UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
Rocky Well Service, Inc.,	)	
and	)	
Edward J. Klockenkemper,	)	DOCKET NO. SDWA-05-2001-002
	)	
Respondents.	)	

Decision and Order on Motions

Background

This proceeding is subject to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22. The original Complaint filed in this matter named the corporation, Rocky Well Service, Inc., as the Respondent. It alleged violations of Section 1423 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h-2(c), due to the corporation's failure to subject six Class II wells to the mechanical integrity testing ("MIT") requirements found at 62 Illinois Administrative Code (IAC) § 240.760 and 40 C.F.R. § 147.701. The Complaint also alleged that the corporation failed to submit annual monitoring reports in violation of 62 IAC § 240.780(e) and 40 C.F.R. § 147.701. Due to these alleged violations, the Complainant proposed the assessment of a civil penalty of $107,817.

Rocky Well Service Inc. timely filed an Answer. In the course of the proceedings, Complainant moved to amend its Complaint pursuant to 40 C..F.R. §§ 22.14(c) and 22.16. In the motion, Complainant proposed to add Respondent Klockenkemper (referred to herein as "Second Respondent") in his individual capacity. Complainant also requested leave to plead further facts. The motion was granted.

Respondent Klockenkemper then filed a Motion to Dismiss arguing that he cannot be held personally liable for the violations alleged because he is not the permittee of the Class II UIC wells at issue. That Motion to Dismiss was denied. On December 5, 2006, the undersigned issued a Prehearing Order in this matter. Pursuant to that Order and 40 C.F.R. § 22.19(a), each party has filed a Prehearing Exchange in his matter. In addition, several motions have been filed.

Pending Motions

The Presiding Officer currently has before her several motions:

(1) Complainant's Motion for an Order Striking Respondent Klockenkemper's Affirmative Defenses, and for a Ruling that Respondent's Answer Does Not Constitute A Motion to Dismiss Amended Administrative Complaint and/or any other Motion, and for Any Other Relief Consistent with Complainant's Motion ("Complainant's Motion to Strike");

(2) Complainant's Motion for an Order Compelling Respondent[s] to Submit a Joint Prehearing Exchange That Complies with the Presiding Officer's December 5, 2005 Prehearing Order and the Consolidated Rules of Practice, and for a Ruling that Certain Statements in their Joint Prehearing Exchange Do Not Properly Identify and Describe Witnesses That May Testify at Hearing, and Certain Statements in their Prehearing Exchange Do Not Constitute Proper Documents and Exhibits that can be Considered for Inclusion as Evidence at Hearing;

(3) Complainant's Motion for an Order Ruling That Respondent Klockenkemper's First Set of Requests to Admit and Threat of Sanctions against Complainant in this Matter Are Not Authorized by the Federal Rules of Civil Procedure. . . . and Finding That Respondent's First Set of Requests to Admit are Held in Abeyance, Pending Issuance of Such Order;

(4) Respondent's Motion for Order Requiring Supplementation of Prehearing Exchange by USEPA as to Respondent Mr. Klockenkemper;

(5) Respondent Klockenkemper's Motion for Leave to File First Supplemental Answer Amending Respondent's July 11, 2005 Answer and to Add Affirmative Defenses, *Instanter*;

(6) Respondent Klockenkemper's Motion to Strike and Exclude Exhibit 31 of Complainant's January 23, 2006, Prehearing Exchange.

Each motion will be addressed in turn.

DISCUSSION

I. Complainant's Motion for an Order Striking Respondent Klockenkemper's Affirmative Defenses, and for a Ruling that Respondent's Answer Does Not Constitute A Motion to Dismiss Amended Administrative Complaint and/or any other Motion, and for Any Other Relief Consistent with Complainant's Motion ("Complainant's Motion to Strike")

Respondent Klockenkemper proffers ten defenses denominated as "affirmative defenses" in his Answer as follows: Lack of SDWA Jurisdiction; Lack of Statutory Jurisdiction; Equitable Estoppel/Estoppel in Pais; Laches; Mootness - Injunctive Relief; Impossibility/Res

Judicata/Equitable Estoppel; Dirty Hands/Arbitrary and Capricious Enforcement; Dirty Hands/Due Process Denial; Failure to Join FRCP 19 Indispensable Party; Good Faith Attempts to Comply. Complainant argues that these "affirmative defenses" are insufficient as a matter of law, are immaterial, impertinent, and/or frivolous and significantly confuse the issues in the case and, thus, must be stricken from his Answer.[1]

