UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
DEARBORN REFINING COMPANY,	)	**Docket No. RCRA-05-2001-0019**
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION TO STRIKE DEFENSES

Background

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On September 28, 2001, the United States Environmental Protection Agency, Region V ("Complainant") filed a Complaint against Dearborn Refining Company ("Respondent"), alleging violations of RCRA and its implementing regulations for the management of used oil found in Michigan Administrative Code Rules 299.9101 *et seq.* and 40 C.F.R. Part 279. Respondent filed an Answer on October 29, 2001, which included a section designated as "Defenses and Basis for Opposing Relief" that set forth the following:

1. Respondent has complied with all applicable law.
2. Complainant has waived its rights.
3. Complainant is estopped.
4. Complainant fails to state a claim.
5. Penalties are not authorized.
6. Penalties are excessive.
7. Violations of law, if proved, are not as severe as claimed in complainant's proposed penalties.
8. The complaint is not a bona fide attempt to enforce

the law, but is a training exercise for EPA Region 5 employees at the expense of respondent.
9. Respondent has good cause not to comply with the proposed compliance order because doing so will waive its rights to judicial review.
10. Many items required by the proposed compliance order are moot.
11. Complainant's position is not substantially justified under 5 U.S.C. § 504(a)(1).

After the parties engaged in a prehearing information exchange, the undersigned issued a Prehearing Order setting November 25, 2002 as the deadline for filing pre-trial motions. On November 22, 2002, Complainant filed a Memorandum of Law and Motion to Strike Defenses, along with a Motion for Accelerated Decision, Motion to Strike Witnesses and Exhibits, and Motion to Compel Discovery Related to Respondent's Inability to Pay. In the Motion to Strike Defenses, Complainant asserts that Respondent has failed to provide any information regarding the circumstances or arguments which are alleged to constitute the grounds of any defense in violation of 40 C.F.R. § 22.15(b), and that Respondent's defenses are factually and legally insufficient and constitute nothing more than a "quick and dirty" response to the Complaint.

Respondent filed its Response to Complainant's Motion to Strike Affirmative Defenses on December 11, 2002. Respondent contends that the motion should be denied because Complainant has failed to meet its high burden of showing the legal and factual insufficiency of Respondent's defenses, that any prejudice or confusion has resulted from such defenses, or that there is no set of circumstances under which the defenses could succeed at trial.

Complainant then filed a Consolidated Memorandum of Law and Reply to Respondent's Response to Complainant's Motions to Strike Defenses, Witnesses and Exhibits and to Compel Financial Discovery on December 23, 2002, asserting that Respondent's response failed to provide any legal and factual basis for its defenses, and that Complainant is not required to demonstrate prejudice in order to succeed on a motion to strike.

Discussion

For the most part, I agree with Complainant's arguments concerning Respondent's "defenses" and its characterization of the Answer as a "quick and dirty" response. The Rules of

Practice provide that the answer "shall clearly and directly admit, deny or explain each of the factual allegations contained in the compliant with regard to which respondent has any knowledge," and shall also state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense..." 40 C.F.R. § 22.15(b). Respondent's Answer contains nothing more than the eleven enumerated defenses listed above, without any factual or legal assertions to support such defenses. As suggested by Section 22.15(b), an important purpose of the answer is to identify the points in dispute through Respondent's statement of factual challenges and the circumstances and arguments that constitute the grounds of any defense. *In the Matter of Wooten Oil Company*, Docket No. CAA-94-H001, 1996 EPA ALJ LEXIS 119 at *4 (ALJ, January 31, 1996). Without such a statement by Respondent, issue cannot be taken on any points in dispute and a tribunal may lack a proper basis upon which to adjudicate the case. *Id.* at *5.

Furthermore, Respondent's characterization of its statements in the Answer as "affirmative defenses" is not technically correct. As the Environmental Appeals Board has explained, "'A true affirmative defense, which is avoiding in nature, raises matters outside the scope of the plaintiff's prima facie case.'" *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB, October 20, 1994) (quoting 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994)); *see In re City of Salisbury*, CWA Appeal No. 00-01, 2002 EPA App. LEXIS 6 n. 38 at *66 (EAB, January 16, 2002) (clarifying that petitioner's defense was not technically an affirmative defense since it raised an issue that directly challenged portions of the Region's prima facie case).

Many of the "defenses" identified by Respondent in its Answer are not defenses at all, but are more in the nature of arguments or claims of possible mitigating factors. For affirmative defenses that are properly raised, Respondent has the burdens of presentation and persuasion following the Complainant's establishment of a prima facie case. 40 C.F.R. § 22.24(a); *see e.g. In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 at *68-72 (EAB, July 31, 2002) (holding that respondent's claim of "inability to pay" in a RCRA enforcement proceeding is an affirmative defense, and finding that respondent failed to provide sufficient information to satisfy its burden of proof on such claim).

Even so, it does not necessarily follow that Complainant's Motion to Strike Defenses should be granted. As motions to strike are not addressed in the Rules of Practice applicable to this administrative proceeding, federal court practice following

the Federal Rules of Civil Procedure ("FRCP") may be looked to for guidance. Motions to strike under FRCP 12(f) are the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and are the primary procedure for objecting to an insufficient defense. *Van Schouwen v. Connaught Corp.*, 782 F.Supp. 1240, 1245 (N.D.Ill. 1991); *see* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380, at 644 (2d ed. 1990). However, Rule 12(f) motions to strike are "generally viewed with disfavor 'because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.'" *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A Wright & Miller, Federal Practice & Procedure § 1380, at 647); *see Van Schouwen*, 782 F.Supp. at 1245 ("Indeed, motions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored").

As a general matter, pleadings should be treated liberally and a party should have the opportunity to support its contentions at trial. *In the Matter of Shawano County*, Docket No. V-5-CAA-013, 1997 EPA ALJ LEXIS 136 at *8 (ALJ, June 9, 1997); *In the Matter of Sheffield Steel Corp.*, Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100 at *8 (ALJ, November 21, 1997) (finding 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"); *Wooten Oil*, 1996 EPA ALJ LEXIS 119 at *5 ("Wherever reasonably possible, it serves justice to decide a case on the merits, rather than on some procedural point"). Furthermore, even if the arguments raised by Respondent do not constitute complete defenses to liability, they may raise issues that are relevant to the determination of any penalty. *See In the Matter of Nibco*, Docket No. RCRA-VI-209-H, 1996 EPA ALJ LEXIS 73 at *40 (ALJ, May 29, 1996); *In the Matter of Scotts-Sierra Crop Protection Company*, Docket No. FIFRA-09-0864-C-95-03, 1996 EPA ALJ LEXIS 138 at *3-4 (ALJ, August 19, 1996). Thus, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined at a hearing on the merits. *In the Matter of Waterville Industries*, Docket No. RCRA-I-87-1086, 1988 EPA ALJ LEXIS 8 at *4 (ALJ, June 23, 1988).

For these reasons, Complainant's Motion to Strike Defenses is denied. At this stage in the proceedings, granting a motion to strike is deemed to be unnecessary and may only result in further delay. *See Sheffield Steel Corp.*, 1997 EPA ALJ LEXIS 100 at *12. Appropriate consideration will be given to the arguments

raised by Respondent at the hearing on this matter, if such evidence is found to be relevant and material to liability or the determination of any penalty.

Order

Complainant's Motion to Strike Defenses is denied.

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Barbara A. Gunning
Administrative Law Judge

Dated: January 3, 2003
Washington, DC.