BEFORE THE ENVIRONMENTAL APPEALS BOARD
NITED STATES ENVIRONMENTAL PROTECTION AGENC
WASHINGTON, D.C.

IN THE MATTER OF:	)	
TIGER SHIPYARD, INC. PORT ALLEN, LOUISIANA	)	CERCLA 106(B) PETITION NO. 96-3
PETITIONER	)	

ORDER GRANTING EPA'S MOTION TO STRIKE INNOCENT LANDOWNER DEFENSE, DENYING EPA'S MOTION IN LIMINE, AND DENYING EPA'S MOTION TO STRIKE THIRD PARTY DEFENSE

I. BACKGROUND AND PROCEDURAL HISTORY

Tiger Shipyard, Inc. (Tiger) operates a barge cleaning and repair facility on the Mississippi River just north of Port Allen, Louisiana. Based in part on statements allegedly made by former Tiger employees that drums containing rust and scale from the barge cleaning operations were dumped into the river, the United States Environmental Protection Agency, Region 6 (EPA) issued a unilateral administrative order (UAO) to Tiger on March 15, 1995, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The UAO directed Tiger to locate and remove the suspected drums. Tiger complied with the order, removing 35 drums from the river bottom.

On April 9, 1996, Tiger timely filed a petition under Section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A), for reimbursement of $1,402,180.65, the costs it contends it incurred in complying with

the UAO. Tiger argues that it is not a liable party of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and that Region 6 arbitrarily and capriciously selected the response action. On April 25, 1997, Region 6 responded to the petition for reimbursement. After numerous filings by the Parties, the Environmental Appeals Board (Board) determined that an evidentiary hearing on the issue of Tiger's liability was necessary.[1]

Pursuant to the Order of the Board dated April 20, 1998, the undersigned was appointed as the Presiding Officer in this case. The Presiding Officer was charged with conducting an evidentiary hearing and providing recommended findings to the Board on the following issues, namely, whether:

> 1. Tiger Shipyard, Inc. (Tiger) is liable within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as an operator of a facility at which hazardous substances were disposed of;
>
> 2. Tiger is liable within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as a person who by contract, agreement or otherwise arranged for disposal of hazardous substances; and
>
> 3. Tiger is liable within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4), as a person who accepted any hazardous substances for transport to disposal facilities.

[1]The foregoing summary was taken from the Order Granting, in Part, Request for Evidentiary Hearing and Denying Motions to Strike at 1 - 2 (EAB April 2, 1998).

If the Presiding Officer determines that the answer to issues 1, 2, or 3 is yes, the Presiding Officer shall make recommended findings on the following two additional issues, namely, whether:

> 1. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), which protects otherwise liable parties from the acts or omissions of third parties; and
>
> 2. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of the "innocent landowner" defense raised by Tiger.

Order Scheduling Evidentiary Hearing at 1 - 2 (EAB April 20, 1998).

Furthermore, the Order provides that:

> In conducting the prehearing proceedings and the evidentiary hearing, the Presiding Officer is authorized to make any necessary decisions including decisions regarding the admission of evidence. In so doing, the Presiding Officer shall look for guidance to the Consolidated Rules of Practice set forth at 40 C.F.R. Part 22 (recognizing, of course, that under the present circumstances the burden of establishing that reimbursement is appropriate is on Tiger).

Id. at 2.

On April 7, 1999, EPA filed a Motion to Strike Affirmative Defenses and Motion in Limine, seeking to strike two affirmative defenses: (1) the innocent landowner defense as defined in Section 101(35) of CERCLA, 42 U.S.C. § 9601(35); and the third party defense of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). The Motion in Limine seeks to exclude the testimony of four witnesses (William Corbin, Cornelius Henke, Jr., Jack Mulvihill, and William McNeal),

and three exhibits (Tiger Exhibits 8, 20, and 26) that EPA claims relate to the "innocent landowner" defense. For the reasons set forth below, EPA's Motion to Strike is granted in part and denied in part. EPA's Motion in Limine is denied.

II. DISCUSSION

A. STANDARD OF REVIEW FOR MOTION TO STRIKE

The Rules of Practice used as guidance in this proceeding (40 C.F.R. Part 22) do not expressly authorize motions to strike.

> Rule 22.16, however, refers to motions without restriction and thus motions to strike have been held to be authorized by the rules. *(Citations omitted)*.
>
> Because of their reputation as a dilatory tactic upon the part of the movant and because granting a motion to strike is a drastic remedy, motions to strike are truly and justly disfavored. Moreover, it is well settled that defenses are not appropriate subjects of a motion to strike, if there is any possibility that the defenses could be made out at trial. *Citation omitted.* Nevertheless, motions to strike have been granted in selected instances. *(Citations omitted)*.