This proceeding is governed by EPA's Consolidated Rules of Practice which require that an answer state, among other things, "the circumstances or arguments which are alleged to constitute the grounds of any defense [and] the basis for opposing any proposed relief . . . ." 40 C.F.R. § 22.15(b). Although the Consolidated Rules are silent on the issue, prior EPA administrative decisions have held that motions to strike are authorized by the Consolidated Rules. *See, e.g., In re Chem-Trol Chemical Co.,* No. I.F.&R.-V-001-89 (order denying motion to strike, Nov. 14, 1989) and *In re Coors Brewing Company,* No. RCRA-VIII-90-09 (order on motions, Jan. 4, 1991). These rules, however, provide no further guidance as to the legal standard to be applied in determining the legal sufficiency of defenses and or the appropriateness of motions to strike. In such cases it is appropriate to look to the Federal Rules of Civil Procedure (FRCP) and pertinent case law for guidance. *In re Asbestos Specialists Inc.,* TSCA Appeal No. 92-3 (Oct. 6, 1993).

Federal Rule of Civil Procedure 12(f) provides that a court may order stricken from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Generally, courts will strike a claim as "redundant" when it essentially repeats another claim in the same complaint. *Moore's Federal Practice* § 12.37(3). An allegation is "impertinent" or "immaterial" when it is neither responsive nor relevant to the issues involved in the action. A motion to strike is also the proper means for attacking the legal insufficiency of a defense. The movant must make a strong showing to succeed in striking an affirmative defense, and it should be stricken only when it is legally insufficient on the face of the pleadings. If insufficiency of the defense depends on disputed issues of fact or questions of law, a motion to strike should not be granted. *See generally Moore's Federal Practice* § 12.37(3)and (4). Motions to strike are generally not favored and if there is any possibility that a defense could be established at trial, it should not be stricken. *See In re Lackland Training Annex,* No. RCRA VI-311-H (May 12,

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[1] Federal Rule of Civil Procedure 8(e) provides that a party must set forth affirmatively certain defenses enumerated in the rule as well as "any other matter constituting an avoidance or affirmative defense." A defense which points out a defect in a plaintiff's prima facie case is not an "affirmative defense." S*ee In re Rawson Food Service, Inc.* 846 F.2d 1343 (11th Cir. 1988). Rather, an affirmative defense is one which "if accepted by the court, will defeat an otherwise legitimate claim for relief," *i.e.*, one which excuses defendant's conduct even if plaintiff is able to establish a prima facie case. *See Moore's Federal Practice* § 8.07[1]; *Donohoe v. American Isuzu Motors Inc.*, 155 F.R.D. 515 (M.D. Pa. 1994). Some of the defenses Respondent pleads are indeed affirmative defenses; others are not. Be that as it may, Complainant seeks an order striking each of the ten defenses and the Presiding Officer will analyze each defense to determine whether the legal standard for striking material from a pleading has been met.

1995) (order on motions).

With these principles in mind, each of Second Respondent's ten defenses will be examined for legal sufficiency and other factors.

1. Lack of Regulatory Jurisdiction

Second Respondent maintains, and sets out as an affirmative defense, that this tribunal has no jurisdiction over him with respect to this matter because he cannot be held liable under SDWA for the alleged violations as a matter of law because he is not the "permittee" nor is he an "unpermitted operator/injector" with respect to the wells at issue. The Illinois UIC regulations Complainant seeks to enforce against him, he argues, do not impose direct liability on an individual officer of a corporation, but only on the "permittee," which he is not.

Complainant argues that this defense is insufficient as a matter of law and must be stricken because the Illinois UIC regulations, as approved by U.S. EPA under SDWA, although couched in terms of the "permittee," apply to an individual who is acting in violation of the state's UIC regulations, whether that individual is the actual "permittee" or not.

These arguments mirror those made by the parties and ruled upon by the prior Presiding Officer in this matter when she denied Second Respondent's Motion to Dismiss for lack of subject matter jurisdiction. In her Decision and Order dated May 5, 2005, the Presiding Officer determined that Complainant had alleged sufficient facts to defeat a challenge to a 12(b)(1) motion to dismiss. Even if Second Respondent is not the "permittee," she held that he could be held liable for the violations alleged by Complainant. In other words, the fact that Second Respondent is not the permittee does not as a matter of law lead to the conclusion that he cannot be held liable. Thus, Second Respondent's affirmative defense that he is not the "permittee" is legally insufficient and is ordered stricken from the pleading.

Second Respondent also argues that he is not an "unpermitted operator/injector" and, thus, cannot as a matter of law be held liable for the violations alleged. This defense is will likely require a fact based determination of liability and, thus, is not a defense that should be stricken at this time. Whether or not Second Respondent is liable because of his actions with respect to the wells at issue is a conclusion to be made on the basis of evidence to be presented at hearing. Thus, Complainant's Motion to Strike this affirmative defense is denied.

