UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of Aguakem Caribe, Inc. **Respondent**	**Prehearing Exchange** Docket No. RCRA-02-2009-7110

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
2010 FEB 11 PM 2:36
REGIONAL HEARING CLERK

COMPLAINANT'S MOTION IN LIMINE AND MOTION TO STRIKE

To the Honorable William B. Moran:

COMES NOW Complainant through the undersigned attorney and very respectfully avers and prays as follows:

Pursuant to the Prehearing Order issued on November 25, 2009 by the Presiding Judge, the parties in the case filed their prehearing exchanges. Respondent's Prehearing Exchange includes a list of documents that should be excluded from being mentioned or presented as evidence during the hearing. These documents are irrelevant, immaterial and of little probative value as to the violations of the Complaint. Respondent has also asserted insufficient defenses, immaterial, impertinent or scandalous testimony which should also be excluded.

Complainant's Motion in Limine

Section 22.22(a)(1) of the Consolidated Rules of Practice, provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value...". Since, the Consolidated Rules of Practice do not specifically address motions *in limine*, the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Evidence ("FRE") may serve as a guidance. Rule 12 of the FRCP, allows a party to file a motion to strike from "...any

pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

In Federal practice, the courts may grant a motion in limine "...only if the evidence sought to be excluded is clearly inadmissible for any purpose." *In the Matter of Minnesota Metal Finishing, Inc.*, Docket No. RCRA-05-2005-0013, "Order on Motions to Supplement Prehearing Exchange and Complainant's Motion In Limine", April 23, 2007, by the Chief Administrative Law Judge, Hon. Susan L. Biro, citing *Noble v Sheahan* 116 F. Supp. 2d 966, 969. The Chief Administrative Judge goes on to discuss the standards relevant to motions in limine, adding that:

> "If evidence is not clearly admissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context (citations omitted) 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." Citing *United States v. Connelly*, 874 F 2d 412, 416 (7th Cir. 1989)

Complainant requests that the following documents listed in Respondent's prehearing exchange be excluded preventing Respondent from mentioning or using them as evidence during the hearing:

a) **E-mails**

1. Dated 12/29/06 from junuanejr@aol.com Friday AM 07:52:21.
2. Dated 02/07/07 from Armando Llorens, counsel for Respondent.
3. Dated March 5, 2007, from Armando Llorens.
4. Dated March 5, 2007, from Armando Llorens.

b) **Other documents**

1. Memo to the file dated 10-04-07 from Jorge J. Unanue.
2. Memo to the file dated 10-05-07 from Jorge J. Unanue.
3. Aguakem Caribe, Inc. Audited Financial Statements dated June 30, 2009.

4. "Environmental Samplings for Contamination in Dust for Asbestos and lead at Aguakem in Ponce, Puerto Rico" by Envirorecycling, Inc., dated December 2006.

The list of e-mails listed in Respondent's prehearing include those generated by Respondent's counsel, Mr. Armando Llorens, who does not appear as a witness for the Respondent. These e-mails can not be authenticated, unless Mr. Llorens plans to testify during the hearing. Respondent's counsel has failed to provide enough information in his prehearing as to allow Complainant to know how he will authenticate those copies of the e-mails he sent. In addition, Respondent's counsel has not indicated the relevance of the information included in the e-mails. The e-mails are irrelevant and immaterial to the allegations of the Complaint and they should be excluded.

The two memos allegedly generated by Mr. Jorge J. Unanue are not relevant to this case. They represent a mere characterization of the facts by Respondent. Respondent has tried to ignore his responsibility with the violations found at the facility. In order to shy away from his responsibility, instead of confronting the actual facts and violations, Respondent raises other issues, i.e. his alleged problems with the Port of Ponce Authority and alleged levels of lead that posed a threat to the health of his employees. We say "alleged" because, even if they were relevant, Respondent has failed to submit any valid, credible information, documents and/or witnesses as to the problems with the Port of Ponce, and he has also failed to provide accurate scientific documentation and/or expert witnesses to show that the alleged levels of contamination at the facility posed an actual health threat.

Both memos should be excluded from the hearing. Complainant would also mention that Respondent's alleged problems with the Port of Ponce Authority and the alleged

health risks of lead contamination have absolutely no bearing on the violations of the Complaint.

