UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Century Aluminum of West Virginia, Inc.,	)	
& Ohio Valley Insulating Company, Inc.,	)	Docket No. CAA-III-116
	)	
Respondents	)	

ORDER GRANTING COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES

This matter arises under Sections 113(a)(3) and (d) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7413(a)(3) and (d). The complaint charges that respondents failed to ensure that regulated asbestos-containing material remained wet until collected, and thus violated 40 C.F.R. 61.145(c)(6)(i) and Section 112 of the CAA, 42 U.S.C. § 7412.

The U.S. Environmental Protection Agency ("EPA") has filed a motion to strike Century Aluminum's ("Century") affirmative defenses two, three and four, as well as Ohio Valley Insulating Company's ("OVI") sole affirmative defense. Century filed no reply to this motion. OVI filed a reply out of time and that reply was stricken in a separate order. For the reasons set forth below, EPA's motion to strike respondents' affirmative defenses is granted.

Discussion

A. The Motion To Strike

EPA makes its motion to strike under 40 C.F.R. 22.16, which authorizes a party to make a written motion in an action. Under Fed. R. Civ. P. 12(f), which complainant submits provides an appropriate standard in the absence of any specific criteria supplied by the Consolidated Rules of Practice, a court may strike "any insufficient defense or any redundant, immaterial [or] impertinent . . . matter." 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). If the defense depends on disputed questions of law or fact, the motion to strike should be denied. *Oliner v. McBride's Industries, Inc.*, 106 F.R.D. 14, 17 (S.D.N.Y. 1985). However, if the defense is insufficient as a matter of law, a court may strike it. *Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1057 (5th 1982), *reh'g denied*, 683 F.2d 1373 (1982), *cert. denied*, 459 U.S. 1105 (1983).

B. Respondents' Affirmative Defenses

Century's second affirmative defense, that EPA has not stated a claim upon which relief can be granted, is insufficient as a matter of law and will be stricken. An examination of the complaint shows it to allege a valid cause of action. Section 112 of the CAA requires EPA to publish a list of air pollutants determined to be hazardous and, where necessary, to establish work practice standards for each listed hazardous pollutant. Pursuant to Sections 112 and 114 of the CAA, EPA promulgated a National Emission Standard for Asbestos ("the Asbestos NESHAP"). 40 C.F.R. Part 61, Subpart M. The standard allegedly violated in this case, 40 C.F.R. 61.145(c)(6)(i), is part of the Asbestos NESHAP. EPA has the authority to enforce the provisions of the Asbestos NESHAP pursuant to Sections 113(a)(3) and (d) of the Clean Air Act. Accordingly, Century's claim that EPA has failed to state a claim upon which relief can be granted has no merit.

As its third affirmative defense, Century asserts that only OVI, the contractor, can be held responsible for any violations that might be found in this case. Century asserts that as the owner of the involved facility, it contracted with OVI to perform the asbestos removal and that it took reasonable steps to monitor OVI's performance. Moreover, Century maintains that EPA policy dictates that the Agency exercise its discretion and, under the circumstances of this case, not seek a penalty from the owner of the facility.

Century's defense is inconsistent with both the text of the regulations at issue and existing case law. The regulation Century is charged with violating applies to "each owner or operator of a demolition or renovation activity." 40 C.F.R. 61.145(a). "Owner or operator" is defined as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. 61.141. Thus, the applicable regulations identify Century, the owner of the facility at issue, as a proper party to this action. *See United States v. Geppert Bros., Inc.*, 638 F. Supp. 996 (E.D.Pa. 1986) (striking defense that regulations did not apply to owner where owner contracted with another party for asbestos removal). In addition, holding both owners and contractors responsible is consistent with the purposes of the CAA. Not allowing property owners to shield themselves from liability simply because they contract with another party to handle asbestos removal ensures that they will act responsibly with respect to asbestos removal operations on their property. *Id.* at 1000.

Century's argument as to EPA policy is similarly without merit. While Century makes reference to several EPA documents in support of its position, complainant, in its motion to strike, quotes extensively from these documents. The passages quoted by EPA directly contradict Century's assertion that it is Agency policy not to pursue

the owner of a facility where the Asbestos NESHAP violation is committed by a third party contractor. Moreover, there has been no showing by respondent that EPA's decision to seek a civil penalty from Century is anything other than a valid exercise of its prosecutorial discretion in the enforcement of the Clean Air Act. Accordingly, Century's third defense is insufficient as a matter of law and will be stricken.

Finally, both Century and OVI raise the affirmative defense of laches. This defense must be viewed against the background that laches generally does not apply to the Federal government when the government is acting in its sovereign capacity to protect the public welfare or to enforce a public right. *See Costello v. United States*, 365 U.S. 265, 281 (1961).

Here, respondents' claims of prejudice are insufficient to support a laches defense. Essentially, respondents argue that evidence was lost when the asbestos at issue was disposed of by EPA. Respondents also suggest that the passage of more than 1 year and 9 months from the time that EPA conducted its inspection to the time that it filed the present complaint unduly inhibits their ability to prepare a defense.

Respondents' general and unsupported claims that witnesses may be difficult to locate and that their recollections may be compromised by the passage of time are unpersuasive. Similarly unpersuasive is the assertion that the asbestos samples taken by EPA are no longer available.[(1)] Finally, respondents' argument that EPA unjustifiably delayed the filing of the complaint is likewise without merit. It is hard to conceive that EPA should be precluded from pursuing this case because approximately 1 year and 9 months passed until the complaint was filed, particularly given the fact that the applicable statute of limitations is five years.[(2)]

Accordingly, for the foregoing reasons, EPA motion to strike is *granted* and the affirmative defenses raised by Century and OVI are stricken as being insufficient as a matter of law.

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Carl C. Charneski
Administrative Law Judge

Issued: June 25, 1999
Washington, D.C.

1. It is worth noting that the asbestos samples taken by EPA were collected from material in the respondents' possession in the first place. Nothing prevented the respondents from taking their own samples. Indeed, EPA asserts that it provided OVI with split samples. As noted, OVI has not filed a response to dispute this assertion. In any event, at the hearing respondents may still challenge the manner in which EPA collected the samples and analyzed them for asbestos content.

2. While the CAA itself does not specify a limitations period, it has been held that the five-year general statute of limitations found at 28 U.S.C. § 2462 applies to actions such as the instant one. *See 3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994); *United States v. Walsh*, 8 F.3d 659, 662 (9th Cir. 1993)(applying 28 U.S.C. § 2462 to action under the CAA), *cert. denied*, 511 U.S. 1081.