UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

I. Background

The Complaint in this matter was filed on May 13, 2011, pursuant to authority granted to the U.S. Environmental Protection Agency ("Complainant" or "EPA") by Section 3008(a) of the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a). On July 15, 2011, Carbon Injection Systems LLC ("CIS"), Scott Forster, and Eric Lofquist (collectively "Respondents") filed their Answer. Complainant filed an Initial Prehearing Exchange ("Complainant's PHE") on October 14, 2011. Respondents' Initial Joint Prehearing Exchange ("Respondents' PHE") was received by the undersigned on November 4, 2011.

On December 9, 2011, Complainant filed a Motion to Strike Respondents' affirmative defenses ("Motion" or "Mot.") in which it seeks to strike all seven of Respondents' Affirmative Defenses on the grounds that they are insufficiently pleaded as a matter of law. Mot. at 3. In Respondents' Opposition to Complainant's Motion to Strike Affirmative Defenses, dated December 27, 2011 ("Opposition" or "Opp."), Respondents oppose the Motion, arguing that they sufficiently described the bases for all of their affirmative defenses in their Prehearing Exchange materials. Opp. at 2. On January 5, 2012 Complainant filed a Reply to Respondents' Opposition ("Reply").

II. Standard for Motion to Strike

This proceeding is governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 - 22.45 ("Consolidated Rules" or "Rules of Practice"). The Rules of Practice contain no express provisions regarding motions to strike, but it is well settled that the Federal Rules of Civil Procedure ("FRCP") provide guidance on ruling on motions where the Rules of Practice are silent. *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993); *Valimet, Inc.*, EPA Docket No. EPCRA-09-2007-0021, 2008 EPA ALJ LEXIS 38, *10 (ALJ, Nov. 6, 2008) (Order on Complainant's Motion to Strike, Motion in Limine, and Motion for Accelerated Decision as to Liability, and Extending Time for Filing Prehearing Briefs). The FRCP provide that a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). However, this remedy is contrary to the general principle that pleadings should be treated liberally and that a party should have the opportunity to present its arguments at trial. Thus, such motions are generally viewed with disfavor and will be granted only if the insufficiency of the defense is clearly apparent. *Valimet, Inc.*, at *10; *Dearborn Refining Co.*, EPA Docket No. RCRA-05-2001-0019, 2003 EPA ALJ Lexis 10, at *6-8 (ALJ, Jan. 3, 2003) (Order on Complainant's Motion to Strike Defenses) ("*Dearborn Refining*").

The insufficiency of a defense may be attributed to its inability as a matter of law to defeat the particular charges alleged in a complaint, or to the fact that it is insufficiently pleaded. Complainant's Motion challenges Respondents' affirmative defenses on both of these bases. As to the sufficiency of a pleaded defense, the Rules of Practice provide that the answer to a complaint shall state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b).

In the pending Motion, Complainant argues that Rule 22.15(b) is "ambiguous as to pleading standards for affirmative defenses" in that it "fail[s] to define the point at which the 'circumstances' provided (if any) adequately notify the complainant of the nature of the defense." Mot. at 10. Complainant further argues that the FRCP can provide guidance in this instance and that Rule 22.15(b) should be interpreted in light of the heightened fact-based pleading standard required for federal complaints by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Complainant asserts that a majority of federal district courts have determined that these heightened standards are applicable to all pleadings, including affirmative defenses, and invites this Tribunal to apply them in ruling on this Motion. Mot. at 7-10. If this Tribunal deems *Twombly* and *Iqbal* inapplicable here, Complainant asserts that federal courts have consistently determined that a defense must offer some allegations in its support and that it must provide the complainant with "notice of how and in what way [respondent's] defense arises." Mot. at 11, citing *Sloan Valve Co. v. Zurn Industries, Inc.*, 712 F. Supp. 2d. 743, 755 (N.D. Ill. 2010) and *Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 640 (N.D. Ill. 2011).