2. Lack of Statutory Jurisdiction

Second Respondent argues that the Notice of Violation issued on January 25, 2002, by U.S. EPA is legally invalid and fails to comply with Illinois regulations. Thus, he maintains he cannot be held liable for the violations. Complainant argues that it properly met all statutory obligations under SDWA prior to commencement of this action and that this defense is legally insufficient and must be stricken.

This tribunal is unaware of case law directly addressing the issue of the effect of a defective notice of violation on SDWA jurisdiction. *Cf. United States v. Alisal Water Corp.*, 427 F.3d 597, 611 (9th Cir. 2005). However, it cannot be said at this point in the proceedings that this defense is invalid on its face and that there exists no possibility that Second Respondent will be able to establish this defense at hearing. For this reason, Complainant's Motion to Strike Second Respondent's Second Affirmative Defense is denied.

3. Equitable Estoppel-Estoppel in Pais

The burden on a party asserting estoppel against the United States is high. A party must show that the United States engaged in "affirmative misconduct" and that the party reasonably relied on the United States' conduct to its detriment. *See In the Matter of Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 521 (Feb. 24, 1993). Nonetheless, it is possible that Second Respondent could present facts to establish its claim of estoppel and it cannot be said that the defense is insufficient on its face. Thus, as to Second Respondent's Third Affirmative Defense, Complainant's Motion to Strike is denied.

4. Laches

Judicial and administrative precedents are not consistent on the issue of whether the equitable defense of laches can be pleaded against the federal government. There are cases that hold that laches cannot be asserted against the government when it acts in its sovereign and governmental capacity to protect public health and safety. *See United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1050 (W.D. Mo. 1984); *but see In re Franklin and Leonhardt Excavating Company, Inc.*, No. CAA-98-011 (Dec. 7, 1998) ("Where the case record is largely undeveloped and any evidence relating to the defenses may be relevant to the determination of penalty, such evidence [as to the applicability of laches] should be heard.")

Certainly, like the doctrine of estoppel, the burden on a party asserting laches against the government is high. A party must show not just a mere lapse of time before initiation of an action, but the delay must be unreasonable and the party asserting the defense must have been prejudiced by the delay. *See Park County Resource Council Inc. v. U. S. Department of Agriculture*, 817 F.2d 609, 617 (10th Cir. 1987). Moreover, in environmental cases, laches must be invoked sparingly because "ordinarily the plaintiff will not be the only victim of alleged environmental damage." *Id.* Nonetheless, like the estoppel defense, it is possible that Respondent could present facts to establish its claim and it cannot be said that the defense of laches is insufficient on its face. Thus, as to Second Respondent's Fourth Affirmative Defense, Complainant's Motion to Strike is denied.[2]

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[2] Although Second Respondent does not raise the statute of limitations in its Answer, he did so in his Response Brief. He later moved to amend his Answer to include a statute of limitations defense, and that motion is addressed later in this decision.

5. Mootness – Injunctive Relief

Second Respondent argues that Rocky Well's transfer, plugging and integrity testing of at least some of the wells at issue "moots any claim that EPA may have for any injunctive relief" as to those wells. As Complainant aptly points out: "This contention, even if true, does not negate this penalty case for Respondent's violations for failing to test and demonstrate mechanical integrity for each of the six wells. . . . The fact that injunctive relief may no longer be required in this case, however, does not provide Respondent Klockenkemper with an affirmative defense to this penalty matter. . . . " The Presiding Officer agrees. However, the defense raises issues that may be relevant to the determination of the appropriate amount of penalty to be imposed, if any, in this matter. The Prehearing Order issued in this matter allows each Respondent to explain why the proposed penalty should be reduced or eliminated in its Prehearing Exchange and will allow such evidence to be presented at hearing for the limited purpose of evaluating the appropriateness of Complainant's proposed penalty. Complainant's Motion to Second Respondent's Fifth Strike Affirmative Defense is denied.[3]

6. Impossiblity/Res Judicata/Equitable Estoppel

Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive to the rights of the parties and parties in privity with them. In general, the federal government is not bound by private party litigation when it seeks to enforce a federal statute that implicates both public and private interests. *See Herman v. South Carolina National Bank*, 140 F.3d 1413 (11th Cir. 1998); citing *Hathorn v. Lovorn*, 457 U.S. 255, 268 n. 23 (1982).[4] Second Respondent fails to allege privity between the United States and any party to the Illinois Appellate Court litigation he cites for the basis of his res judicata defense. Accordingly, Complainant's Motion to Strike Respondent's Sixth Affirmative Defense (Res Judicata) is granted.

