UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Eagle Brass Company,	)	**Docket No. EPCRA-03-2015-0127**
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND MOTION TO STRIKE AFFIRMATIVE DEFENSES

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA"), Director of the Land and Chemicals Division, Region III ("Complainant"), initiated this proceeding on June 4, 2015, by filing a Complaint ("Compl.") against Eagle Brass Company ("Respondent"), pursuant to the authority granted in 42 U.S.C. § 11045. The Complaint alleges three counts of violation of the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. §§ 11001-11050, arising from Respondent's alleged failure to submit a toxic chemical release form for copper for the years 2010, 2011, and 2012. For these alleged violations, the Complaint seeks the imposition of civil penalties against Respondents in the total amount of $38,360.[1]

Respondent, through counsel, filed an Answer on June 22, 2015. In its Answer, Respondent denies each of the three counts of violation alleged in the Complaint, and requests that the penalty proposed by Complainant be denied in its entirety. Respondent further asserts 17 self-identified affirmative defenses in its Answer.

The parties participated in this Tribunal's Alternative Dispute Resolution process from July 17, 2015, through August 20, 2015, on which date I was designated to preside. On August 27, 2015, I issued a Prehearing Order directing the parties to file and serve prehearing exchanges. Consistent therewith, Complainant submitted an Initial Prehearing Exchange on October 6, 2015, with Complainant's proposed exhibit index ("CX IDX") and proposed exhibits ("CX") 1-23; Respondent submitted its Prehearing Exchange on October 30, 2015, with Respondent's proposed exhibits ("RX") 1-4; and Complainant filed a Rebuttal Prehearing Exchange on November 5, 2015.

[1] Specifically, Complainant proposes a penalty of $7,090 for Count One; $24,080 for Count Two; and $7,090 for Count Three. Compl. at 6.

Prior to filing its prehearing exchanges, Complainant filed a Motion for Accelerated Decision as to Liability and to Strike Affirmative Defenses ("Comb. Mots.") on September 2, 2015, including both Complainant's Motion and Memorandum of Law in Support of Accelerated Decision as to Liability ("Motion for Partial Accelerated Decision"), and Complainant's Motion to Strike Affirmative Defenses ("Motion to Strike").[2] Accompanying its Motion for Accelerated Decision as to Liability and to Strike Affirmative Defenses, Complainant additionally filed an Affidavit of Craig Yussen ("Yussen Aff.")[3] and exhibits ("CMX") 1-14 in support of such motion. Respondent filed a Response to Complainant's Motion for Accelerated Decision as to Liability and to Strike Affirmative Defenses ("Response" or "Resp.") on September 17, 2015,[4] along with exhibits ("RMX") 1-5 in opposition.[5] Complainant responded by filing a Reply Brief in Support of Complainant's Motion for Accelerated Decision as to Liability and to Strike Affirmative Defenses ("Reply") and a Reply Affidavit of Craig Yussen ("Reply Affidavit" or "Reply Aff.") on September 23, 2015.

Both Complainant's Motion for Partial Accelerated Decision, and Complainant's Motion to Strike, are considered and decided in this Order, as set forth below.

II. FACTUAL BACKGROUND

Respondent is a privately owned company, which owned and operated a manufacturing operation located on 1243 Old Bernville Road, in Leesport, Pennsylvania ("Manufacturing Operation"), at all times relevant to this proceeding. Compl. ¶¶ 5-6; Answer ¶¶ 5-7. During each of the calendar years of 2010, 2011, and 2012, Respondent had ten or more full-time employees at its Manufacturing Operation. Compl. ¶ 8; Answer ¶ 8. Respondent's Manufacturing Operation had a primary Standard Industrial Classification ("SIC") Code of 3331, falling between Major Group SIC Codes 20 and 39 (as in effect on July 1, 1987), for the calendar years of 2010, 2011, and 2012. Compl. ¶¶ 9-10; Answer ¶¶ 9-10.[6]

The Complaint alleges that Respondent's Manufacturing Operation is a "facility" under 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3, Compl. ¶ 7, and that Respondent processed more than 25,000 pounds of copper at its Manufacturing Operation in the calendar years of 2010,

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[2] Although titled as a singular motion, Complainant's Motion for Accelerated Decision as to Liability and to Strike Affirmative Defenses contains two motions, as noted above.

[3] The Affidavit of Craig Yussen filed by Complainant contains enumerated paragraphs that are non-consecutively numbered and reflect multiple identically numbered paragraphs. To avoid confusion, citations to this document in this Order cite the enumerated paragraphs by their natural number within the document, rather than the number assigned in the document.

[4] Pages 5-11 of Respondent's Response contain the same material as reflected in pages 2-8 of Respondent's Prehearing Exchange.

[5] It is notable that RMX 5 is an affidavit from Jonathon Anderton, Vice President of Operations for Respondent.

[6] In its Answer, Respondent admitted that the Manufacturing Operation "had a primary SIC Code of 3331 during each of the calendar years 2010, 2011, and 2012." Answer ¶ 9; Compl. ¶ 9. However, it is notable that this admission is in apparent conflict with a statement in Jonathon Anderton's affidavit in RMX 5 that Respondent's primary SIC Code is 7440020. RMX 5 at 2.

2011, and 2012, Compl. ¶¶ 14, 18, 22. The Complaint asserts that the EPA conducted a review of Respondent's compliance with the requirements of Section 313 of EPCRA, 42 U.S.C. § 11023, and regulations at 40 C.F.R. Part 372, from June 3, 2014, through July 17, 2014. Compl. ¶ 13. The Complaint alleges that Respondent violated 42 U.S.C. § 11023 and 40 C.F.R. § 372.30 by failing to submit a completed Form R, toxic chemical release form, for copper for the calendar years of 2010 (Count One), 2011 (Count Two), and 2012 (Count Three).[7] Specifically, the Complaint alleges that Respondent did not submit a completed Form R for copper processed at its Manufacturing Operation in the calendar years of 2010, 2011, and 2012, to the Administrator of the EPA ("Administrator") or the Commonwealth of Pennsylvania by July 1st of the year following each of these respective calendar years, thereby violating 42 U.S.C. § 11023 and 40 C.F.R. § 372.30. Compl. ¶¶ 15-16, 19-20, 23-24.