In their Opposition, Respondents counter that Rule 22.15(b) is clear in its terms and that

Respondents are not required to support their affirmative defenses in detail - "an affirmative defense may be pleaded in general terms and will be held to be sufficient ... as long as it gives plaintiff fair notice of the nature of the defense." Opp. at 5 (quoting *Lawrence v. Chabot*, 182 Fed. Appx. 442, 456 (6th Cir. 2006)). Respondents argue that defenses have been held to be inappropriate subjects for motions to strike if there is any possibility that the defenses could be made out at trial, and even arguments that do not constitute complete defenses to liability should not be barred since they may be relevant to determination of the penalty. Opp. at 4 (citing *Dearborn Refining Co.*, EPA Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *4, 2003 WL 402868, at 4 (Order on Complainant's Motion to Strike Defenses)).[1] Further, Respondents argue, "Complainant acknowledges" that *Twombly* and *Iqbal* "were found not to apply to the pleading of affirmative defenses in administrative cases." Opp. at 5-6 (citing Motion at 10 and *San Pedro Forklift*, EPA Docket No. CWA-09-2009-0006, 2010 WL 3324918, 2010 EPA ALJ LEXIS 17, at *9 (EPA ALJ Aug. 11, 2010) (Order on Respondent's Motion for Leave to File a First Amended Answer to Administrative Complaint) ("*San Pedro Forklift*").[2]

First, the undersigned points out that Respondents' statement that "Complainant acknowledges" that *Twombly* and *Iqbal* "were found not to apply to the pleading of affirmative defenses in administrative cases" is a significant mischaracterization of both the *San Pedro Forklift* order and Complainant's description of it. Opp. at 5-6. In fact, as Complainant correctly states, in *San Pedro Forklift*, my esteemed colleague Administrative Law Judge Gunning expressly found it "unnecessary to decide" whether *Twombly* does, in fact, govern affirmative defenses. Mot. at 10, *San Pedro Forklift* at *9. Rather, the judge in *San Pedro Forklift* noted that in EPA's administrative proceedings the FRCP is not binding but merely provides guidance, and instead focused on the specific wording of EPA's Rule 22.15(b), which articulates the requirements for contents of an answer. *San Pedro Forklift* at *9-10. The decision in *San Pedro Forklift* focused in particular on the requirement that an answer must state "arguments" alleged to constitute the grounds of a defense. *Id.*

Similarly, it is unnecessary in this case to decide whether *Twombly* and *Iqbal* apply in this context. The undersigned agrees with the emphasis in *San Pedro Forklift* both on looking to the wording of Rule 22.15(b), and the "the importance of providing the complainant with fair notice of the affirmative defenses that respondent intends to assert in order to allow the complainant sufficient opportunity to prepare to meet those defenses." *San Pedro Forklift* at *10. Given Complainant's repeated focus on the word "circumstances" in Rule 22.15(b), the undersigned further notes something implicit in the *San Pedro Forklift* ruling, i.e., that Rule 22.15(b) uses the

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[1] Respondents' Opposition incorrectly cites to *Dearborn Refining Co.*, 2003 WL 402868, an order ruling on Complainant's Motion for Accelerated Decision in the same case. The Order on Complainant's Motion to Strike Defenses is not available on Westlaw.

[2] All subsequent page number citations herein for this *San Pedro Forklift* order are to the Lexis version.

disjunctive term "or," as in "circumstances or arguments." 40 C.F.R. § 22.15(b). The application of this approach can also be seen in, for example: *Aguakem Caribe, Inc.*, EPA Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9 (ALJ, Jan. 2, 2010) (Order on Complainant's Motion in Limine and Motion to Strike and Respondent's Request for Discovery), in which the court denied complainant's motion to strike where the defenses had been enumerated and the underlying factual circumstances pleaded; *Strong Steel Products, LLC*, EPA Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191 (ALJ, Oct. 27, 2003) (Order on Motions for Leave to File Amended Complaint and to Strike Defenses and Motions in Limine), in which the motion to strike was denied but the respondent was required to submit a narrative statement identifying specific facts in support of its affirmative defenses; and *Arizona Envtl. Container Corp.*, EPA Docket No. EPCRA-09-2007-0028, 2008 EPA ALJ LEXIS 34 (ALJ, Aug. 12, 2008) (Order Granting Motion for Change of Venue, Granting Complainant's Motion of Accelerated Decision as to Liability, and Granting in Part and Denying in Part Motion to Strike and Motion in Limine), in which the motion to strike was granted in part because the respondent had failed to comply with an order to provide a detailed narrative statement and a copy of any documents in support explaining the factual and/or legal basis for its affirmative defenses.