Second Respondent also maintains that it was "impossible" for Respondents to have complied with the SDWA testing requirements at issue because "to do so would upset the status quo of the ongoing litigation and because the issue of title, ownership, leasehold and operation of the wells was clearly in dispute up until [1997]." Second Respondent's decision not to comply with

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[3] Complainant argues that where Second Respondent's affirmative defense is insufficient as a matter of law, it should be stricken from the record. Because, however, the Consolidated Rules which govern this proceeding require that an Answer state "the basis for opposing any proposed relief," this tribunal has chosen not to order such defenses stricken. Second Respondent will, however, be limited to the presentation of such evidence solely for the purpose of rebutting Complainant's proposed penalty.

[4] An exception may exist where the United States is deemed to have a "sufficient laboring oar" in the conduct of the private party litigation to make the application of res judicata fair. *Montana v. United States*, 440 U.S. 147 (1978).

Illinois regulations because of the ongoing state litigation over the wells would not give rise to a defense of "impossibility" even if one were available to him. *See United States v. Bethlehem Steel,* 38 F.3d 862, 866-67 (7th Cir. 1995) ("a facility cannot by its own actions make itself [unable to comply] and then claim "impossibility" as a defense"). Nonetheless, the impossibility defense raises issues that may be relevant to the determination of the appropriate amount of the penalty to be assessed in this matter, if any, and Second Respondent will be permitted to present evidence on this issue at hearing for the limited purpose of evaluating the appropriateness of Complainant's proposed penalty. *See supra* note 3. Complainant's Motion to Strike Respondent's Sixth Affirmative Defense (Impossibility/Equitable Estoppel) is denied.

7. Dirty Hands/Arbitrary and Capricious Enforcement

As a basis for this defense, Second Respondent maintains that Illinois DNR requested in writing that EPA remove three of the wells from the administrative enforcement action and that EPA ignored the request. Second Respondent further states that EPA is "required to heed" section 706(2)(A) of the Administrative Procedures Act and this affirmative defense should be allowed to stand. Complainant argues that this defense should be stricken because this is a federal enforcement matter and Complainant is exercising its enforcement discretion in fully prosecuting this matter to protect the integrity of SDWA and its regulations.

Section 706(2) of the APA provides, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court. . . shall . . . hold unlawful and set aside agency action, findings and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . "

This provision cited by Second Respondent governs the scope of judicial review, and pertains only to a reviewing court, not to a presiding officer in an EPA administrative proceeding. Therefore, to the extent Second Respondent relies on Section 706 of the APA, his argument is rejected.

The affirmative defense of "unclean hands" has been permitted, however, to proceed in EPA administrative proceedings. *See In the Matter of Nibco Inc.*, No. RCRA-VI-209-H (May 29, 1996). Thus, Complainant's motion to strike Second Respondent Seventh Affirmative Defense is denied.

8. Dirty Hands/Due Process

Second Respondent's argument here appears to be two-fold. First, he argues that Complainant is enforcing Illinois UIC regulations and must abide by the jurisdictional and other requirements of 62 IAC 240 with regards to notice and hearing. Second, he argues that the Illinois DNR's denial of a hearing ten years ago with respect to the "future use status" of one well amounted to a denial

of due process at the state level which made compliance impossible.

As Complainant again aptly points out in its Response Brief, SDWA does not require that it meet the state UIC notice requirements in those states with primacy. Such state notice requirements under the state regulations are applicable to state enforcement personnel when the state with primacy chooses to pursue enforcement of its own UIC regulations under the SDWA. The Illinois UIC notice requirements do not apply to Complainant in this federal administrative penalty case. Moreover, as noted above, Second Respondent will have an opportunity to challenge the validity of Complainant's notice of violation under SDWA in this proceeding.

Moreover, the legality of Illinois DNR's denial of a hearing to Second Respondent ten years ago is not an issue on which this tribunal will hear evidence on in this matter. Such evidence would not be pertinent to the issues involved in this case. For these reasons, Second Respondent's Eighth Affirmative Defense is deemed legally insufficient and impertinent to the issues in this case and Complainant's Motion to Strike this defense is granted.

9. Failure to Join FRCP 19 Indispensable Party

The Consolidated Rules of Practice which govern this proceeding provide no mechanism for joinder of parties. Furthermore, it is well established that the federal government has broad discretion regarding its decision-making authority on whom to prosecute. *Wayte v. United States*, 470 U.S. 598 (1985).

In looking to the Federal Rules for guidance, FRCP 19 requires joinder of a party to an action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) 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 otherwise inconsistent obligations by reason of the claimed interest.