In its Answer, Respondent denies that its Manufacturing Operation is a "facility" under 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3, Answer ¶ 7, and specifically denies that it processed more than 25,000 pounds of copper at its Manufacturing Operation in the calendar years of 2010, 2011, and 2012, Answer ¶¶ 14, 18, 22. Respondent instead asserts in its Answer that it processed an alloy that contained nickel and copper, and that it properly and timely reported processing the alloy to the EPA. Answer ¶¶ 14, 18, 22. The Answer further states that Respondent submitted Form Rs, fully and accurately reporting the amount of alloy processed, to the Administrator and/or the Commonwealth of Pennsylvania for the calendar years of 2010, 2011, and 2012, by July 1 of the year following each of these respective calendar years. Answer ¶¶ 15, 19, 23. Respondent denies that it has violated 42 U.S.C. § 11023 and 40 C.F.R. § 372.30, and demands strict proof of such allegations from Complainant at the hearing. Answer ¶ 24. Respondent further asserts 17 enumerated affirmative defenses to liability and penalty in its Answer, including equitable remedies and constitutional challenges.[8]

III. COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

A. Standard of Review

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice"). With regard to accelerated decision, the Rules of Practice provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

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[7] Although Complainant alleges in the Complaint that Respondent violated 40 C.F.R. § 372.30, it indicates in its Reply that the alleged violations of 42 U.S.C. § 11023 are the basis for the proposed penalty sought. *See* Reply at 3.

[8] Notably, as discussed below, the 17 self-identified affirmative defenses enumerated in Respondent's Answer include affirmative defenses, as well as material misidentified as affirmative defenses.

40 C.F.R. § 22.20(a). As the standard for accelerated decision under 40 C.F.R. § 22.20(a) is reflective of the standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), jurisprudence relating to Rule 56 provides applicable guidance for motions for accelerated decision. *See P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Accordingly, the Environmental Appeals Board has consistently relied upon Rule 56 and jurisprudence regarding summary judgment for guidance in adjudicating motions for accelerated decision under the Rules of Practice. *See, e.g., Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The governing substantive law determines which facts are material for summary judgment, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Id.*

Rule 56 requires a party asserting that a fact cannot be or is genuinely in dispute to support its assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The party moving for summary judgment bears the initial responsibility of informing the tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

In considering a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. When contradictory inferences may be drawn from the evidence, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, in opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49.

Applying the jurisprudence for summary judgment to the present matter, Complainant, as the party moving for accelerated decision as to liability, bears the initial responsibility of informing this Tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact with regard to liability. *See Celotex Corp.*, 477 U.S. at 323. In considering Complainant's Motion for Partial Accelerated Decision, the evidence of Respondent, the non-moving party, is to be believed, and all justifiable inferences are to be drawn in Respondent's favor. *See Anderson*, 477 U.S. at 255.

B. Governing Substantive Law

Section 313 of EPCRA imposes reporting requirements on owners and operators of facilities that (1) have ten or more full-time employees; (2) fall within SIC Codes 20 through 39 (as in effect on July 1, 1985); and (3) manufactured, processed, or otherwise used a listed toxic chemical in quantities exceeding the specified toxic chemical threshold quantity during the preceding calendar year. 42 U.S.C. § 11023 (a)-(b). The Section 313 reporting requirements require the owner or operator of a covered facility to complete and submit a toxic chemical release form for each listed toxic chemical manufactured, processed, or otherwise used in quantities exceeding the specified toxic chemical threshold quantity to the Administrator and designated state officials annually, by July 1, for the preceding calendar year. 42 U.S.C. § 11023(a).

EPCRA directs the Administrator to publish a uniform toxic chemical release form for facilities covered by the Section 313 reporting requirements, 42 U.S.C. § 11023(g), and further empowers the Administrator to prescribe regulations necessary to carry out EPCRA, 42 U.S.C. § 11048. Pursuant to this authority, the EPA published Form R as a uniform toxic chemical release reporting form for purposes of Section 313 of EPCRA, *see* 40 C.F.R. § 372.85, and otherwise set forth regulations pertaining to the use of this form, *see generally* 40 C.F.R. Part 372 (setting forth regulations relevant to toxic chemical release reporting).

Relevant to this proceeding, copper and nickel were listed toxic chemicals subject to Section 313 reporting requirements in the years of the alleged violations. 40 C.F.R. § 372.65; *see also* 42 U.S.C. § 11023(c)-(d) (discussing the toxic chemicals subject to Section 313 reporting requirements and empowering the Administrator to add or delete a chemical from this list). During the years relevant to this matter, the threshold amount of a toxic chemical manufactured or processed at a facility requiring reporting under Section 313 of EPCRA was 25,000 pounds of the toxic chemical per year. 42 U.S.C. § 11023(f). The term "process," is defined by EPCRA as:

> the preparation of a toxic chemical, after its manufacture, for distribution in commerce--
>
> > (I) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or
> >
> > (II) as part of an article containing the toxic chemical.

42 U.S.C. § 11023(b)(1)(C)(ii). Regulations implementing EPCRA further specify that the term "process" applies "to the processing of a toxic chemical contained in a mixture or trade name product." 40 C.F.R. § 372.3.

The EPCRA regulations provide that, for purposes of Section 313 reporting, an owner or operator is required to report a listed toxic chemical that it knows is present as a component of a mixture it receives from another, if the chemical is processed in excess of the threshold quantity at the facility as part of that mixture. 40 C.F.R. § 372.30(b)(1). Pursuant to the regulations, a "mixture" is "any combination of two or more chemicals, if the combination is not, in whole or in part, the result of a chemical reaction." 40 C.F.R. 372.3. An owner or operator is found to know that a toxic chemical is present as a component of a mixture, under the regulations, if it has been told the chemical identity of the listed chemical or has been told by the supplier of the mixture that the mixture contains a toxic chemical subject to Section 313 of EPCRA. 40 C.F.R. § 372.30(b)(2).

The EPCRA regulations further set forth how an owner or operator shall calculate the quantity of a toxic chemical that is a component of a mixture for purposes of determining whether that toxic chemical was processed in a quantity exceeding the threshold amount. 40 C.F.R. § 372.30(b)(3). If an owner or operator knows the specific chemical identity of the toxic chemical and the specific concentration at which it is present in the mixture, the regulations provide that it shall calculate the weight of the toxic chemical processed with this information. 40 C.F.R. § 372.30(b)(3)(i). If an owner or operator knows the specific chemical identity of the toxic chemical and the upper bound concentration of the toxic chemical in the mixture, but otherwise does not know the specific concentration at which the toxic chemical is present in the mixture, it shall assume that the toxic chemical is present in the mixture at the upper bound concentration to calculate the weight of the toxic chemical processed. 40 C.F.R. § 372.30(b)(3)(ii).

EPCRA authorizes the Administrator to assess a civil penalty to any person, other than a governmental entity, who violates any requirement of Section 313. 42 U.S.C. § 11045(c). A civil penalty may be assessed for each violation of a Section 313 requirement. 42 U.S.C. § 11045(c)(1). The maximum civil penalty for a violation of a Section 313 requirement, set at $25,000 in EPCRA, 42 U.S.C. § 11045(c)(1), has been increased for inflation $37,500 for the relevant period, 40 C.F.R. § 19.4.

