleged ill will, and consequently EPA is effectively unable to respond. In regards to their fourth affirmative defense, Respondents' failed to identify those actions or inactions that are allegedly inconsistent with EPA's claims against Respondents. Without identifying which actions are the bases of their allegations, Respondents' have not allowed EPA to prepare a response. Finally, with respect to their fifth affirmative defense, Respondents' failed to identify those constitutional rights that EPA sought to inhibit in its enforcement action against Respondents. In their reply, Respondents do no more than summarily conclude that their pleadings provided fair notice, without explaining how they satisfied those standards. Respondents are correct in noting that they are not required to provide detailed facts in their pleading, but by requiring the respondent to state "circumstances", 40 C.F.R. 22.15(b) clearly requires at least *some* facts to satisfy the pleading standard. By merely stating that EPA's claims "arise out of ill will", or are "barred by the doctrine of selective enforcement", Respondents failed to state any "circumstances" whatsoever.

Even more persuasive is Respondents' failure to address the other manners in which their affirmative defenses are insufficient as a matter of law. For example, Respondents remain silent in regards to their first affirmative defense and EPA's assertion that Administrative Law Judges have no authority to implead a third party. In addition, Respondents fail to respond to the arguments raised by EPA with regard to Respondents' second affirmative defense: the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. §§ 6901-6992k, does not legally require EPA to issue a notice of violation. Given the strength of EPA's arguments on

affirmative defenses one and two and the fact that Respondents cannot even rebut EPA's arguments concerning these affirmative defenses, affirmative defenses one and two must be stricken from Respondents' Answer.

II. Respondents' Affirmative Defenses Are Redundant

In its Motion to Strike Respondents' Affirmative Defenses, EPA argued that affirmative defenses one, four, five and seven were redundant. In so doing, EPA explained that each of these defenses is a different way of wording one criticism – "why us and not them?" In arguing that these defenses are distinct, Respondents offer only one sentence in rebuttal – "A clear reading of the four defenses shows clear factual distinctions and differing legal standards." Such conclusory assertions fail to identify the factual distinctions and differing legal standards that are allegedly so clear. Accordingly, this terse advocacy is unpersuasive.

Next, Respondents argue that, even if the defenses are redundant, there will be no prejudice to Complainant in allowing Respondents to maintain such defenses; therefore, the motion to strike these defenses should be denied. Respondents quote a federal district court case from the Central District of California for the notion that a motion to strike should be denied absent a showing of prejudice. *See California Department of Toxic Control v. Alco Pacific, Inc.* 217 F. Supp.2d 1028 (C.D. Cal. 2002). However, FRCP 12(f) mandates no such showing. FRCP 12(f) provides only that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Furthermore, this Court has granted motions to strike without ever addressing the prejudice on the moving party. *See e.g., In the Matter of Valimet, Inc.*, Docket No. EPCRA-09-2007-0021, 2008 EPA ALJ LEXIS 38 (Nov. 6, 2008); *In the Matter of USA Remediation Services, Inc.*, Docket No. CAA-03-2002-0159, 2003 EPA ALJ LEXIS 6 (Feb. 10, 2003); *In the Matter of Indespec Chem. Corp.*

and Associated Thermal Servs., Inc., Docket No. CAA-III-086, 1997 EPA ALJ LEXIS 141 (Dec. 5, 1997). Therefore, EPA need not demonstrate a prejudice before this Court can grant its current motion.