In this case, prong (1) of FRCP 19 does not apply because if Complainant is able to prove its case, complete relief, both injunctive in nature and penalty assessment, can be obtained from present Respondents. Moreover, prong (2) of FRCP 19 does not compel joinder of an outside party (or dismissal because of that party's absence from the proceeding) because if Respondents are found liable in this proceeding, their recourse is further litigation against that non-party. The theoretical possibility of a subsequent action does not require joinder or dismissal for nonjoinder. *See Moore's Federal Practice* § 19.03(4)[e]. For these reasons, Second Respondent's Ninth Affirmative Defense is deemed legally insufficient and is ordered stricken.

10. Good Faith Attempts to Comply

Second Respondent argues that Rocky Well "made numerous efforts to attempt to cause Rocky Well to comply with IDNR's and EPA's compliance requests." Complainant correctly points out, however, that any such efforts, if proven, would not shield it from liability. While section 1423(c)(4)(A) of the Act requires the Administrator to take into account several factors, including good faith efforts to comply, in assessing a civil penalty, that does not mean that such efforts constitute a defense to liability. Such efforts may, however, be considered in the penalty phase of these proceedings and Second Respondent will be permitted to present such evidence at that time. *See supra* note 3. Complainant's Motion to Strike Second Respondent's Tenth Affirmative Defense is denied.

Finally, with respect to Complainant's Motion to Strike, Second Respondent maintains that the motion was filed well beyond the 20-day limit imposed by FRCP 12(f). While that may be true, such time limit is not controlling in this proceeding.

II. Complainant's Motion for an Order Compelling Respondent[s] to Submit a Joint Prehearing Exchange That Complies with the Presiding Officer's December 5, 2005 Prehearing Order and the Consolidated Rules of Practice, and for a Ruling that Certain Statements in their Joint Prehearing Exchange Do Not Properly Identify and Describe Witnesses That May Testify at Hearing, and Certain Statements in their Prehearing Exchange Do Not Constitute Proper Documents and Exhibits that Can Be Considered for Inclusion as Evidence at Hearing

Complainant moves for an order compelling Respondents to comply with the Prehearing Order entered by the Presiding Officer on December 5, 2005, and the Consolidated Rules of Practice. Complainant also seeks a ruling that certain statements in Respondents' Joint Prehearing Exchange do not comply with the Presiding Officer's Prehearing Order and the Consolidated Rules and therefore do not constitute proper documents, exhibits and witness that can be used at hearing.

Complainant first argues that Respondents' Prehearing Exchange failed to provide sufficient information regarding their proposed witnesses and failed to produce sufficient narrative descriptions of their witnesses' intended testimony for hearing. Complainant then argues that Respondents failed to provide copies of all documents and exhibits they intend to introduce into the record and properly identify and mark each exhibit in accordance with the Prehearing Order. Respondent Rocky Well Service responded to Complainant's motion and argues that it has been prematurely filed, and that Respondents will supplement their initial exchange sometime before 30 days before the date of scheduled for hearing.

The Presiding Officer agrees with Complainant. Consolidated Rule § 22.19(a)(2)(I) and the December 5, 2005, Prehearing Order in this matter require Respondents to provide the **names** of any expert or other witnesses they intend to call at hearing, together with a **brief narrative summary** of their expected testimony. These requirements are intended to give notice to the opposing party to allow that party to prepare for hearing. The broad categories of witnesses

Respondents list in Attachment 1 to their Prehearing Exchange do not meet these requirements. In addition, the list of 87 witnesses Respondents submit is also deficient in that it fails to provide the narrative summary of their expected testimony as required by Rule 22.19 and this tribunal's Prehearing Order. Respondents are hereby ordered to identify by name each and every witness they intend to call at hearing and provide a brief narrative summary in sentence format of the testimony they expect each of those witnesses to deliver. In addition, Respondents are ordered to identify which numbered allegation in the Amended Complaint or Amended Answer with respect to which each witness will testify.[5] Respondents shall comply with these requirements within 20 days of the date of this Order or they will not be permitted to present such testimony at hearing.

This Presiding Officer also agrees with Complainant with respect to the exhibits and documents Respondents state they will introduce at hearing. Again, as previously stated in the Prehearing Order: "Copies of all documents and exhibits which it intends to introduce into evidence at the hearing" shall be included in each party's prehearing exchange. **No document will be admitted into evidence at hearing unless that document has been individually included in Respondents' Prehearing Exchange and appropriately identified and marked, as required by the Prehearing Order and Consolidated Rule § 22.19(a)(2)(ii).** The Presiding Officer again agrees with Complainant that the right afforded by the Consolidated Rules to supplement an initial prehearing exchange does not imply that a party may postpone or evade producing information in a prompt fashion, and certainly does not mean that Respondents can wait until a month before a scheduled hearing to provide the information required by the Consolidated Rules and this Presiding Officer's Prehearing Order. For these reasons, Complainant's Motion to Compel is granted and Second Respondent shall comply with these requirements within 20 days of the date of this Order.