In the Matter of Sheffield Steel Corporation, Docket No. EPCRA-V-96-017, Order Denying Motions to Strike Answers and to Dismiss at 4 (November 21, 1997).

Tiger asserts that the Presiding Officer lacks the authority to strike Tiger's affirmative defenses. The Presiding Officer disagrees. The Presiding Officer is authorized, at both the prehearing stage and at the hearing, to make "*any necessary decisions*". Order Scheduling Evidentiary Hearing at 2 (emphasis

added). Thus, the Presiding Officer is not limited in his authority to rule on motions related to the issues in this case. The Presiding Officer is also to look to 40 C.F.R. Part 22 (Part 22) for guidance for decisions at the pretrial stage and the hearing. *Id*. Part 22 allows for motion practice. 40 C.F.R. § 22.16. Motions to strike can be brought under Part 22. *In the Matter of Sheffield Steel Corporation*, Docket No. EPCRA-V-96-017, Order Denying Motions to Strike Answers and to Dismiss at 4. Therefore, the Presiding Officer does have the authority to strike affirmative defenses.

B. STATUTORY BACKGROUND

In order to prevail at this evidentiary hearing, Tiger must prove by a preponderance of the evidence that it is not a liable party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).[2] Section 107 of CERCLA includes the following list of "responsible parties" who are liable under CERCLA:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned by such person, by any other

[2]If Tiger is found liable, Tiger may nevertheless recover its costs to extent it can demonstrate that EPA's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with the law. 42 U.S.C. § 9606(b)(2)(D).

> party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. § 9607(a).

In this case, Tiger must prove that it is not liable as an "operator" under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2); a "generator" under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3); or a "transporter" under Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(3). Order Scheduling Evidentiary Hearing at 1 - 2.

If Tiger if found liable, it may be able to avail itself of one of the defenses set forth in Section 107(b) of CERCLA. Section 107(b) provides:

> There shall be no liability [under section 107(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship,

> existing directly or indirectly, with the [liable party] if [the liable party] establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing paragraphs.

C. INNOCENT LANDOWNER DEFENSE

First, EPA contends that Tiger's "innocent landowner defense" should be stricken as a matter of law. EPA claims that Tiger has attempted to raise this defense by confusing the issue in two ways: (1) by claiming that a CERCLA operator is entitled to this defense; and (2) by confusing the CERCLA facility (bed of the Mississippi River) with Tiger's barge cleaning facility.

The "innocent landowner" defense is an application of the "third party" defense of CERCLA § 107(b)(3), and is defined by Section 101(35)(A) of CERCLA, 42 U.S.C. § 9601(35)(A). *In Re Tamposi Family Investments,* 6 E.A.D. 106, 110 (July 6, 1995). Both Tiger and EPA agree that Tiger is not an "owner" of a facility under Sections 107(a)(1) or (2) of CERCLA, 42 U.S.C. §§ 9607(a)(1) and (2). Order Scheduling Evidentiary Hearing at 6 - 7 (EAB April 20, 1998). Both parties agree that the "facility" in question, as defined by Section

101(9) of CERCLA, 42 U.S.C. § 9601(9), is the bed of the Mississippi River, not the Tiger Shipyard site.[3] The question becomes whether the "innocent landowner" defense applies to "operators".[4] The answer to that question is no. The "innocent landowner" defense is only available to current or past owners of the facility.

The Board stated the following regarding this defense:

> The "innocent landowner" defense is an application of the "third party" defense of CERCLA § 107(b)(3), and is defined by CERCLA § 101(35)(A). That section defines "contractual relationship" to include "land contracts, deeds or other instruments transferring title or possession." *Id.* § 101(35)(A). Because of this broad definition, a landowner can have a "contractual relationship" with former owners in the property's chain of title, because the chain of deeds or other instruments transferring title creates an indirect contractual relationship between the owner and its predecessors in ownership. *See HRW Systems, Inc. v. Washington Gas Light Co.,* 823 F. Supp. 318, 347 (D. Md. 1993) (owners of property contaminated by past owner in the chain of title were liable under CERCLA, subject to establishing at trial the elements of the "innocent landowner" defense); *U.S. v. Hooker Chemicals & Plastics Corp.,* 680 F. Supp. 546, 557 (W.D. N.Y. 1988) ("innocent landowner" defense included in SARA because definition of "contractual relationship" otherwise precludes land purchasers from predicating a third-party defense on acts of predecessors in title).

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[3]Tiger's CERCLA 106(b) Reimbursement Petition at 33 (April 4, 1996); EPA Region 6 Response to Petitioner's CERCLA 106(b) Reimbursement Petition at 14 (April 25, 1997).