C. Parties' Arguments

1. Complainant's Motion for Partial Accelerated Decision

In moving for accelerated decision as to liability, Complainant asserts that it has established a *prima facie* case as to Respondent's liability. Comb. Mots. at 23-24.[9] In support of this assertion, Complainant argues that it has established that (1) Respondent is within the jurisdiction of EPCRA, (2) that Respondent processed the toxic chemical copper in excess of the

[9] This assertion is made in a conclusion following Complainant's Motion to Strike. However, this conclusion appears to apply to both Complainant's Motion for Partial Accelerated Decision and its Motion to Strike. *See* Comb. Mots. at 23-24.

threshold amount of 25,000 pounds for each of the calendar years of 2010, 2011, and 2012, and (3) Respondent failed to file a Form R with the EPA and the state for copper for these years by July 1 of the year following each respective calendar year at issue. Comb. Mots. at 23-24. Furthermore, Complainant argues that Respondent's asserted affirmative defenses fail as a matter of law, and do not shield Respondent from liability for the allegations asserted in the Complaint. Comb. Mots. at 23-24.

Complainant provides support for the factual assertions made in furtherance of its Motion for Partial Accelerated Decision by providing an affidavit from Craig Yussen ("Yussen"), the primary investigator for this matter, *see* Yussen Aff. ¶ 3 (identifying Yussen as the primary investigator), and numerous exhibits, CMX 1-14. Notably, Complainant's Motion for Partial Accelerated Decision relies heavily on the undated responses of Johnathon Anderton, Vice President of Operations for Respondent, to a Request for Information Letter from the EPA, dated June 3, 2014 ("Response to RFI"), submitted in CMX 2. Based upon Respondent's Answer and the Response to RFI, Complainant asserts that for the relevant time period, Respondent's Manufacturing Operation employed 47 employees, and had a SIC code of 3331. Comb. Mots. at 8. Additionally, based upon admissions in Respondent's Answer, Complainant asserts that Respondent processes an alloy consisting of copper and nickel at its Manufacturing Operation. Comb. Mots. at 8 (citing Answer ¶ 14). Complainant provides that copper is a toxic chemical for which EPCRA Section 313 reporting is required, and states that EPA guidance provided to the regulated community, including instructions for completion of Form R for calendar years 2010, 2011, and 2012, advises that alloys are treated as mixtures for purposes of EPCRA Section 313 reporting. Comb. Mots. at 11.

In calculating the amount of copper Respondent's Manufacturing Operation processed in the copper-nickel alloy for each of the relevant years, Complainant relies upon the calculations of Yussen, which are based upon data contained within the Response to RFI, and material test reports reportedly provided by Respondent. Comb. Mots. at 8-9; *see also* Yussen Aff. ¶¶ 11, 13-14 (discussing calculations)[10]; CMX 6 (referenced material test reports). In his calculations, Yussen determined the amount of the copper-nickel alloy processed at the Manufacturing Operation in the relevant years from information provided in the fifth response of the Response to RFI, which corresponds to a request for "[t]hroughput data of all raw materials containing chemicals subject to EPCRA Section 313 for years 2010, 2011, and 2012." Yussen Aff. ¶¶ 11, 13; CMX 2 at 1, 3. The aforementioned response reflects the following information: "2010 – 363, 365 / 2011 – 561,482 / 2012 – 403,210." CMX 2 at 3. Although neither the aforementioned response, nor the applicable request, specify the metric of the throughput data, Yussen's calculations suggest that he interpreted the values in the response to be reported in pounds. *See* CMX 2 at 1, 3 (fifth request and response in the Response to RFI); Yussen Aff. ¶¶ 11, 13-14 (using data from the fifth response of the Response to RFI to find the weight of copper processed in pounds). Likewise, although the fifth response of the Response to RFI does not specify that it is referring to the throughput of the copper-nickel alloy exclusively, Yussen used the values in this response as the total amount of the copper-nickel alloy processed for the relevant years. *See* Yussen Aff. ¶¶ 11, 13-14.

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[10] *See supra* note 3, explaining paragraph citations for Yussen's Affidavit.

Notably, both Complainant, in its Motion for Partial Accelerated Decision, and Yussen, in his affidavit, indicate that the Response to RFI, which they relied upon to determine the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation, contains errors. *See* Comb. Mots. at 8-9 n.2 (noting suspected errors in the Response to RFI, and specifically discussing "an obvious error" regarding the fourth and fifth responses); Yussen Aff. ¶ 10 ("Respondent's RFI response contained some errors."). Complainant and Yussen note that values provided in the fourth response of the Response to RFI, corresponding to a request for "[a] list of all chemicals and amounts (lbs.) subject to EPCRA Section 313 manufactured (either directly or incidentally), processed, or used at the facility during the years 2010, 2011, and 2012," exceed the values in the aforementioned fifth response regarding the throughput data of all raw materials containing chemicals subject to EPCRA Section 313 for the relevant years. Comb. Mots. at 8-9 n.2; Yussen Aff. ¶ 11; CMX 2 at 3. Complainant concludes that the difference between the values in the fourth and fifth response indicates that "there is an obvious error," as it asserts that these responses indicate greater materials manufactured, processed, or otherwise used, than the raw materials. Comb. Mots. at 8-9 n.2. Nevertheless, Complainant concludes that it took "a conservative approach," in using the lower values in the fifth response of the Response to RFI for the amount of the copper-nickel alloy processed. Comb. Mots. at 8-9 n. 2.

In order to determine the percentage of copper in the copper-nickel alloy processed by Respondent at its Manufacturing Operation for the relevant years, Yussen relied upon material test reports dated July 15, 2013; June 5, 2014; June 16, 2014; and June 24, 2014, which he asserts were provided by Respondent. Yussen Aff. ¶ 13; CMX 6. Indicating that the aforementioned material test reports contain differing percentages of copper, Yussen reported that he used the material test report "which stated the lowest percentage of copper in the alloy" in calculating the total amount of copper processed by Respondent for the relevant years. Yussen Aff. ¶ 13. Although Yussen, in his affidavit, does not more explicitly state the percentage of copper he utilized in his calculation, Complainant indicates that the percentage used by Yussen in his calculation is 54.8 percent. Comb. Mots. at 9.[11] Applying this percentage of copper to the values provided in the fifth response of the Response to RFI as the amount of the copper-nickel alloy processed in pounds, Yussen found that Respondent processed 199,124 pounds of copper in 2010; 307,692 pounds of copper in 2011; and 220,959 pounds of copper in 2012. Yussen Aff. ¶¶ 13-14. Complainant adopts Yussen's calculations in its Motion for Partial Accelerated Decision, Comb. Mots. at 9, and concludes that Respondent processed copper in excess of the threshold amount of 25,000 pounds for each of the calendar years of 2010, 2011, and 2012, Comb. Mots. at 24.