The "Aguakem Caribe, Inc. Audited Financial Statements dated June 30, 2009." should also be excluded. Respondent alleges **for the first time** in his prehearing exchange that "...the penalty sought by the Complaint will have an adverse, likely fatal, impact on Aguakem Caribe's (sic) Inc.'s ability to remain in business." Respondent has not announced as a witness the individual who prepared the financial statement he wishes to introduce into evidence. If Mr. Unanue testifies about the financial statements he will be providing hearsay testimony since he did not prepare the document. In addition, the document does not contain any opinion or explanation as to the "...likely fatal, impact..." the proposed penalty will have on his business. Since the document can not be authenticated, it is irrelevant or immaterial to the issues of the case at hand.

The last document mentioned in Respondent's prehearing the "Environmental Samplings for Contamination in Dust for Asbestos and lead at Aguakem in Ponce, Puerto Rico" by Envirorecycling, Inc., dated December 2006, should also be excluded for the same reason we have discussed. No witness has been announced that will be able to authenticate the document. The prehearing exchange lists Mr. Unanue as the individual who will testify about the document. Mr. Unanue did not conduct the alleged sampling and did not prepare the document. At a minimum, we are concerned of how the sampling was conducted, where the samples were taken, what protocol was followed, if any, and the chain of custody of these samples. These are genuine concerns, that only the individual who prepared the report or certified the results could answer such inquiries, not Mr. Unanue.

We should also note that the document does not address the RCRA violations EPA found at the facility which resulted in the present Complaint. The Complaint has three counts: failure to make a hazardous waste determination, failure to minimize risks of a fire, explosion or release and failure to comply with the used oil requirements. The counts do not include any allegation as to the "lead contamination" mentioned in the report. This document is irrelevant and immaterial to the present case.

Under *In the Matter of Valimet, Inc.*, the Administrative Law Judge held that "a motion *in limine* should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." Docket No. EPCRA-09-2007-0021,(A.L.J., Nov. 6, 2008) (Order Denying Complainant's Motion to Strike, Motion *in Limine,* and Motion for Accelerated Decision as to Liability, and Extending Time for Filing Prehearing Briefs) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)) (emphasis added). Although the court further stated that "[m]otions *in limine* are generally disfavored." *Id.* (quoting *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) unless the evidence sought to be excluded meets this high standard.

The documents submitted by Respondent as part of his prehearing exchange all meet the "high standard" of documents that are "clearly inadmissible" , *In the Matter of Valimet, Inc.,* supra. We can group the documents mentioned above into those with similar characteristics: documents generated by individuals not listed as witnesses for the Respondent and documents that do not discuss any of the aspects of the allegations of the complaint in the case at bar.

As we have stated, the e-mails, the financial audit and the sampling document, should be excluded, for among other reasons, they cannot be authenticated. The Chief

Administrative Law Judge, Hon. Susan L. Biro, in *Minnesota Metal Finishing, Inc., on an* "Order on Motions to Supplement Prehearing Exchange and Complainant's Motion in Limine", dated April 23, 2007, Docket Not. RCRA-05-2005-0013, discusses the authentication process and its relevancy when a party requests that a particular document be excluded:

> "Authentication is the act of proving that something, such as a document, is true or genuine so that it may be admitted into evidence in a contested proceeding. Black's Law Dictionary, 127 (7th Ed. 1999); *United States v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997) (authenticity of exhibit is established if enough evidence is introduced to show that the exhibit is what the proponent says it is)."

A look at Respondent's prehearing exchange demonstrates that he has not shown that the documents Complainant seeks to exclude can be authenticated by its sole witness, Respondent himself. Therefore, the documents are irrelevant, immaterial, unreliable, and of little probative value.

The documents that Respondent pretends to introduce into evidence do not make its liability more or less probable. They do not contain information relevant to the counts against Respondent. To allow the inclusion of the documents and/or having Respondent mention them in his testimony will only delay the process to have a hearing on the merits of the case.

Complainant's Motion to strike

Respondent mentions in his prehearing document that he will testify:

> "...that the allegations made by the EPA are inaccurate and that the legal release granted to Aguakem by the EPA in the AOC, mitigation, failure to join necessary parties, the defense of illegality (federal OSHA laws and Puerto Rico law precluded Aguakem to act in the ways desired by the EPA), the equitable defense of laches, and failure to state a claim all preclude recovery by the EPA on the Complaint"

This paragraph refers to Respondent's last paragraph of its Answer to the Complaint, under Section II. Factual Response. Respondent has submitted its prehearing exchange and he has provided no factual or legal basis to support his assertions. We request that these "defenses" be excluded from the record.