Separate from the issue of fair notice and the sufficiency of the pleading itself, Complainant's Motion could also succeed by demonstrating that an affirmative defense as pleaded is invalid as a matter of law. *See Envtl. Prot. Servs., Inc.*, EPA Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 13, *1 (ALJ, Feb. 28, 2003) (Order Denying Motion to Strike Defense of Selective Prosecution); *Century Aluminum of W. Va., Inc.*, Docket No. CAA-III-116, 1999 EPA ALJ LEXIS 26, *2 (ALJ, June 25, 1999) (Order Granting Complainant's Motion to Strike Affirmative Defenses).

With that background, I now turn to the specific Affirmative Defenses alleged in this case.

III. Respondents' Affirmative Defenses

A. First Affirmative Defense: failure to join necessary parties

As their First Affirmative Defense, Respondents assert that "Complainant has failed to join a party or parties necessary for the just and equitable adjudication of U.S. EPA's claims in this administrative proceeding." Answer at 33.

1. Arguments of the Parties

Complainant argues that this affirmative defense is legally insufficient because Administrative Law Judges have no authority to implead parties under RCRA. Mot. at 4 and 5

(citing *Frank Acierno, Christiana Town Center, LLC and CTC Phase II, LLC*, ("*Frank Acierno*") EPA Docket No. CWA-03-2005-0376, 2007 EPA ALJ LEXIS 9 (ALJ, Feb. 28, 2007) (Order Granting in Part and Denying in Part Complainant's Motion to Strike)).

Respondents claim that the entities that sold them the allegedly hazardous waste without properly identifying it (JLM Chemicals, Inc., International Flavors and Fragrances, LLC ("IFF"), the blast furnace owner which burned the material, and the middlemen who brokered the sales of material) all have critical information regarding the characterization of the products bought by CIS, and should all be parties to these proceedings. Respondents' PHE at 17.

2. Discussion and Conclusion

Complainant is correct that RCRA does not provide authority to Administrative Law Judges to implead parties. The court in *Frank Acierno*, dealing with proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1309(g), considered the consequences of such lack of authority. Noting that the Rules of Practice do not address dismissal of enforcement cases in the absence of an allegedly indispensable party, the court looked to the FRCP for guidance. *Frank Acierno,* 2007 EPA ALJ LEXIS 9, at 37. According to FRCP Rule 19(a), a party is necessary if:

> in that person's absence, the court cannot accord complete relief among existing parties; or that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). Under Rule 19(b), if a necessary party cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed, and it sets out certain factors to consider.

In the present case, the violations of RCRA alleged in the Complaint are all based on the activities of the Respondents alone, and the other potential parties identified by the Respondents are not "necessary" in the sense contemplated by FRCP Rule 19(a). Accordingly, Respondents' alleged First Affirmative Defense is insufficient to avoid liability and thus is not a true "affirmative defense." *Dearborn Refining Co., supra.* However, under Section 3008 of RCRA (42 U.S.C. § 6928) as interpreted by EPA's 2003 RCRA Civil Penalty Policy[3] (pages 33-41), the issues raised by this defense may legitimately be taken into account in determining the appropriate penalty, as Complainant acknowledges. Reply at 5; *Dearborn Refining Co.* In particular, the facts pertaining to the other parties referenced in Respondents' First Affirmative Defense are likely relevant to the penalty adjustment factor "Degree of Willfulness and/or Negligence" discussed on pages 36-37 of the RCRA Civil Penalty Policy. Thus, the Motion will be denied

[3] http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf

with respect to the First Affirmative Defense. Evidence offered at trial with respect to this issue will be limited in relevance to penalty determination.