Complainant states that based upon information provided along with the Response to RFI, Respondent received a Material Safety Data Sheet ("MSDS") related to the copper-nickel alloy from PMX Industries, Inc., dated December 15, 2004, and submitted in CMX 5. Comb. Mots. at 9, 12; CMX 5. Complainant notes that this MSDS, which addresses various copper-nickel-zinc alloys supplied by PMX Industries, Inc., denotes that these alloys contain copper and

[11] Notably, in its Motion for Partial Accelerated Decision, Complainant erroneously states that the referenced material test reports provide two differing percentages of copper for the copper-nickel alloy. Comb. Mots. at 9. Review of these material test reports actually reflect four different percentages of copper, ranging from 54.8 percent (from a test dated September 8, 2013) to 96.8480 percent (from a test dated July 15, 2013). CMX 6.

nickel, and lists copper and nickel as toxic chemicals subject to reporting requirements. Comb. Mots. at 9-10; *see also* CMX 5. However, Complainant states that Respondent did not file a Form R for copper for the calendar years 2010, 2011, 2012, with the EPA and the state by July 1 of the year following each of these respective years. Comb. Mots. at 24. In support of this assertion, Complainant cites to the affidavit of Yussen and EPA records submitted in CMX 10. Comb. Mot. 10. In his affidavit, Yussen asserts that he reviewed a public EPA database, and determined that "Respondent had not filed a Form R for copper to EPA for calendar years 2010, 2011, and 2012 on or before the statutory deadlines for submitting the forms." Yussen Aff. ¶ 16. Yussen further indicates that Respondent filed "corrected Form Rs" in November 2014, following initial enforcement contact, as reflected in the records in CMX 10. Yussen Aff. ¶ 18.[12] Complainant acknowledges that Respondent submitted Form Rs for copper for the calendar years 2010, 2011, and 2012, in November 2014, after initial enforcement contact in October 2014, and Complainant provided these Form Rs in CMX 9. Comb. Mots. at 9-10 nn.3-4; CMX 9.

Aside from Form Rs for copper, Complainant acknowledges that Respondent filed Form Rs for nickel for the years 2011 and 2012, and Complainant provided these Form Rs in CMX 8. Comb. Mots. at 10; CMX 8 at 1-16. Review of the Form Rs in CMX 8, indicates that Jonathon Anderton certified and electronically signed a Form R for nickel at Respondent's Manufacturing Operation for the 2011 calendar year on October 8, 2012, and likewise certified and electronically signed a Form R for nickel at Respondent's Manufacturing Operation for the 2012 calendar year on June 6, 2014. CMX 8 at 1-16. Complainant states that Respondent did not submit a Form R for any toxic chemical for the calendar year of 2010, until November 2014. Comb. Mots. at 10.

Complainant concludes that the aforementioned evidence supplied in support of its Motion for Partial Accelerated Decision establishes a *prima facie* case as to Respondent's liability for the charged violations. *See* Comb. Mots. at 15, 23-24. Addressing Respondent's arguments against liability in its Motion for Partial Accelerated Decision, Complainant suggests that Respondent's arguments against liability are premised on a distinction that Respondent processed an alloy, not copper or nickel, and its assertion that it filed Form Rs for nickel for 2010, 2011, and 2012, which addressed the processed alloy. Comb. Mots. 13-14. In response to such arguments, Complainant suggests that the copper-nickel alloy is a mixture, and that it was necessary for Respondent, as an owner or operator, to calculate the amount of the toxic chemical components of this mixture and complete a Form R for each toxic chemical subject to EPCRA reporting requirements. Comb. Mots. at 8, 11-12. With regard to the 2010 calendar year, Complainant states that Respondent did not submit a Form R for any toxic chemical until after initial enforcement contact with the EPA in October 2014. Comb. Mots. at 10. Complainant further asserts that Respondent's treatment of the copper-nickel alloy as nickel for Form R reporting for the remaining years at issue,

> resulted in inaccurate reporting of its processing of the toxic chemical for nickel, and no reporting of its processing of the toxic chemical copper, thereby defeating the purpose of EPCRA to inform the general public and the communities surrounding covered facilities about releases of toxic

[12] The EPA records submitted in CMX 10 reflect that Form Rs for copper were filed for the years of 2010, 2011, and 2012, in November, 2014, but notably do not specify the entity associated with these forms. CMX 10 at 1.

chemicals, to assist research, [and] to aid in the development of regulations, guidelines and standards.

Comb. Mots. at 14.

Except for addressing Respondent's arguments relating to treatment of the copper-nickel alloy as nickel in Form R reporting, Complainant notably does not otherwise address the defenses of Respondent in its Motion for Partial Accelerated Decision, including the numerous self-identified affirmative defenses asserted by Respondent in its Answer. *See* Comb. Mots. 6-14. However, in its simultaneously filed Motion to Strike, Complainant notably asserts that "all of Respondent's affirmative defenses fail as a matter of law." Comb. Mots. at 15.

2. Respondent's Response

In its Response, Respondent argues that Complainant's Motion for Partial Accelerated Decision "should be denied because a genuine issue of material fact exists as to whether the Respondent failed to report." Resp. at 5. Respondent states that it processed an alloy containing nickel and copper, and asserts that for each year at issue, it filed Form Rs to the EPA, which designated the alloy it processed as nickel. Resp. at 2, 7. Respondent contests what it asserts is Complainant's position that such filing is a failure to report copper. Resp. at 7. Instead, Respondent indicates that its reporting of the alloy as nickel in Form Rs constitutes inaccurate reporting, rather than a failure to report. Resp. at 7; *see also* Resp. at 13. Respondent argues that this presents a genuine issue of material fact with regard to "whether an erroneous, although factual report constitutes a failure to report." Resp. at 11. Respondent further suggests that EPCRA regulations and Form R instructions are unclear with regard to reporting requirements, Resp. at 7, and argues that pursuant to the policy guidance used by Complainant in calculating the proposed penalty in this matter, the Enforcement Response Policy for Section 313 of the Emergency Planning Right-to-Know Act ("Section 313 Enforcement Policy"), a notice of noncompliance should have been issued to Respondent for incorrect information in the Form R submissions, Resp. at 8-12.[13] In support of its arguments, Respondent submitted exhibits along with its Response, including an affidavit from Jonathon Anderton ("Anderton"), Vice President of Operations for Respondent, and undated file copies of nickel Form Rs for Respondent's Manufacturing Operation for the years of 2011 and 2012 in RMX 5.[14]

In his affidavit, Anderton states that he prepares and submits Form Rs to the EPA on behalf of the Respondent, and has done so since approximately 1997. RMX 5 at 2. Anderton further indicates that the material subject to Form R submission is an alloy that contains copper, nickel, and iron, and he states that for each year he prepared Form Rs submitted to the EPA, the information contained in these forms "is a complete and accurate statement of the total amount

[13] Although Complainant and Respondent both reference the Section 313 Enforcement Policy with regard to Complainant's Motion for Partial Accelerated Decision, the record suggests that the parties may be referring to differing versions of this policy guidance. Respondent appears to cite to a 1986 version of the Section 313 Enforcement Policy in its Response, Resp. at 8, but Complainant cites to an April 12, 2001 version of the Section 313 Enforcement Policy in its Reply, Reply at 3.