Respondent alleges that the EPA is precluded from the issuance of the complaint because:

- "that the legal release granted to Aguakem by the EPA in the AOC, mitigation"
- "failure to join necessary parties"
- "the defense of illegality (federal OSHA laws and Puerto Rico law precluded Aguakem to act in the ways desired by the EPA)"
- "the equitable defense of laches" and
- "failure to state a claim"

Since some of Respondent's assertions are hard to follow, due to the way they are written, we will try to discuss them in the context that we assume they were presented.

Respondent alleges that EPA granted Aguakem a "legal release" in the Administrative Order on Consent, ("AOC") Index Number CERCLA-02-2007-2017, against the Municipality of Ponce and herein Respondent. (See Complainant's Exhibit 13 of its Prehearing Exchange) The AOC was issued under Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, ("CERCLA") 42 U.S.C. §§ 9604, 9606, 9607 and 9622. The AOC was for the performance of a removal action and the reimbursement to EPA of response costs associated with the site.

Section XI of the AOC, (Other Claims) clearly states that, except as provided under other sections of the order, "...nothing in this Agreement and Order constitutes a satisfaction of or release from any claim or cause of action against respondents...for any liability such person may have under CERCLA, other statutes, or common law, ..." (Emphasis supplied)

Section XV of the AOC (Covenant Not to Sue by EPA) provides in part that:

> "In consideration of the actions that will be performed and the payments that will be made by respondents under the terms of this Agreement and Order, and except as otherwise specifically provided in this Agreement and Order, EPA covenants no to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a) for performance of the Work and for recovery of Response Costs." (Emphasis supplied)

Section XVI of the AOC (Reservation of Rights by EPA) specifically states that:

> "The covenant not to sue ...does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement and Order is without prejudice to, all rights against Respondents with respect to all other matters, ..."

EPA did not grant any "legal release" as alleged by Respondent, and his prehearing exchange fails to provide information, evidence or witnesses to prove such defense. The AOC was under another statute (CERCLA.) The allegations of the present complaint were brought under the authority of the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §§ 6901 et seq. (referred to collectively as RCRA).

The assertion made by Respondent should be excluded since he has failed to provide any evidence to support such allegation.

Respondent raises as a defense EPA's failure to join necessary parties.

The Consolidated Rules of Practice do not provide a remedy for dismissal of a case due to the absence of an indispensable party. Section 3008 of RCRA, 42 U.S.C. § 6928 provides that the Administrator of EPA may issue an order assessing civil penalties and may also require compliance to a person who has violated or is violating the requirements of RCRA. The EPA Delegation Manual, 8-9-A, delegated such authority to the Regional Administrators. The Regional Administrator of Region 2 delegated its authority to Complainant[1]. The Administrative Judges are not included under Delegation of Authority 8-9-A.

When the Consolidated Rules of Practice are silent, the Federal Rules of Civil Procedure may serve as guidance, although they are not binding on an administrative proceeding. Administrative Law Judge, Hon. Spencer T Nissen, discussed the criteria set forth under Rule 19(a) of the FRCP, which needs to be met before a federal judge considers that a party is necessary for adjudication of a case. According to Rule 19(a) a party is indispensable if its

> "...absence would prevent an award of complete relief or if the person claims an interest relating to the subject of the action and is so situated that the disposition 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 any of the persons already parties subject to a substantial risk of incurring double, multiple, or other wise inconsistent obligations by reason of the claimed interest." *In the Matter of: Frank Aciemo, Christiana Town center, LLC and CTC Phase II, LLC,* Docket No. CWA-03-2005-0376 (February 28, 2007, Order on Motion to Strike)

Respondent has not provided any factual or legal basis as to the party he deems necessary, nor the reasons why such party should be included. In the above cited case, the Respondent at least made the effort to mention those parties that it thought

needed to be included under the complaint. However, he did not meet the Rule 19(a) criteria and the Judge granted complainant's request to strike the applicable paragraphs of the complaint.

In the present case, Respondent failed to provide the relevant information in its Prehearing Exchange, as well as in its Answer to the Complaint. The assertions in both documents should be excluded. We should also note, that as stated in the complaint, the Commonwealth of Puerto Rico is not authorized by EPA to conduct a hazardous waste management program under Section 3006 of RCRA, 42 U.S.C. § 6926. Therefore, EPA retains primary responsibility for requirements promulgated under RCRA. All requirements in 40 C.F.R. Parts 260 through 268 and 270 through 279 relating to hazardous waste are in effect in the Commonwealth of Puerto Rico and EPA has the authority to implement and enforce these regulations. Respondent has not shown that he will likely be subject to other litigation under RCRA, for the same violations and findings of fact alleged in the complaint.