B. Second Affirmative Defense: inadequate notice

As their Second Affirmative Defense, Respondents assert that "Complainant's claims are barred by its failure to provide adequate notice." Answer at 33.

1. Arguments of the Parties

Complainant argues that this is an insufficient defense since there is no requirement in RCRA that EPA issue a notice of violation. Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a). Mot. at 5.

Respondents make no specific reference to the Second Affirmative Defense in their Opposition, however, they do expand upon it in Respondents' PHE. The gist of Respondents' argument is that while they were aware of the various RCRA violations alleged against them, they were unaware until receipt of Complainant's PHE that IFF was one of the sources of hazardous waste that Respondents are alleged to have received. As a result, Respondents assert, they did not retain documents regarding their purchases, sampling, analysis and approval of IFF products which would support their defense. Respondents suggest that Complainant, in failing to reveal this information earlier, intended unfairly to prevent them from defending themselves. Respondents' PHE at 17-18.

2. Discussion and Conclusion

Respondents' Second Affirmative Defense appears unrelated to any statutory notice requirement or to any concept of "fair notice" as to the meaning of the RCRA requirements that Complainant alleges Respondent has violated. Rather, Respondent's argument might be better encapsulated by two other affirmative defenses, namely laches and expiration of the statute of limitations period.

Laches was described in *Ram Inc.*, EPA Docket No. SWDA-06-2005-5301, 2008 EPA ALJ LEXIS 27, at *74 (ALJ, Jul. 12, 2008) (citing Black's Law Dictionary) as "[u]nreasonable delay in pursuing a right or claim — almost always an equitable one — in a way that prejudices the party against whom relief is sought." However, laches is not an affirmative defense that can be raised against the United States government. *Tennessee Valley Authority*, 9 E.A.D. 357, 415 n.56 (EAB 2003). Laches is ineffective not only as an affirmative defense against the government, but also to reduce the penalty imposed in administrative proceedings. *Ram, Inc.* at *74-75.

The statute of limitations period applicable to these alleged RCRA violations is five years. 28 U.S.C. § 2462; *3M Company v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994); *Minnesota Metal*

Finishing, Inc., EPA Docket No. RCRA-05-2005-0013, 2006 EPA ALJ LEXIS 8 (ALJ, Mar. 17, 2006) (Order on Motion for Leave to Amend Complaint). In the present action, the five year limitation period operates to prevent the success of any complaint based on events occurring before May 13, 2006. But it does not operate to excuse Respondents' failure to retain records from that date onwards. Indeed, one might reasonably expect Respondents to have retained all relevant records once they became aware of Complainant's investigation of their operations. For these reasons, the Motion to Strike Respondents' Second Affirmative Defense will be granted.

C. Third, Fourth and Fifth Affirmative Defenses

As their Third Affirmative Defense, Respondents assert that "Complainant's claims are barred on grounds that they were brought for improper motive, arise out of malice or ill will, and amount to an abuse of U.S. EPA's enforcement discretion." As their Fourth Affirmative Defense, Respondents assert that "Complainant's claims are estopped because they are arbitrary and capricious and inconsistent with other actions and inactions of U.S. EPA that involve the same products that are the subject of this administrative proceeding." As their Fifth Affirmative Defenses, Respondents assert that "Complainant's claims are barred by the doctrine of selective enforcement." Answer at 33.

1. Arguments of the Parties

Complainant notes that Respondents have failed to provide any factual support for the Third Affirmative Defense, either in the Answer or in Respondents' PHE, with the result, Complainant argues, that Respondents fail to provide fair notice of the nature of the defense. Mot. at 7, 12 and Reply at 3. Complainant also argues that it is allowed broad discretion in managing its enforcement activities. Mot. at 12 (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)). While Complainant recognizes that its enforcement discretion is generally limited by constitutional restraints (*Wayte v. United States*, 470 U.S. at 608), it points out that Respondents here have failed to identify any such restraints to which Complainant has failed to adhere. Mot. at 12-13.