[14] Notably, in its Response, Respondent does not cite directly to the exhibits it submitted in support of its Response, including the affidavit of Anderton.

of the alloy that was processed by the [Respondent]." RMX 5 at 2. Anderton acknowledges in his affidavit that when he prepared the Form Rs, he "designated the alloy, perhaps incorrectly, as nickel rather than the alloy." RMX 5 at 3. However, Anderton otherwise states "[a]t best, the Forms R is [sic] inaccurate, however, they were timely filed, timely reported and contains [sic] the accurate information." RMX 5 at 3. Anderton indicates that the undated file copies of nickel Form Rs for Respondent's Manufacturing Operation for the years of 2011 and 2012 in RMX 5 are the Form Rs he prepared on behalf of Respondent for the years of 2011 and 2012. RMX 5 at 3. Anderton further asserts that at "[s]ometime within approximately the last ten (10) years," an auditor for the EPA requested to view Respondent's Form Rs, and was provided Form Rs prepared in the same manner as the ones in dispute in this matter without issue. RMX 5 at 2. Anderton states in his affidavit that Respondent did not receive any notices of noncompliance from the EPA after the filing of its Form Rs, but acknowledges that he filed amended Form Rs at the request of Abraham Reich of the EPA during the pendency of this matter. RMX 5 at 3.

3. Complainant's Reply

In its Reply, Complainant argues that Respondent's Response "fails to raise an issue of material fact but rather is an admission to liability." Reply at 1. Complainant cites to Respondent's acknowledgement that it filed Form Rs designating the alloy at issue as nickel, Reply at 1, and rejects Respondent's characterization of this filing as an error in filling out the forms, Reply at 3. Complainant states that "[t]he Administrative Complaint alleges non-reporting for the toxic chemical copper, not that Respondent is guilty of a typographical error." Reply at 4. In support of its arguments, Complainant states that EPCRA Section 313 requires regulated entities to file a Form R for each toxic chemical to be reported, Reply at 2-3 (citing 42 U.S.C. § 11023(a)), and asserts that Respondent did not file a Form R for copper for the years 2010-2012, Reply at 2.

Complainant asserts that EPCRA is a strict liability statute, and that as a result, "there are few, if any, excuses to liability for noncompliance." Reply at 2 (citing *Steeltech, Ltd.*, 8 E.A.D. 577, 586 (EAB 1999)). Although it contends that the EPA has no record of an inspection consistent with the assertion contained in Anderton's affidavit that an EPA inspector reviewed Respondent's records sometime in the last ten years, Complainant concludes that any such prior review of Respondent's records is irrelevant to the present action, as "any representations of an EPA inspector contrary to law are not binding on EPA." Reply at 4 (citing *Clarksburg Casket*, 8 E.A.D. 496, 507, n. 16 (EAB 1999)).

With regard to Respondent's arguments about the applicability of a notice of noncompliance under the Section 313 Enforcement Policy, Complainant argues that an administrative complaint is the appropriate enforcement response for a failure to report in a timely manner. Reply at 3. Complainant asserts that the EPA alerts reporters of errors detected in Form R submissions, but states that the Respondent's "incorrect designation" of the alloy would not be detected as a filing error. Reply at 2. Complainant further concludes that "[v]iolaters of EPCRA Section 313 as implemented by 40 C.F.R. Part 372 are subject to a penalty under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c)." Reply at 3.

In support of its Reply, Complainant simultaneously filed a Reply Affidavit from Yussen. In his Reply Affidavit, Yussen states that the EPA Region III Land and Chemicals Division Records Center database does not contain records of a previous EPA EPCRA inspection for Respondent. Reply Aff. ¶ 2. Yussen further indicates in his Reply Affidavit that both under the prior system of written form submission, and the current system of electronic filing, Form R reporters have been alerted of errors detected by the EPA in their filings, and given an opportunity to correct detected errors or re-input invalid entries. Reply Aff. ¶¶ 3-4.

D. Discussion

On its Motion for Partial Accelerated Decision, Complainant, the moving party, has not demonstrated that no genuine issue of material fact exists with regard to liability and that it is entitled to judgment as a matter of law in this matter. On the contrary, the evidence reflects an issue of material fact relevant to liability on each count of the Complaint with regard to whether Respondent's Manufacturing Operation processed over 25,000 pounds of copper in 2010, 2011, and 2012. In the Complaint, Complainant alleges that Respondent violated EPCRA Section 313, at 42 U.S.C. § 11023, by failing to timely submit a Form R for copper processed at its Manufacturing Operation for the years 2010, 2011, and 2012. Compl. ¶¶ 14-16, 18-20, 22-24. As previously discussed, the EPCRA Section 313 reporting requirements in 42 U.S.C. § 11023 apply to owners and operators of facilities that (1) have ten or more full-time employees; (2) fall within SIC Codes 20 through 39 (as in effect on July 1, 1985); and (3) manufactured, processed, or otherwise used a listed toxic chemical in quantities exceeding the specified toxic chemical threshold quantity during the preceding calendar year. 42 U.S.C. § 11023 (a)-(b). Accordingly, for Complainant to establish that Respondent violated 42 U.S.C. § 11023 as alleged, it must establish, among other elements, that Respondent processed copper at its Manufacturing Operation in quantities exceeding the toxic chemical threshold quantity in 2010, 2011, and 2012. As previously noted, in the years 2010, 2011, and 2012, the threshold amount of a toxic chemical processed at a facility requiring reporting under Section 313 of EPCRA was 25,000 pounds of the toxic chemical per year. 42 U.S.C. § 11023(f).