The Respondent also makes the "defense of illegality" and alleges he could not "act in the ways desired by EPA" because he was precluded by the "federal OSHA laws and Puerto Rico law." Respondent once more asserts a defense without any factual or legal background. The only interpretation we can make of his statement is that he might be making reference to the "lead contamination" matter he is trying to bring by force into the discussions of the case. It is outrageous to even think that a party can get away from his responsibility under RCRA by abandoning his facility and leaving behind hazardous waste, without proper disposal. To allege that he would have violated "federal OSHA laws" borders

---

1 Region 2 Delegation of Authority 8-9-A, dated July 1, 2003, Administrative Enforcement: Issuance of Complaints, Signing of Consent Agreements, etc.

on the absurd. His statement in no way provides information as to what EPA wanted him to do that constituted a violation of federal laws, and state laws. He can not provide such information simply because his allegations are not true. He has failed to provide the relevant information in his Answer to the Complaint and in his Prehearing Exchange. The alleged defense should be excluded from both documents.

The Respondent also makes the "equitable defense of laches." It is well established that the defense of laches is not available to Respondent "...as a defense to liability where the Federal Government is seeking to enforce laws that protect the environment." *In the Matter of: Frank Aciemo, Christiana Town Center, LLC and CTC Phase II, LLC, supra.* The Administrative Law Judge stated when it granted to strike the defense of laches:

> "It is well settled that the doctrine of laches does not bar the enforcement of statutes intended to protect public health and the environment. ... While Respondents contend that this proceeding involves the assessment of punitive penalties rather than the protection of public health and the environment, this argument overlooks the enforcement scheme provided by Congress which provides for the assessment of penalties as a deterrent to future violations."

Respondent also alleges a "failure to state a claim." Following his already typical pattern, Respondent fails to provide any factual or legal basis to support such claim. The Complaint filed in this case describes the facts; the dates of EPA's inspection; EPA's investigative activities; EPA's findings of Respondent's violations; the regulations Respondent violated for each of the three counts of the Complaint and the proposed penalty, to support Complainant's allegations against the Respondent. See *In the Matter of Plaza Land Associates, Ltd. Partnership; and Twitchell Wrecking Co., and DML Corp.*, Docket No. TSCA III-483 (October 31, 1995.)

In the administrative case *In the Matter of: Robert J. Heser, Heser Farms, and*

Andrew Heser, Docket No. Cwa-05-2006-0002, the respondents filed a motion to dismiss a complaint for lack of jurisdiction. The Honorable William B. Moran declined the motion in an Order dated February 23, 2007, where among other conclusions he stated as to respondents claim of failure to state a claim by complainant that:

> "...EPA has set forth the relevant law and facts in support of its allegation that Respondent has violated the CWA. The statute provides that the discharge of any pollutant from a point source into navigable waters by any person, absent a permit issued under Section 404 of the Act, is unlawful. 33 U.S.C. § 1311. The Complaint identifies the applicable statutory provisions, the dates, nature, source, and location of the discharge as well as the type and quantity of the pollutant discharged. The Complaint also describes the receiving area of the discharge, asserts that the water bodies that are hydrologically connected to the receiving area, and the nature and characteristics of these water bodies. <u>This information is sufficient to put Respondent on notice as to the nature of Complainant's claim. Complainant need not prove its case in the complaint itself</u>." (Emphasis added)

Respondent's lack of factual or legal basis to support his allegation merits that his statement be excluded from the prehearing exchange and his Answer to the complaint.