Complainant asserts that the Fourth Affirmative Defense also fails to provide fair notice of the nature of the defense (it is "vague and fails to include minimal specifics"), and that it is redundant (it is difficult to distinguish from the First, Fifth and Seventh Affirmative Defenses "because they all relate to EPA's decision to name only Respondents CIS, Forster and Lofquist in the present action"). Mot. at 13. If this Tribunal were to agree with Respondents on any one of those four defenses and accord relief, Complainant asserts, that relief would satisfy all four defenses. Mot. at 14.

According to Complainant, the Fifth Affirmative Defense is yet another instance in which Respondents have failed to provide fair notice of the nature of the defense. While acknowledging that Respondents did attempt to provide a factual basis for the First, Fifth and Seventh Affirmative Defenses collectively in Respondents' PHE, Complainant states that "they failed to

provide any factual support [for the allegation] that EPA selected them for enforcement on some constitutionally impermissible basis." Mot. at 14. This is a necessary element of the selective enforcement defense (*United States v. Production Plated Plastics* ("*Production Plated Plastics*"), 742 F. Supp. 956, 962 (W.D. Mich. 1990), *opinion adopted by* 955 F. 2d 45 (6th Cir. 1990), *cert. denied*, 506 U.S. 820 (1992)) and the constitutional rights in question must be identified "[t]o satisfy the pleading standards of *Twombly* and *Iqbal*." Mot. at 15 and Reply at 3.

According to Respondents, the combination of their Answer and PHE provide "detail sufficient to provide Complainant with notice of the points in dispute." Opp. at 5. That being so, they argue that they "should have the opportunity to present their full affirmative defense arguments at the hearing." Opp. at 6 (citing *Dearborn Refining* at 6). Regarding the Fifth Affirmative Defense, Respondents allege that: JLM Chemicals, Inc., IFF, the owner of the blast furnace, and the middlemen who brokered the sales of materials in question are not parties to this proceeding; they possess and control the most critical information regarding the characterization of the products they manufactured and sold to CIS; by singling out CIS, Complainant unfairly disadvantages Respondents, who have limited opportunities for third-party discovery; and the actions of all these parties are inextricably intertwined so that selective enforcement against CIS alone is an abuse of enforcement discretion. Respondents' PHE at 17. Respondents also allege that "U.S. EPA acted with the intent not only to unfairly prevent CIS from successfully defending against the allegations of non-compliance, but also prevented CIS from addressing the conduct of its operations that U.S. EPA now claims should subject it to significant multi-day and gravity-based penalties." Respondents' PHE at 18.[4] Respondents reiterate these points in their Opposition, claiming that Complainant's actions have severely prejudiced their ability to defend this case, so as to deny them due process, and that they "should be entitled to explore U.S. EPA's rationale for its selective enforcement at the hearing." Opp. at 7.

Respondents stress that "the record for this case is largely undeveloped and any evidence relating to the defenses may be relevant to the determination of a penalty; therefore, such evidence should be heard." Opp. at 6 (citing *Franklin and Leonhardt Excavating Co.*, EPA Docket No. CAA-98-011, 1998 WL 1006472 (ALJ, Dec. 7, 1998)). Respondents deny that their First, Fourth, Fifth and Seventh Affirmative Defenses deal with the same issue and are, therefore, redundant, but argue that even if that is wrong, there will be no prejudice to Complainant in maintaining each defense because they will not add to the time, expense or complexity of the hearing. Opp. at 7-8 (citing *Calif. Dept. of Toxic Substances Control v. ALCO Pac., Inc.*, 217 F. Supp. 2d 1028 (C.D. Cal. 2002)). Finally, Respondents argue that substantial relevant information is still expected from third parties, so that the record is currently insufficient to allow a decision on the redundancy of the affirmative defenses. Opp. at 8 (citing *Envtl. Prot. Servs., Inc.*, EPA Docket No. TSCA-03-2001-0331, 2003 WL 21213217 (ALJ, Feb. 28, 2003) (motion to strike affirmative defense of selective enforcement denied where respondent was still developing proof of its defenses)).