[4]Tiger does not contend that the "innocent landowner" defense applies to "generators" or "transporters". Tiger's Cross Motion and Memorandum to Strike and Motion in Limine With Respect to Operator Liability at 2, fn 2 (April 20, 1999) (if EPA's argument of operator liability is stricken, Tiger will withdraw its innocent landowner defense).

> CERCLA § 101(35)(A) creates an important exception to the existence of a "contractual relationship" between an owner and its predecessors in title, and it is this exception that forms the core of the "innocent landowner" defense. The exception was added to CERCLA expressly "to eliminate liability which might exist under [§ 107(a)] for landowners who acquired title to real property after the time hazardous substances, pollutants or contaminants had come to be located thereon and who, although they had exercised due care with respect to discovering such materials, were nonetheless ignorant of their presence." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., at 187 (1986). The exception provides that a deed or other instrument transferring title or possession is not a "contractual relationship" under CERCLA if the contaminated property was acquired after the disposal of the hazardous substance and if the landowner establishes one or more of the following by a preponderance of the evidence:
>
> > (i) At the time the [landowner] acquired the [contaminated property] the [landowner] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the [property].
> >
> > * * * *
> >
> > (iii) The [landowner] acquired the [property] by inheritance or bequest.

In Re Tamposi Family Investments, 6 E.A.D. at 110 - 111.[5]

The terms that are used through the foregoing quotation from *Tamposi* are “landowner”, “chain of title”, and “transferring title”. The legislative history also supports limiting this defense to landowners. 5 U.S. Code Cong. & Admin News 3279 - 3280 (1986).

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[5]CERCLA § 101(35)(A)(ii) concerns government entities, and is not applicable to this case.

Therefore, it is clear that this defense is limited to landowners. Because Tiger neither owned or acquired the "facility" (the bed of Mississippi River) by any means, this defense is not available to Tiger as a matter of law. Since Tiger's defense is inapplicable as a matter of law, there is no need to make any factual findings in regard to this defense. Therefore, EPA's Motion to Strike Tiger's innocent landowner defense is granted. *See United States v. Kramer*, 757 F.Supp. 397, 418 (D. N.J. 1991) (third party defenses that fail to conform to section 107(b)(3) can be stricken as insufficient).

However, the Presiding Officer declines to exclude the testimony of the four witnesses (William Corbin, Cornelius Henke, Jr., Jack Mulvihill, and William McNeal), and three exhibits (Tiger Exhibits 8, 20, and 26) that EPA claims relate to the "innocent landowner" defense at this time. Although evidence on the innocent landowner defense will not be allowed, the aforementioned witnesses and exhibits may be relevant to some other area of Tiger's case. EPA can make an objection at the time the witnesses are called to testify and/or the exhibits offered into evidence. If EPA's objection is sustained, Tiger will be able to make an offer of proof.

D. THIRD PARTY DEFENSE

EPA also asserts that Tiger's third party defense should be stricken because if Tiger is found to be a CERCLA operator, generator, or transporter, this finding would preclude Tiger from

establishing a third party defense. The third party defense is only applicable if the third party is solely responsible for the contamination. Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

The third party defense is set forth in Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), which provides that:

> There shall be no liability [under section 107(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
>
> * * * *
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the [liable party] if [the liable party] establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

The question to be answered is whether a person who has been found liable as a CERCLA operator, generator, or transporter is prohibited as a matter of law from raising the third party defense.

After reviewing the arguments of both parties, the Presiding Officer is not convinced that there is no possibility that this third party defense could be made out at the hearing. *See In the Matter of Sheffield Steel Corporation*, Docket No. EPCRA-V-96-017, Order Denying

Motions to Strike Answers and to Dismiss at 4. In addition, it appears that some of the facts necessary to disprove liability on behalf of Tiger may also be related to the third party defense. Therefore, nothing would be saved by granting the motion to strike. Therefore, EPA's Motion to Strike Tiger's Third Party Defense is denied.

III. CONCLUSION

For the reasons set forth above:

1. EPA's Motion to Strike Tiger's innocent landowner defense is granted;

2. EPA's Motion in Limine to exclude the testimony of four witnesses: William Corbin, Cornelius Henke, Jr., Jack Mulvihill, and William McNeal, and Tiger Exhibits 8, 20, and 26 is denied at this time; and

3. EPA's Motion to Strike Tiger's third party defense is denied.

Dated this 21st day of April, 1999.

/S/
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 1999, I served true and correct copies of the foregoing Order Granting EPA's Motion to Strike Innocent Landowner Defense, Denying EPA's Motion in Limine, and Denying EPA's Motion to Strike Third Party Defense on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Clerk of the Environmental Appeals Board (1103B)
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Washington, D.C. 20460

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