The Consolidated Rules of Practice do not provide for the use by a party of motions to strike in administrative proceedings. Rule 12 of the FRCP, allows a party to file a motion to strike from "...any pleading, any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

Under *In the Matter of County of Bergen, and In the Matter of Betal Environmental Corporation, Inc.*, Docket Nos. RCRA-02-2001-7110 and 7108, on an Order deciding several motions filed by the parties, Hon. Stephen McGuire stated that in general:

> "Motions to strike are "generally disfavored because they are a drastic sanction and because they are often employed as a delay tactic." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d §1380 (1990) *quoted in Century Aluminum of West Virginia, Inc. & Ohio Valley Insulating*

Company, Inc., 1999 WL 504703 (ALJ, June 25, 1999). *See also Oliner v. McBride's Industries, Inc.*, 106 F.R.D. 14, 17 (S.D.N.Y. 1985). In addition, such motions are contrary to the "general policy that pleadings should be treated liberally, and that a party should have the opportunity to support his contentions at trial."*Oliner,* 106 F.R.D. at 17. As a result, a motion to strike a defense can only be granted if that defense is clearly insufficient as a matter of law. *Oliner,* 106 F.R.D. at 17. *See also Aluminum and Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1057 (5th Cir 1982), *reh'g denied*, 683 F.2d 1373 (1982), *and cert. denied*, 459 U.S. 1105 (1983)."

Respondent's mere recital of affirmative defenses is not sufficient. He failed to provide a detailed narrative statement that fully elaborates the exact factual and legal basis of its affirmative defenses, as stated in his Answer to the Complaint and its Prehearing Exchange. See, *In the Matter of Martex farms, Inc.* Docket No. FIFRA-02-2005-5301 (October 5, 2005, Order on Respondent's Motion Requesting Recommendation of Interlocutory Review.) Respondent has not raised any genuine issue of material fact as to liability in his affirmative defenses. His defenses should be excluded.

Relief Requested

Complainant requests that the above motions be granted, specifically that:

as to the **Motion in Limine**, that the following documents be excluded from Respondent's Prehearing Exchange and from mentioning or using them as evidence during the hearing:

1. E-mail dated 12/29/06 from junuanejr@aol.com Friday AM 07:52:21.
2. E-mail dated 02/07/07 from Armando Llorens, counsel for Respondent.
3. E-mail dated March 5, 2007, from Armando Llorens.
4. E-mail dated March 5, 2007, from Armando Llorens.
5. Memo to the file dated 10-04-07 from Jorge J. Unanue.
6. Memo to the file dated 10-05-07 from Jorge J. Unanue.
7. Aguakem Caribe, Inc. Audited Financial Statements dated June 30, 2009.

8. "Environmental Samplings for Contamination in Dust for Asbestos and lead at Aguakem in Ponce, Puerto Rico" by Envirorecycling, Inc., dated December 2006.

as to the **Motion to Strike** that the following affirmative defenses be stricken from the Prehearing Exchange and from the Answer to the Complaint:

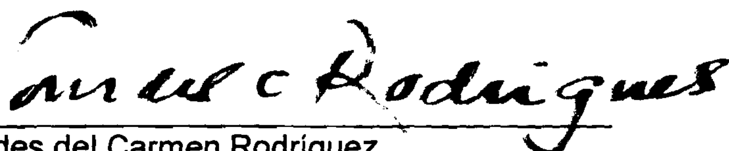
1. That the legal release granted to Aguakem by the EPA in the AOC, mitigation;
2. Failure to join necessary parties;
3. The defense of illegality (federal OSHA laws and Puerto Rico law precluded Aguakem to act in the ways desired by the EPA);
4. The equitable defense of laches" and
5. Failure to state a claim.

Complainant reserves its right to submit its Rebuttal to Respondent's Prehearing Exchange, once Respondent fully complies with the Prehearing Order issued on November 25, 2009 by the Presiding Judge.

Conclusion

Complainant prays that the Presiding Administrative Law Judge grant Complainant's Motion in Limine and Motion to Strike.

Respectfully submitted, in San Juan, Puerto Rico, on February 10, 2010.



Lourdes del Carmen Rodríguez
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
Centro Europa Bldg., Suite 417
1492 Ponce de León Ave.
San Juan, PR 00907-4127
Phone: (787) 977-5819
Facsimile: (787) 729-774
E-mail address: rodriguez.lourdes@epa.gov

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Complainant's Motion in Limine and Motion to Strike,** dated February 10, 2010, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy, **Federal Express** to:

Karen Maples
Regional Hearing Clerk
Region 2
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007-1866.

Copy by **Federal Express** to:

Attorney for Respondent:
Armando Llorens, Esq.
FURGANG & ADWAR
1325 Avenue of the Americas, 28th Floor
New York, New York 10019
[Phone: (212) 725-1818

Copy and a CD by **Federal Express** to:

Administrative Law Judge:
The Honorable William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Building
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
[Phone: (202) 564-6255 Att: Knolyn R. Jones, Legal Staff Assistant]

2/10/10
Date

Office of Regional Counsel – Caribbean Team