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[4] Although this allegation is made specifically in relation to the Second Affirmative Defense, it is also relevant in the context of the Third, Fourth and Fifth Affirmative Defenses.

Complainant responds that information obtained in third party discovery will have no bearing on the merits of Respondents' affirmative defenses, nor whether they are redundant, immaterial, or pleaded insufficiently. Reply at 6 and 6 n.1. Regarding Respondents' expressed view that denial of Complainant's Motion will cause no prejudice to Complainant, Complainant argues that the presence or absence of prejudice forms no part of FRCP 12(f) and the issue of prejudice has not been addressed by this tribunal in numerous cases granting motions to strike, therefore Complainant need not demonstrate prejudice here. Reply at 4-5. Nonetheless, asserts Complainant, the denial of the Motion would cause it prejudice, namely confusion and distraction (in a case that is already legally and scientifically complex), because none of the Affirmative Defenses is relevant to liability, as opposed to mitigation of penalty. Reply at 5.

2. Discussion and Conclusion

Despite Respondents' failure to elaborate specifically on their Third and Fourth Affirmative Defenses, those defenses reflect essentially the same grievance as the Fifth Affirmative Defense upon which Respondents have elaborated, namely that Respondents have been unfairly singled out for enforcement action. For that reason, the Third, Fourth, and Fifth Affirmative Defenses are considered together here as different expressions of the doctrine of selective enforcement.[5]

The defense of selective enforcement is difficult to establish. "[T]raditionally courts have accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *Elementis Chromium, Inc., F/K/A Elementis Chromium, L.P.*, EPA Docket No. TSCA-HQ 2010-5022, 2011 EPA ALJ LEXIS 18 (ALJ, Aug. 8, 2011) (Order on Complainant's Motion for Accelerated Decision and Respondent's Request for Oral Argument), quoting *B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998). To raise a selective enforcement defense successfully, "the Respondent must show: (1) that Respondent has been singled out while other similarly situated violators were left untouched, and (2) that the EPA selected Respondent for prosecution invidiously or in bad faith, i.e., based upon such considerations as race, religion, or the desire to prevent the exercise of Constitutional rights." *Ram, Inc.*, EPA Docket No. SWDA-06-2005-5301, 2008 EPA ALJ LEXIS 27, at *78 (ALJ, July 12, 2008) (internal quotation marks omitted) (citing *United States Dept. of the Navy*, EPA Docket No. RCRA-III-9006-062, 2000 EPA ALJ LEXIS 76 (ALJ, Nov. 15, 2000) and *Newell Recycling Co.*, 8 E.A.D. 598 (EAB 1999), *aff'd* 231 F.3d 204 (5th Cir. 2000)). In *Ram, Inc.*, the defense of

[5] Complainant's suggestion that the First and Seventh Affirmative Defenses cover the same ground as the Fifth Affirmative Defense, *see* Motion at 13-14 and Reply at 4, is rejected. The First Affirmative Defense of failure to join a necessary party focuses on whether a non-party is indispensable to the proper disposal of the present proceedings. The Seventh Affirmative Defense of lack of scienter focuses on the state of mind of the Respondents. Both these affirmative defenses have different doctrinal and factual bases from the Fifth Affirmative Defense of selective enforcement which focuses on the motivation of the Complainant.

selective enforcement was unsuccessful because Respondent failed to allege that it was selected for prosecution based on any of these considerations and EPA's evidence showed it was not.

In considering the adequacy of a pleaded defense of selective enforcement prior to hearing, the following two cases are instructive. In *San Pedro Forklift, supra*, the respondent sought permission to amend its answer to add a selective enforcement defense alleging that "Complainant has engaged in unreasonable and selective enforcement of the [Clean Water Act], targeting Respondent, a tenant on the subject premises, for alleged violations which were caused or created by others and which predate Respondent's tenancy on the subject premises." *San Pedro Forklift* at *16. In allowing the amendment, Judge Gunning noted as follows:

> Respondent is not required under the Rules of Practice to allege discrete elements of an affirmative defense. All that is required is a statement of the "circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). Respondent has in this instance met the bare minimum. As an affirmative defense, Respondent will bear the burden of establishing this defense on the record at hearing, which will necessarily include the submission of evidence that addresses each prong of the selective enforcement standard. However, that burden cannot be placed on the Respondent at the pleading stage.... It is also apparent from the depth of detail in Complainant's Response that Respondent has laid out sufficient statements to provide notice to Complainant of the basis for the first proposed amendment and Complainant does not dispute that it is a recognized affirmative defense.

