UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
WATERVILLE INDUSTRIES, INC.,	)	Docket No. RCRA-I-87-1086
	)	
Respondent	)	

ORDER

The United States Environmental Protection Agency, Region I (sometimes complainant or EPA) issued a complaint and compliance order on September 28, 1987 pursuant to Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a). The complaint charged Waterville Industries, Inc. (respondent) with violations of regulations found in 40 C.F.R. Part 265 and Chapter 855, Section 5E of the Hazardous Waste Management Rules of the Maine Department of Environmental Protection (MDEP). Respondent served its answer, defenses, request for hearing, and motion on October 29, 1987. On February 19, 1988,* complainant's motion to strike certain defenses in the answer was received. Respondent served a response to this motion on March 19. On April 8, an order was issued requiring complainant to set out more completely its reasons for the motion to strike, with authority, and respondent

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1/Unless otherwise indicated, all dates hereinafter are for the year 1988.

was accorded the opportunity to respond to complainant's submission. On April 22, complainant served its brief in support of its motion to dismiss respondent's defenses, and on May 6 respondent served its response. The respective arguments of the parties are well-known to them and they will not be repeated here except to the extent deemed necessary by this order.

Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and they traditionally enjoy "wide latitude" in fashioning their own rules of procedure.[2/] Although administrative agencies generally are unrestricted by the technical or formal rules of procedure which govern trials before a court, rules such as the Fed. R. Civ. P. often guide decision making in the administrative context.

A motion to strike under Fed. R. Civ. P. 12(f), hereinafter Rule, constitutes the primary procedure for objecting to an insufficient defense.[3/] In that striking a portion of a pleading is a drastic remedy and because it is often considered

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[2/] See, e.g., In the Matter of Katzon Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D. N.Y. 1982); and Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

[3/] Wright & Miller, Federal Practice and Procedure: Civil § 1380, at 782 (1969).

simply a dilatory tactic of the movant, motions under the Rule generally are received with disfavor and, according to commentators granted infrequently. A motion to strike must state with particularity the grounds therefor, and set forth the nature of relief or type of order sought. All well-pleaded facts shall be taken as admitted, but conclusions of law or of fact need not be treated in that fashion.[4] Matter outside the pleadings normally is not considered in a motion under the Rule.

A motion to strike a defense will be denied if the defense is sufficient as a matter of law or if it fairly presents a question of law or fact which the court ought to hear.[5] 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.[6]

The first affirmative defense asserted in the motion concerning the purported failure of the complaint and order to state a claim upon which relief may be granted raises both legal and factual questions not yet susceptible to resolution. The motion to strike this defense is denied.

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[4] Id. at 787.

[5] 2A Moore's Federal Practice ¶12.21[3] at 12-179 (2d ed. 1987); Wright & Miller, supra, note 3 at 801; Lundsford v. United States, 570 F.2d 221 (8th Cir. 1977); Salcer v. Envicon Equities, 744 F.2d 935, 939 (2d. Cir. 1984)

[6] Id.

Complainant's motion seeks to strike respondent's second affirmative defense, which essentially claims that the State of Maine (Maine), and not EPA, possessed jurisdiction and enforcement authority over respondent with regard to the alleged violations. EPA maintains that it has authority to enforce RCRA's requirements regardless of the extent of Maine's concurrent enforcement authority.

Briefly, as background, Maine received Phase I interim authorization on March 18, 1981 and Phase II interim authorization, Components A, B and C, on September 26, 1983. In March 1984, Maine submitted to complainant a draft application for final authorization. On February 8, 1985, Maine submitted to EPA its official application for final authorization. However, because Maine was not granted final authorization by the statutory deadline of January 31, 1986, responsibility for the hazardous waste program reverted to EPA as required by law.7/

Respondent relies mistakenly upon lanugage in Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986) to support its contention that complainant is without jurisdictional authority. Similar arguments have been considered and rejected in numerous administrative and judicial

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7/ 52 Fed. Reg. 30192 (August 13, 1987). EPA granted final authorization to Maine effective May 20, 1988. 53 Fed. Reg. 16264 (May 6, 1988).

decisions.[8/] A system of dual enforcement is envisioned under RCRA. This means that even where a state has final authorization, EPA has the option of instituting enforcement proceedings under either federal or state law. Despite respondent's claim to the contrary, it is also found that complainant provided Maine with proper notice under RCRA 3008(a)(2), 42 U.S.C. § 6928(a)(2). Complainant's motion to strike respondent's second defense is granted because the insufficiency of the defense is clearly apparent and there is no question of fact with regard to satisfaction of the notice requirement by complainant.

Respondent's third and fourth affirmative defenses are that the subject lagoons were and are exempt from the requirements of RCRA; and by virtue of the lagoons exemption EPA is estopped from bringing the complaint. The motion to strike these defenses is denied because there are substantial questions of fact and law regarding the subject lagoons which cannot be resolved prior to an evidentiary hearing.