III. Complainant's Motion for an Order, Ruling That Respondent Klockenkemper's First Set of Requests to Admit and Threat of Sanctions Against Complainant in this Matter Are Not Authorized by the Federal Rules of Civil Procedure. . . . and Finding That Respondent's First Set of Requests to Admit are Held in Abeyance, Pending Issuance of Such Order

Respondent has served Requests to Admit on Complainant pursuant to Federal Rule of Civil Procedure 36. Complainant seeks an order from the Presiding Officer that would hold such requests in abeyance until the closure of the prehearing exchange process. Respondent argues that his discovery request is authorized by the Federal Rules as well as EPA's Consolidated Rules of Practice. The Presiding Officer disagrees.

Consolidated Rule § 22.52, contained within Subpart I of the Consolidated Rules and thus applicable to this proceeding, provides in part:

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[5] While this level of detail is not normally required in a prehearing exchange, it is not apparent to the Presiding Officer what relevance the testimony of at least some of the 87 witnesses Respondents have listed would have to the issues in this proceeding.

> .... Discovery under § 22.19(e) ["Other discovery"] shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

As EPA explained when it adopted the 1999 revisions to the Consolidated Rules: "Congress intended that the non-APA process provide faster, simpler, less costly and more efficient administrative proceedings, not just an additional corps of adjudicators." 64 Fed. Reg. 40,170 (July 23, 1999). For these reasons, Complainant's Motion is denied. Nonetheless, Complainant will not be ordered to respond to Respondent's Request to Admit or to any other discovery except as authorized by the Consolidated Rules.

IV. Respondent's Motion for Order Requiring Supplementation of Prehearing Exchange by USEPA as to Respondent Mr. Klockenkemper

Second Respondent seeks an order requiring Complainant to supplement its prehearing exchange to include: (1) a statement of reasons it believes Mr. Klockenkemper violated or was personally responsible for alleged violations of SDWA; (2) certain document referred to in Complainant's prehearing exchange; and (3) documentation Complainant intends to use to support its allegations as to Second Respondent.

The Presiding Officer concludes that Complainant's Prehearing Exchange complies with the Consolidated Rules and her Prehearing Order. Thus, Second Respondent's motion is denied. Complainant's narrative summaries of its witnesses' expected testimony are sufficient to give Respondent's adequate notice as to the nature and subject matter of what each witnesses will testify to at hearing. It is anticipated that an explanation of the legal basis for Complainant's position that Second Respondent is personally liable for the SDWA violations it alleges will be provided after the hearing is concluded pursuant to Consolidated Rule § 22.26.[6] As to the sufficiency of its prehearing exchange with respect to documentary evidence, whether or not the documents Complainant has produced up to this point are sufficient to establish Second Respondent's liability again is a matter to be decided at a later point in this proceeding.[7] As for now, Complainant has complied with the Presiding Officer's Prehearing Order by producing copies of properly marked documents it plans to introduce at hearing.[8]

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[6] It is also noted that Complainant's legal theory of liability as to Second Respondent has been thoroughly briefed in response to Second Respondent's Motion to Dismiss.

[7] Complainant is, of course, subject to the same consequences as Respondents if it fails to timely provide documents it plans to introduce at hearing. *See* Consolidated Rules §§ 22.19(a), 22.2(a).

[8] The Presiding Officer notes, in addition, that Complainant has filed a Supplemental Prehearing Exchange since the filing of this motion by Second Respondent that includes at least

V. Respondent Klockenkemper's Motion for Leave to File First Supplemental Answer Amending Respondent's July 11, 2005 Answer and to Add Affirmative Defenses, *Instanter*

Second Respondent moves to amend his Answer to include five additional affirmative defenses: (1) statute of limitations; (2) selective enforcement/prosecutorial misconduct; (3) due process denial (lack of adequate notice); (4) impossibility; and (5) arbitrary and capricious enforcement/due process denial.

The Consolidated Rules provide that a respondent may amend its answer upon motion granted by the Presiding Officer. 40 C.F.R. § 22.15(e). The Federal Rules are more expansive and state that leave to amend "shall be freely given when justice so requires." FRCP 15(a). Factors in deciding a motion to amend include undue delay, undue prejudice to the opposing party and futility of amendment. *Elf Atochem North America v. United States,* 161 F.R.D. 300, 301 (E.D. Pa. 1995). At least one EPA administrative decision has allowed amendment of an answer where there appeared to be no dilatory motive, the affirmative defense was plausible and the hearing had not been scheduled. *See In the matter of Wozniak Industries, Inc.*, No. 5-EPCRA-97-051 (Feb. 4, 1998).