San Pedro Forklift, at *17.

In *United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, (S.D. Ohio, 2003), a motion to strike the defendants' affirmative defense of selective enforcement was successful, in part, because the basis upon which the defendants claimed to have been "singled out" (being "coal-fired electric power generation plants in the Midwest and South") did not implicate the "impermissible considerations, such as race or religion [or] to punish the exercise of constitutional rights," and there were no allegations of "malicious or bad faith intent to injure." *Id.* at 807.

In considering the pending Motion in relation to the Third, Fourth and Fifth Affirmative Defenses, this Tribunal applies the legal standards discussed in section II above, namely that:

1. The answer to a complaint must state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," 40 C.F.R. § 22.15(b);
2. A court may strike from a pleading an insufficient defense or any "redundant, immaterial, impertinent, or scandalous matter," FRCP 12(f);
3. However, this remedy is contrary to the general principle that pleadings should be treated

liberally and that a party should have the opportunity to present its arguments at trial. Thus, motions to strike are generally disfavored and will be granted only if the insufficiency of the defense is clear, *Dearborn Refining*; and

4. One important role of the answer is to provide the complainant with fair notice of the affirmative defenses that respondent intends to assert, in order to allow the complainant sufficient opportunity to prepare to meet those defenses, *San Pedro Forklift* at *10.

In the present case, the Answer provides only the barest information about the Third, Fourth and Fifth Affirmative Defenses. Answer at 2. However, in Respondents' PHE at 17-18, and in the Opposition at 7, Respondents have provided some information regarding the circumstances on which these Affirmative Defenses are based. These circumstances are addressed, almost entirely, to the first element of selective enforcement, namely the singling out for prosecution of the Respondent. In relation to the second element, namely that Complainant singled Respondents out invidiously or in bad faith, i.e., based upon such considerations as race, religion, or the desire to prevent the exercise of Constitutional rights, Respondents' pleaded case is sparse. However, concerning the Third Affirmative Defense, there is a reference in the Answer to the present case having been brought for an improper motive arising out of malice or ill will, Answer at 2, and a suggestion that Complainant's actions were intended to deny Respondents due process. Opp. at 7.[6]

Although the pleading requirements of Rule 22.15(b) have barely been met by Respondents, the undersigned finds that the general arguments and circumstances of the Third, Fourth and Fifth Affirmative Defenses articulate a selective enforcement defense and are sufficiently clear to allow Complainant adequate opportunity to prepare any response. The burden of proving a selective enforcement defense rests on Respondents. However, in this instance, the precise circumstances on which the Third, Fourth and Fifth Affirmative Defenses are based may not be within their knowledge, and the evidence to prove those facts may be outside their control. For example, it is conceivable that evidence to support these Affirmative Defenses might emerge at the hearing during cross-examination of Complainant's witnesses. Complainant's preparation to meet the first element of the selective enforcement defense in relation to which sufficient detail has been provided by Respondents (regarding the process by which Complainant decided to initiate these proceedings) is likely to coincide with its preparation to meet the second, more sparsely pleaded, element of the selective enforcement defense (regarding Complainant's motive in so doing). Accordingly, the Motion to Strike the Third, Fourth and Fifth Affirmative Defenses is denied. Those defenses are deemed consolidated into a single selective enforcement defense.

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[6] In considering this Motion, this Tribunal is not concerned with the likely success of Respondents' affirmative defenses, but solely with whether they have been sufficiently pleaded. *Valimet, Inc.*, EPA Docket No. EPCRA-09-2007-0021, 2008 EPA ALJ LEXIS 38, (ALJ, Nov. 6, 2008) (Order on Complainant's Motion to Strike, Motion in Limine, and Motion for Accelerated Decision as to Liability, and Extending Time for Filing Prehearing Briefs).