[8/] United States of America v. Conservation Chemical of Illinois, and Norman B. Hjersted (Conservation Chemical), 660 F. Supp. 1236 (N.D. Ind. 1987); In the Matter of Inland Metals Refining Co., Docket No. V-W-85-R-59 (Order Denying Motion to Dismiss, November 5, 1987); In the Matter of SCA Chemical Services, Inc., Docket No. V-W-87-R-056 (Order Denying Motion to Dismiss, November 19, 1987); In the Matter of Triangle Metallurgical, Inc. and L.C. Metals, Inc., Docket No. RCRA-V-W-87-R-009 (Order Denying Motion to Dismiss, December 9, 1987); and In the Matter of Kimberly-Clark Corporation, Docket No. RCRA-88-04-R (Order Denying Motion to Dismiss, April 8, 1988).

Respondents fifth affirmative defense is that any legal obligations pertaining to closure of the subject lagoons are obligations of prior owners of the facility. It is argued that RCRA does not furnish a cause of action against an "innocent purchaser" of an "inactive facility" who never held an interim license for the facility. Complainant seeks to strike this defense without providing any statutory or judicial authority. Complainant, however, disagrees with respondent's assertion that 40 C.F.R. § 265.1 provides such an "innocent purchaser" defense. The motion to strike this affirmative defense is denied because its insufficiency is not clearly apparent and is the proper subject of further legal and factual development.

Complainant's motion seeks to strike respondent's sixth affirmative defense that complainant is barred from bringing this complaint and order by the doctrine of laches. This equitable defense to liability raised by respondent cannot be asserted against the government when it acts in its sovereign and governmental capacity to protect public health and safety.9/ Indeed, no court has ruled that the doctrine of laches bars an enforcement action.10/ The motion to strike the sixth affirmative defense is granted.

9/Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125 (1919); United States v. Weintraub, 613 F.2d 612 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980).

10/Connecticut Fund for Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1413 (D. Conn. 1987).

Respondent asserts, as its seventh affirmative defense, that the complaint and order are barred by the five-year statute of limitation imposed by 28 U.S.C. § 2462, which applies to civil fines, penalties, or forfeitures, pecuniary or otherwise. Respondent further asserts that any claims pertaining to closure of the facility accrued no later than October 6, 1981 when First Hartford Corporation ceased being the operator of the facility. Complainant states that there is no statute of limitations bar to this action, and cites Conservation Chemical, supra, note 8, in support of the continuing obligations of the owner of a hazardous waste disposal facility. Respondent, however, correctly distinguishes that case from the facts of the instant one. RCRA contains no statute of limitations, and 28 U.S.C. § 2462 constitutes the relevant federal statute of limitations applicable to an enforcement action brought by complainant under RCRA § 3008(a).[11/] The conclusion that the five-year federal statute applies to the instant case raises the issues of when the statute of limitations began to run and when it was tolled in this case. At a minimum, the statute of limitations was tolled by the filing of the complaint on September 29, 1987. The statute did not begin to run when First Hartford Corporation ceased being the owner of

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[11/] Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987).

the facility. The statute of limitations began to run when the alleged violations were first discovered[12/] on December 17, 1986 when complainant's representatives conducted an inspection of the facility. Complainant's motion to strike the seventh affirmative defense is granted.

IT IS ORDERED that:

1. Complainant's motion to strike respondent's affirmative defenses numbered 2, 6 and 7 is GRANTED.

2. Complainant's motion to strike respondent's affirmative defenses numbered 1, 3, 4 and 5 is DENIED.

In its answer respondent moved that the presiding officer order First Hartford Corporation and the Finance Authority of Maine be joined as respondents in this proceeding. (Answer at 8) For the reasons stated in its submission of November 16, 1987, complainant opposed the motion. In the order of April 8, the parties were advised that this motion would be ruled upon at the time other questions were decided. The Consolidated Rules of Practice, 40 C.F.R. Part 22, make no provision for

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[12/] Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284 (N.D. N.Y. 1986).

joinder and the undersigned, (even if he were so inclined and he is not) is without authority to consider this motion. IT IS FURTHER ORDERED that respondent's motion for joinder be DENIED.

Frank W. Vanderheyden
Administrative Law Judge

Dated: June 23, 1988

IN THE MATTER OF WATERVILLE INDUSTRIES, INC., Respondent,
Docket No. RCRA-I-87-1086

Certificate of Service

I certify that the foregoing Order dated June 23, 1988 was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Lisa Newkirk
Regional Hearing Clerk
U. S. Environmental Protection Agency
Region I
J. F. Kennedy Federal Building
Boston, MA 02203

Copy by Regular Mail to:

Attorney for Complainant:

Charles Bering, Esquire
Assistant Regional Counsel
U. S. Environmental Protection Agency
Region I
J. F. Kennedy Federal Building
Boston, MA 02203

Attorneys for Respondent:

Daniel E. Boxer, Esquire
Daniel W. Emery, Esquire
Pierce, Atwood, Scribner, Allen, Smith & Lancaster
One Monument Square
Portland, ME 04101

Doris M. Thompson
Secretary

Dated: June 23, 1988