Nonetheless, EPA can demonstrate a prejudice in allowing Respondents' to maintain their seven affirmative defenses. This matter involves several complex legal and scientific issues that are contended by the parties. By allowing redundant pleadings, this Court would permit Respondents to confuscate matters and distract from the issues material to this case. It is important to note that none of Respondents' affirmative defenses are material to the issue of liability, but rather they constitute arguments that may mitigate only a portion of the civil penalty that may be assessed. Federal courts have explained that a motion to strike should be granted to "remove unnecessary clutter from the litigation", *Cassetica Software, Inc. v. Computer Science Corp.*, No. 11 C 2187, 2011 U.S. Dist. LEXIS 108646, at *11 (N.D. Ill. Sep. 22, 2011) (*citing Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)), and can serve to avoid delay, *Isringhausen Imports, Inc. v. Nissan North America, Inc.*, No. 20-CV-3253, 2011 U.S. Dist. LEXIS 140056, at *4 (C.D. Ill. Dec. 5, 2011) (citing *Heller Fin., Inc.*, 883 F.2d at 1294). By striking Respondents' affirmative defenses, or in the alternative, limiting the effect of such defenses to mitigation of a penalty, this Court would narrow the issues to those material to the case and allow both parties to efficiently prepare for hearing.

III. Motion to Strike Should Not Be Denied Because the Case Is Undeveloped

Respondents argue that Complainant's Motion to Strike Respondents' Affirmative Defenses should be denied because the case remains largely undeveloped. Specifically, they assert that new evidence obtained through the anticipated third party discovery will be relevant to the determination of a penalty. However, Respondents requested, and were granted, third party

discovery to explore whether the products purchased by Respondents from International Flavors and Fragrances, Inc. (IFF) were hazardous wastes. The third party discovery exploring waste-generating processes at the IFF facility will shed no light on whether Respondents' affirmative defenses were redundant, immaterial, or pleaded insufficiently as EPA suggests. Because any information obtained from third party discovery will not alter an analysis of the legal sufficiency of Respondents' affirmative defenses, this Court can evaluate their legal sufficiency now.[1]

Respondents also argue that EPA's Motion to Strike Respondents' Affirmative Defenses should be denied due to EPA's stated intent to amend the Complaint. First, an answer has been

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[1] In Respondents' Opposition to Complainant's Motion to Strike Respondents' Affirmative Defenses, Respondents also addressed the merits of the affirmative defenses, suspecting all of the defenses may benefit from increased collective merit after additional discovery is conducted. Not only is this argument an improper reason to maintain affirmative defenses, but it is also an unsupported assumption. Additional discovery of IFF's processes will not shed light on whether EPA acted with ill will or failed to join a necessary party. Likewise, any new information about IFF wastes will not alter the analysis of whether EPA provided Respondents with adequate notice of their violations. Finally, the anticipated third party discovery will not aid this Court in determining whether EPA violated the doctrine of selective enforcement, because EPA has already initiated enforcement activities against several parties that have potential liability due to the wastes at issue in this case. EPA sent a notice of violation letter to IFF on September 12, 2011 for violations of RCRA, CX59, and a Default Order was entered against JLM Chemicals, Inc. on March 24, 2011, CX54. EPA also issued an Information Request to WCI Steel, Inc. on December 12, 2005. CX23.

filed in this matter. Therefore, under 40 C.F.R. §22.14(c), Complainant may amend the Complaint only upon motion granted by the Presiding Officer. If such a motion is filed[2], and such a motion is granted, Respondents will then have 20 additional days from the date of service of the amended complaint to file their answer. Respondents will be able to assert any additional affirmative defenses which may be applicable at that time. The fact that the Complaint may be amended in the future is of no consequence to Complainant's Motion to Strike Respondents' Affirmative Defenses.

IV. CONCLUSION

For all of the reasons set forth above, Complainant respectfully requests that the Presiding Administrative Law Judge grant Complainant's Motion to Strike Respondents' Affirmative Defenses.

Respectfully submitted,

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[2] Complainant currently expects to submit a motion to amend the Complaint as to penalty amount and minor factual/typographical errors only.

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Docket No. RCRA-05-2011-0009

CERTIFICATE OF SERVICE

I certify that the foregoing "Complainant's Reply to Respondents' Opposition to Complainant's Motion to Strike Respondents' Affirmative Defenses" dated January 5, 2012, was sent this day in the following manner to the addressees listed below:

Original and one copy hand-delivered to:

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1/5/12
Date

J. Matthew Moore, Assistant Regional Counsel