In the Complaint, Complainant alleges that Respondent processed more than 25,000 pounds of copper at its Manufacturing Operation in 2010, 2011, and 2012. Compl. ¶¶ 14, 18, 22. However, Respondent, specifically denies that it processed more than 25,000 pounds of copper at its Manufacturing Operation in each of these years in its Answer. Answer ¶¶ 14, 18, 22. To support its contested allegations that Respondent processed more than 25,000 pounds of copper at its Manufacturing Operation in 2010, 2011, and 2012, Complainant, in its Motion for Partial Accelerated Decision, relies on the calculations of Yussen. Comb. Mots. at 9. As previously discussed, Yussen determined that Respondent processed 199,124 pounds of copper in 2010; 307,692 pounds of copper in 2011; and 220,959 pounds of copper in 2012. Yussen Aff. ¶¶ 13-14; *see also* Comb. Mots. at 9 (adopting Yussen's calculations). Review of Yussen's calculations, however, reflects reliance on inapplicable data and assumptions inadequately supported by the evidence. Specifically, Yussen's calculations (1) rely upon assumptions that are not adequately supported by the evidence in determining the amount of copper-nickel alloy processed by Respondent's Manufacturing Operation during the relevant period, and (2) rely on data from material testing reports dated subsequent to the 2010, 2011, and 2012 calendar years to determine the amount of copper in the copper-nickel alloy processed by Respondent's

Manufacturing Operation in these years, without explanation as to how such data are applicable to the relevant time period. Given these deficiencies with Yussen's calculations, Complainant has failed to demonstrate in its Motion for Partial Accelerated Decision that Respondent processed more than 25,000 pounds of copper at its Manufacturing Operation in 2010, 2011, and 2012, and that it is entitled to judgement as a matter of law.

1. Amount of Copper-nickel Alloy Processed

In determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation for 2010, 2011, and 2012, Yussen made a number of assumptions on data provided within the Response to RFI, which are not adequately supported by the evidence. As previously discussed, Yussen used the values reported in the fifth response in the Response to RFI, which corresponds to a request for "[t]hroughput data of all raw materials containing chemicals subject to EPCRA Section 313 for years 2010, 2011, and 2012," as the total amount of the copper-nickel alloy processed, in pounds, by Respondent's Manufacturing Operation for each of the relevant years. Yussen Aff. ¶¶ 11, 13; CMX 2 at 1, 3. In doing so, Yussen apparently assumed that the values listed in this response were reported in pounds, despite neither the response, nor the applicable request, specifying the metric of the throughput data. *See* CMX 2 at 1, 3; Yussen Aff. ¶¶ 11, 13-14 (using data from the fifth response in the Response to RFI to find the weight of copper processed in pounds). Additionally, although the fifth request in the RFI Response asks for throughput data of "*all raw materials* containing chemicals subject to EPCRA Section 313 for years 2010, 2011, and 2012," CMX 2 at 1 (emphasis added), and the response to this request does not specify what materials the values listed apply to, CMX 2 at 3, Yussen assumed that the values in this response referred exclusively to the copper-nickel alloy, *see* Yussen Aff. ¶¶ 11, 13-14 (using the values in the fifth response in the Response to RFI the total amount of the copper-nickel alloy processed). Neither Yussen in his calculations, nor Complainant in adopting Yussen's calculations, provide an explanation for these assumptions made by Yussen in determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation.

The reliance of Yussen, and Complainant, on the information provided in the Response to RFI in determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation in 2010, 2011, and 2012, is also seemingly inconsistent with their position that the Response to RFI contains erroneous responses. *See* Comb. Mots. at 8-9 n.2 (noting suspected errors in the Response to RFI, and specifically discussing "an obvious error" regarding the fourth and fifth responses); Yussen Aff. ¶ 10 ("Respondent's RFI response contained some errors."). In particular, Yussen and Complainant both note that values provided in the fourth response in the Response to RFI, corresponding to a request for "[a] list of all chemicals and amounts (lbs.) subject to EPCRA Section 313 manufactured (either directly or incidentally), processed, or used at the facility during the years 2010, 2011, and 2012," exceed the values in the aforementioned fifth response regarding the throughput data of all raw materials containing chemicals subject to EPCRA Section 313 for the relevant years. Comb. Mots. at 8-9 n.2; Yussen Aff. ¶ 11; CMX 2 at 3. Although Complainant concludes that the difference between the values in the fourth and fifth response indicate that "there is an obvious error," it nevertheless relies on the data in the fifth response for the amount of the copper-nickel alloy

processed by Respondent's Manufacturing Operation, and concludes that in so doing it took "a conservative approach." Comb. Mots. at 8-9 n.2.

Notably, the evidence reflects that an email communication, ostensibly sent by Abraham Reich ("Reich"), an employee of EPA, Region III, Land and Chemicals Management Division, on July 22, 2014, to the email address "Production@eaglebrass.com," sought clarification regarding the information in the Response to RFI. CMX 4; CX3; *see also* CX 2 at 1 (identifying Abraham Reich as an employee of EPA, Region III, Land and Chemicals Management Division). The email communication on July 22, 2014, noted that the fourth and fifth responses in the Response to RFI seemed transposed, and otherwise sought clarification as to the quantities of materials processed. CMX 4; CX3. Handwritten notes without identification of authorship or date of transcription, submitted by Complainant in CMX 3 and CX 3, suggest that a telecommunication with Anderton on July 24, 2014, clarified that the fourth and fifth responses in the Response to RFI were reversed, and that Respondent only used a "nickel-copper alloy." CMX 3; CX 3 at 2. Complainant identifies the author of the aforementioned handwritten notes as Reich in the index of exhibits submitted with its Prehearing Exchange, CX IDX, but otherwise does not provide support for this assertion, or discuss or explain the contents of the aforementioned notes. If the content of the handwritten notes were found to be accurate representations of responses from Anderton with regard to the Response to RFI, these notes could possibly provide some support for the assumptions Yussen made in determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation from the fourth response in the Response to RFI. However, the handwritten notes do not specify an author or date of transcription, and Complainant has otherwise not submitted evidence substantiating the information in these notes regarding purported telephone communication with Anderton on July 24, 2014. Accordingly, this evidence, as submitted, is unreliable and unsubstantiated, and, therefore, is insufficient to adequately support the assumptions Yussen made in determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation. As the evidence submitted does not adequately support the assumptions made by Yussen in determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation for 2010, 2011, and 2012, Yussen's calculations regarding the amount of copper processed by Respondent's Manufacturing Operation are unreliable.