It does not appear that Second Respondent's motion has been unduly delayed. Although this matter has languished for some time, it cannot be said that the delay has been due to action on the part of Second Respondent. Complainant argues it will be prejudiced if Respondent is allowed to amend his answer because it will have to prepare to counter additional affirmative defenses not raised in the initial Answer, which will require additional evidence and argument that will add to the length of the hearing. Since no hearing has been scheduled in this matter, I do not consider this additional burden in and of itself to merit denial of Second Respondent's motion.

The Presiding Officer will, however, review each affirmative defense Second Respondent proposes to add to his answer for legal sufficiency to assure that the amendment is not futile:

1. Statute of Limitations (Proposed Eleventh Affirmative Defense)

It appears from the face of Second Respondent's motion that the five-year statute of limitations contained in 28 U.S.C. § 2462 may be an issue in this matter. Accordingly, Second Respondent's Motion to Amend to include the statute of limitations as an affirmative defense is granted.

2. Selective Enforcement/Prosecutorial Misconduct (Proposed Twelfth Affirmative Defense)

In order to make a prima facie selective enforcement defense in an environmental case, Second Respondent will need to establish that it has been singled out while other similarly situated

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some of the documents Second Respondent complains were not initially included, including the report of the civil investigator.

violators were left untouched and that the government selected it for prosecution "invidiously or in bad faith, i.e., based on upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [his] constitutional rights." *See United States v. Smithfield Foods, Inc.*, 969 F. Supp 975 (E.D.Va. 1997); *In the Matter of Environmental Protection Services, Inc.*, No. TSCA-03-2001-0331 (March 7, 2006). While this burden is quite high, it cannot be said that there is no possibility that Second Respondent will be able to prove this defense at hearing. Accordingly, Second Respondent will be permitted to amend his Answer to include this defense.

3. Due Process Denial/Lack of Adequate Notice (Proposed Thirteenth Affirmative Defense)

Second Respondent maintains that he had no reason to know *at the time of the alleged violations* that he could be held to be liable under SDWA for the wells at issue and that Complainant's failure to provide him such notice prejudiced him by allowing penalties to accrue against him without his knowledge or ability to mitigate the same. Second Respondent admits that Complainant issued a Notice of Violation under SDWA on January 25, 2002. The sufficiency of that notice has been put in issue by Second Respondent's Second Affirmative Defense. Generalized pleas of ignorance of the law, however, do not constitute a defense to an enforcement action. Second Respondent's motion to amend its answer to include this proposed Thirteenth Affirmative Defense is denied.

4. Impossibility (Proposed Fourteenth Affirmative Defense)

Second Respondent maintains that he was not in legal possession of two of the wells at issue at the time the violations were alleged to have occurred because another party was determined in state court litigation to have held the leases to and operated the wells at issue. Again, as discussed above in reference to Second Respondent's Sixth Affirmative Defense, impossibility is not a defense to this action, but raises issues that may be relevant to the determination of the appropriate amount of the penalty to be assessed in this matter, if any. Second Respondent will be permitted to present evidence on this issue at hearing for the limited purpose of evaluating the appropriateness of Complainant's proposed penalty. *See supra* note 3. Second Respondent will be permitted to add this defense of impossibility, and his motion to amend his answer to do so is granted.

5. Arbitrary and Capricious Enforcement/Due Process Denial (Proposed Fifteenth Affirmative Defense)

Respondent asserts that "numerous circumstances appear to be arbitrary and capricious and denials of due process by Illinois and/or the EPA" and that these actions result in this matter having been pursued "in an arbitrary and capricious manner." The Presiding Officer has carefully reviewed the allegations Second Respondent puts forth as the factual basis for this defense and concludes that each of these allegations has been raised in conjunction with one of the other fourteen defenses put forward by Second Respondent either in his Answer or in his Motion for Leave to File a Supplemental Answer. To allow this defense to proceed would

merely add redundant allegations to this proceeding. Second Respondent's motion to amend his Answer by adding this defense is denied.

VI. Respondent Klockenkemper's Motion to Strike and Exclude Exhibit 31 of Complainant's January 23, 2006, Prehearing Exchange

Complainant's Exhibit 31 appears to be a Partial Consent Order filed August 8, 2002, in the matter of Edward J. Klockenkemper v. Illinois Department of Natural Resources in the Fourth Judicial Circuit, Clinton County, Illinois, an appeal of a decision by the Department of Natural Resources finding that certain wells permitted by Rocky Well Service were abandoned. Second Respondent moves to strike Complainant's Exhibit 31 from its prehearing exchange on the grounds that its use in this proceeding is barred by Federal Rule of Evidence 408 and that EPA is bound by the terms of the Consent Order. On both counts, I disagree.