D. Sixth Affirmative Defense

As their Sixth Affirmative Defense, Respondents assert that "Complainant's demand for the assessment of a civil penalty should be denied on grounds that Respondents, or some of them, are not able to pay all or some of the penalty claimed." Answer at 33.

1. Arguments of the Parties

Complainant seeks to strike the Sixth Affirmative Defense only in relation to Respondents Scott Forster and Eric Lofquist. Mot. at 16. Respondents have stated that no evidence regarding the ability to pay of Scott Forster and Eric Lofquist will be presented at the hearing, thereby waiving the Sixth Affirmative Defense in relation to those Respondents. Respondents' PHE at 18, Mot. at 1 and 16.

2. Discussion and Conclusion

In light of Respondents' waiver, Complainant's Motion to Strike the Sixth Affirmative Defense in relation to Scott Forster and Eric Lofquist will be granted. To be clear, the Sixth Affirmative Defense remains with respect to Respondent Carbon Injection Systems LLC and, although inability to pay is sometimes categorized as an affirmative defense, it is relevant in this proceeding only in relation to mitigation of penalty, once any liability has been established. *Crest Indus., Ltd.*, EPA Docket No. RCRA-05-2005-0024, 2007 EPA ALJ LEXIS 3 (ALJ, Jan. 10, 2007) (Order on Respondent's Motion for Partial Accelerated Decision on Inability to Pay).

E. Seventh Affirmative Defense

As their Seventh Affirmative Defense, Respondents assert that "[t]o the extent that Complainant's allegations are proven true (which Respondents deny), Respondents were without sufficient knowledge or ability to properly characterize the material in question and/or were otherwise misled with respect to the nature of the material." Answer at 33.

1. Arguments of the Parties

According to Complainant: (1) FRCP 12(f) allows a court to strike any pleading which is immaterial; (2) RCRA imposes strict liability (*see Production Plated Plastics, Inc.*, 742 F. Supp. at 960); and (3) therefore, the Seventh Affirmative Defense is irrelevant. Mot. at 17. Complainant concedes, however, that the Seventh Affirmative defense may be relevant to penalty amount and requests that it be limited accordingly. Mot. at 17 and 17 n.4.

Respondents argue that the Seventh Affirmative Defense is not redundant, Opp. at 7, and that other parties possess and control the most critical information regarding the characterization of the products manufactured and sold to Respondents. Respondents' PHE at 7.

2. Discussion and Conclusion

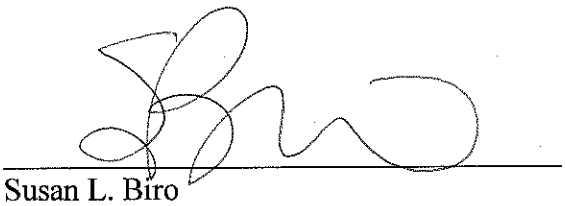
As Complainant notes, RCRA is a strict liability statute, so liability does not depend on a respondent's knowledge. Respondents' Seventh Affirmative Defense cannot defeat liability and is, therefore, not a true affirmative defense. However, the alleged defense is relevant to the issue of appropriate penalty amount and any evidence at hearing with be restricted to that limited purpose. Therefore, the Motion is denied regarding Respondents' Seventh Affirmative Defense.

ORDER

1. Complainant's Motion to Strike is **DENIED** as to the First, Third, Fourth, Fifth and Seventh Affirmative Defenses, and as to the Sixth Affirmative Defense with respect to Respondent Carbon Injection Systems LLC.

2. Complainant's Motion to Strike is **GRANTED** as to the Second Affirmative Defense, and as to the Sixth Affirmative Defense with respect to Respondents Scott Forster and Eric Lofquist.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: February 14, 2012
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion To Strike Affirmative Defense's,** dated February 14, 2012, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: February 14, 2012

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