2. Percentage of Copper in the Copper-nickel Alloy Processed

Aside from relying on inadequately supported assumptions in determining the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation, Yussen's calculations also rely on data from material testing reports dated subsequent to the 2010, 2011, and 2012 calendar years to determine the amount of copper in the copper-nickel alloy processed by Respondent's Manufacturing Operation in these years, without explanation as to how such data are applicable to the relevant time period. In determining the amount of copper in the copper-nickel alloy processed by Respondent in the years 2010, 2011, and 2012, Yussen relied upon material test reports, reportedly provided by Respondent, which are dated July 15, 2013; June 5, 2014; June 16, 2014; and June 24, 2014. Yussen Aff. ¶ 13: CMX 6; CX 4. Although these test reports reflect alloys with four differing percentages of copper, ranging from 54.8

percent to 96.8480 percent, CMX 6; CX 4,[15] Yussen applied the percentage of copper from the material test report "which stated the lowest percentage of copper in the alloy" in calculating the total amount of copper processed by Respondent for the relevant years, Yussen Aff. ¶ 13.[16] The material test report that correlates with Yussen's calculations, dated June 16, 2014, relates to a copper-nickel alloy composed of 54.8 percent copper, and reflects a laboratory testing date of September 6, 2013, subsequent to the calendar years at issue.[17] CMX 6 at 2; CX 4 at 10. In discussing his calculations, Yussen does not note that the material testing he relied upon to calculate the percentage of copper in the copper-nickel alloy was performed subsequent to the calendar years at issue in this matter, and otherwise did not provide a rationale as to how this subsequent testing is applicable to the copper-nickel alloy processed by Respondent's Manufacturing Operation in the 2010, 2011, and 2012 calendar years. *See* Yussen Aff. ¶ 13. Likewise, Complainant, in adopting Yussen's calculations, does not provide any rationale as to how the material test report Yussen relied upon to calculate the percentage of copper in the copper-nickel alloy, which reflects a testing date in 2013 and a report date in 2014, is applicable to the copper-nickel alloy processed by Respondent in the 2010, 2011, and 2012 calendar years.

Notably, it is not apparent that any of the material test reports Yussen consulted are applicable to the copper-nickel alloy processed by Respondent in the 2010, 2011, and 2012 calendar years. Each of the material test reports at issue is dated subsequent to the 2010, 2011, and 2012 calendar years, and nothing in these reports suggests that they are applicable to materials received by Respondent in the 2010, 2011, and 2012 calendar years. *See* CMX 6; CX 4. Only one of the material test reports contains a test date occurring during the relevant period, and this report, which reflects a composition test date of November 2, 2012, is dated subsequent to the calendar years at issue, on July 15, 2013, and does not otherwise reflect that it relates to materials received by Respondent in the relevant years. CMX 6 at 5; CX 4 at 12.

As with the reliance on inadequately supported assumptions to determine the amount of the copper-nickel alloy processed by Respondent's Manufacturing Operation, Yussen's reliance in his calculations on data from material testing reports dated subsequent to the 2010, 2011, and 2012 calendar years to determine the amount of copper in the copper-nickel alloy processed by Respondent's Manufacturing Operation in these years, without explanation as to how such data are applicable to the relevant time period, renders his calculations unreliable. As Complainant, in its Motion for Partial Accelerated Decision, solely relies upon Yussen's deficient calculations as evidence that Respondent processed more than 25,000 pounds of copper at its Manufacturing Operation in 2010, 2011, and 2012, it has failed to establish an essential element of each of the

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[15] In these material test reports, copper is designated by "cu," the atomic symbol for copper in the periodic table of elements. *See* CMX 6; CX 4; *see also* International Union of Pure and Applied Chemistry, *IPUAC Periodic Table of Elements* (November 28, 2016), https://www.iupac.org/cms/wp-content/uploads/2015/07/IUPAC_Periodic_Table-28Nov16.pdf (depicting the periodic table of elements with the atomic symbol for copper).

[16] Yussen does not provide a rationale in his affidavit for why he chose to apply the material test report which stated the lowest percentage of copper. *See* Yussen Aff. ¶ 13.

[17] As previously noted, Yussen does not more explicitly state the percentage of copper he utilized in his calculation in his affidavit. *See* Yussen Aff. ¶ 13. However, Complainant indicates that the percentage used by Yussen in his calculation is 54.8 percent, Comb. Mots. at 9, which correlates with a material test report dated June 16, 2014, CMX 6 at 2; CX 4 at 10.

three counts in the Complaint, and therefore, has failed to demonstrate that it is entitled to judgement as a matter of law. Accordingly, as the evidence reflects a genuine issue of material fact with regard to an essential element of each count of the Complaint, denial of the Complainant's Motion for Partial Accelerated Decision is appropriate. Because denial of Complainant's Motion for Partial Accelerated Decision is warranted on these grounds, I need not further evaluate the arguments asserted by the parties in their filings on this motion with regard to Respondent's Form R submissions for nickel and the EPA's policy guidance.

IV. COMPLAINANT'S MOTION TO STRIKE

A. Standard of Review

The Rules of Practice require that an answer to a complaint contain "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). With regard to affirmative defenses, the Rules of Practice further provide that "[t]he respondent has the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24(a). Aside from these provisions, the Rules of Practice do not more specifically address pleading requirements for affirmative defenses, or provide for a motion to strike such defenses. As a result, it is appropriate to consult the FRCP and related jurisprudence for guidance on such procedural matters. *See B&L Plating, Inc.*, 11 E.A.D. 183, 188 (EAB 2003); *Euclid of Va., Inc.*, 13 E.A.D. 616, 657-658 (EAB 2008) (noting that while the FRCP are not binding on proceedings, they may be used as guidance for the Rules of Practice); *see also Aguakem Caribe, Inc.*, 2010 EPA ALJ LEXIS 9, *20 (June 2, 2010); *Dearborn Ref. Co.*, 2003 EPA ALJ LEXIS 10, *6 (Jan. 3, 2003); *Health Care Products, Inc.*, 1996 EPA ALJ LEXIS 142,*42 (June 13, 1996) (finding that the Rules of Practice do not address a motion to strike defenses, and seeking guidance from FRCP 12(f)).

An affirmative defense is "matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 393 (3d Cir. 1994) (quoting *Black's Law Dictionary* 60 (6th ed. 1990)).[18] Rule 8(c) of the FRCP requires a party, in responding to a pleading, to "affirmatively state any avoidance or affirmative defense," including estoppel, illegality, laches, statute of limitations, and waiver. Fed. R. Civ. P. 8(c)(1). Applied to an answer, Rule 8(c) "requires that a defendant plead an affirmative defense . . . in his answer." *Robinson v. Johnson*, 313 F.3d 128, 134 (3d Cir. 2002). The purpose of this requirement in Rule 8(c) is "to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed." *Id.* at 134-135.

Rule 12(f) of the FRCP provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Such action may be taken pursuant to Rule 12(f) upon the court's own action or upon motion made by a party. Fed. R. Civ. P. 12(f). Motions to strike made pursuant to Rule 12(f) "are generally viewed with disfavor because of their potential to be used as a dilatory tactic."