The Consolidated Rules provides:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.

40 C.F.R. § 22.22(a)(1).

Federal Rule of Evidence 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . **This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.**

Rule 408 on its face excludes compromise evidence only when it is offered to prove the validity of the claim, the invalidity of the claim, or the amount of damages. Such evidence may be admissible when it is offered for some other purpose at issue in the case. Complainant here represents that it is not proffering Exhibit 31 as proof of liability or penalty amount. Thus, Federal Rule of Evidence 408 does not bar its admission.

Second Respondent also argues that Exhibit 31 should be stricken because the document itself provides that "neither the fact that a party has entered in to this Partial Consent Order, nor any of

the facts stipulated herein, shall be used for any purpose in this or any other proceeding except to enforce the terms hereof by the parties to this agreement." Respondent argues that U.S. EPA is bound by the terms of the Partial Consent Order because "Illinois is U.S. EPA's proxy in enforcing the SDWA UIC Program in Illinois" and cites the *case In Re Zoo Med Laboratories, Inc.*, No. FIFRA-09-0886-C-98-11 (July 28, 1999) in support. That decision, however, is inapposite to this matter as it addressed the res judicata effect on an EPA enforcement action of a settlement of claims with a state agency arising under the same facts. That is simply not the issue presented here. *Zoo Med* does not stand for the proposition that a cooperative agreement between a state and EPA, in and of itself, establishes privity between the two governmental entities.

Respondent's Motion to Strike Complainant's Exhibit 31 is denied. Complainant will be permitted to use Exhibit 31, as well as Exhibits 28, 29, and 30,[9] at hearing so long as the exhibits comply with the Consolidated Rules.

ORDER

It is hereby ordered:

(1) Affirmative defenses number 1 (lack of regulatory jurisdiction because Second Respondent is not the permittee), 6 (res judicata), and 9 (failure to join indispensable party) are ordered stricken from the Answer;

(2) Affirmative defenses number 5 (mootness), 6 (impossibility/equitable estoppel) and 10 (good faith attempts to comply) are allowed to proceed only as they are relevant to the proposed penalty assessment;

(3) Respondents are ordered to file a supplemental Prehearing Exchange that complies with the Consolidated Rules, the December 5, 2005, Prehearing Order and this Order within 20 days of this Order;

(4) Complainant's Motion for an Order holding Respondent's Request to Admit in abeyance is denied;

(5) Respondent's Motion for an Order Requiring Supplementation of the Prehearing Exchange by USEPA is denied;

(6) Second Respondent's Motion for Leave to amend its answer and add affirmative defenses is

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[9] Second Respondent "reserved" his right to bring a subsequent motion to strike these exhibits on the same grounds as he moved to strike Exhibit 31. For the reasons stated above, such motion, if properly made, will be denied.

granted as to proposed affirmative defenses 11, 12 and 14, and denied in all other respects;

(7) Second Respondent is ordered to file an amended Answer containing all defenses that have not been ordered stricken within 20 days of the date of this Order;

(8) Second Respondent's Motion to Strike Complainant's Exhibit 31 is denied; and

(9) A telephone conference in this matter is scheduled for **May 24, 2006, at 2:00 p.m.** No additional motions shall be filed prior to this date. Counsel will be notified of the call-in number prior to the call. Parties are requested to jointly contact the Presiding Officer (at 312/886-3186) as soon as possible if one or more counsel is not available at this time. Counsel should be prepared to discuss any additional motions they plan to file and the location and scheduling of the prehearing conference and hearing in this matter.

IT IS SO ORDERED.

Date: May 17, 2006

Marcy A. Toney
Presiding Officer

IN THE MATTER OF Rocky Well Service, Inc., and Edward J. Klockenkemper, Respondents
Docket No. SDWA-05-2001-002

CERTIFICATE OF SERVICE

I certify that the foregoing Decision and Order on Motions, dated May 17, 2006, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Copy hand delivered to
Attorneys for Complainant:

Cynthia Kawakami
Mary McAuliffe
U.S. Environmental Protection
Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Copy by U.S. Mail,
First Class, and facsimile
(618/829-3340) to:

Richard J. Day, P.C.
Attorney at Law
413 North Main Street
St. Elmo, Illinois 62458

Copy by U.S. Mail,
First Class, and facsimile
(773/281-6227) to:

Felipe Gomez
P.O. Box 180118
Chicago, Illinois 60618

Dated: 5/17/06

By: Darlene Weatherspoon
Secretary