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[18] In contrast, "a matter that merely negates an element of the plaintiff's prima facie case is not an affirmative defense." *Sterten v. Option One Mortg. Corp.*, 479 F. Supp. 2d 479, 483 (E.D. Pa. 2007) (citing *Sanden v. Mayo Clinic,* 495 F.2d 221, 224 (8th Cir. 1974)).

Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 305 (E.D. Pa. 1993). Accordingly, a motion to strike a defense pursuant to Rule 12(f) for insufficiency should not be granted "unless the insufficiency of the defense is clearly apparent." *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 (3d Cir. 1986) (internal quotation marks omitted). Nevertheless, "a motion to strike is the primary procedure for objection to an insufficient affirmative defense." *Resolution Trust Corp.*, 823 F. Supp. at 306 (internal quotation marks omitted) (citing *United States v. Union Gas Co.*, 743 F. Supp. 1144 (E.D. Pa. 1990)).

Motions to strike made pursuant to Rule 12(f) are to be decided on the pleadings. *See Tonka Corp. v. Rose Art Indus.*, 836 F. Supp. 200, 217-218 (D.N.J. 1993); *Krauss v. Keibler-Thompson Corp.*, 72 F.R.D. 615, 617 (D. Del. 1976). To survive a motion to strike, an affirmative defense need not be plausible, but must be sufficiently pleaded to provide fair notice. *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011). "[A] mere rote recitation of generally available affirmative defenses without citation to any other fact or premise from which an inference may arise that the stated defense is logically related to the case in any way," is insufficient pleading to satisfy fair notice, and is appropriately struck upon a motion to strike made pursuant to Rule 12(f). *Mifflinburg Tel., Inc. v. Criswell*, 80 F. Supp. 3d 566, 574 (M.D. Pa. 2015). Likewise, where asserted affirmative defenses consist of nothing but bare bones, conclusory allegations, such affirmative defenses are properly struck as insufficient under Rule 12(f). *See, e.g.*, *Dann v. Lincoln Nat'l Corp.*, 274 F.R.D. 139, 145-46 (E.D. Pa. 2011); *Fesnak & Assocs., LLP v. U.S. Bank Nat'l Ass'n*, 722 F. Supp. 2d 496, 503 (D. Del. 2010); *Sun Microsystems, Inc. v. Versata Enters.*, 630 F. Supp. 2d 395, 408 (D. Del. 2009); *FDIC v. Modular Homes*, 859 F. Supp. 117, 121 (D.N.J. 1994) (finding affirmative defenses consisting of bare bones, conclusory allegations insufficient and properly struck under Rule 12(f)).

B. Discussion

In its Answer, Respondent asserts 17 enumerated defenses addressing penalty and liability, which it identifies as affirmative defenses. Answer at 7-10. Despite being identified as affirmative defenses, Respondent's enumerated defenses include material improperly characterized as affirmative defenses, as discussed below. Complainant, in its Motion to Strike, challenges all 17 of Respondent's enumerated defenses on the basis that they "all fail as a matter of law and provide no shield to a finding of liability against Respondent for the allegations contained in the Administrative Complaint." Comb. Mots. at 24. In response, Respondent argues that its enumerated defenses "have the effect of barring the EPA's claims," Resp. at 13, and asserts general arguments in support of ten of its 17 enumerated defenses, Resp. at 13-15. The 17 challenged enumerated defenses, and the parties' arguments relating to such defenses, are discussed below.

1. First and Ninth Defenses

Respondent, in its First Defense, asserts:

> The Complaint herein and each cause of action thereof, fails to set forth facts sufficient to state a claim upon which relief may be granted against the

> Respondent and further fails to state facts sufficient to entitle the Complainant to the relief sought, or to any relief whatsoever from the Respondent.

Answer at 7. Likewise, in its Ninth Defense, Respondent states that "[t]he facts and circumstances as asserted in the Complaint do not give rise to a basis for a civil penalty." Answer at 8.

Addressing Respondent's First and Ninth Defenses, Complainant indicates that such defenses fail because it has established a *prima facie* case and is entitled to an affirmative finding of liability against Respondent on its claims. Comb. Mots. at 15-16. In support of its assertions, Complainant cites to evidence submitted in conjunction with its Motion for Partial Accelerated Decision and Motion to Strike. Comb. Mots. at 15-16.

Respondent does not assert support for its First and Ninth Defenses in its Response. Notably, however, Respondent's First and Ninth Defenses are reflective of the standard for a motion to dismiss under the Rules of Practice, and suggest a defense challenging the adequacy of the Complaint and the alleged violations contained therein. *See* 40 C.F.R. § 22.20(a) (addressing the standard for a motion to dismiss).

Unlike a motion for accelerated decision, a motion to strike is appropriately decided upon the pleadings. *See supra* at p. 17; *Tonka Corp.*, 836 F. Supp. at 217-218; *Krauss*, 72 F.R.D. at 617. As a result, evidence outside of the pleadings, is not an appropriate basis for striking Respondent's First and Ninth Defenses. In supporting its request to strike Respondent's First and Ninth Defenses, Complainant has not asserted a valid basis for finding these defenses insufficient on the pleadings. Consequently, Complainant's request to strike these defenses is appropriately denied.

2. Second Defense

In its Second Defense, Respondent asserts "[t]he Complainant's claims may be barred, in whole or in part, by the applicable statutes of limitation." Answer at 7. Complainant argues that it filed the Complaint in this matter within the applicable statute of limitations, and therefore Respondent's Second Defense is insufficient as a matter of law. Comb. Mots. at 16. Notably, in its Response, Respondent neither provides support for, nor advances any argument in defense of, its Second Defense.

As a preliminary manner, Respondent's Second Defense fails to affirmatively state the statute of limitations defense. By stating that the Complainant's claims "may be barred, in whole or in part" by the statute of limitations, Respondent suggests merely the possibility that the defense may be applicable to some or all of Complainant's claims. As a result, Respondent's Second Defense fails to sufficiently state an affirmative defense, and is therefore, deficient. *See* Fed. R. Civ. P. 8(c)(1) (requiring a party, in responding to a pleading, to affirmatively state any affirmative defense).

In addition to the deficiency in pleading, Respondent's Second Defense is insufficient because the appropriate statute of limitations does not bar the claims in the Complaint. As a proceeding for the enforcement of a civil penalty, this matter is governed by the five-year statute

of limitations established in 28 U.S.C. § 2462. *See also 3M Co. v. Browner,* 17 F.3d 1453, 1456-57 (D.C. Cir. 1994) (finding that § 2462 applies to civil penalty cases brought before agencies); *Rhone-Poulenc Basic Chems. Div.*, 1998 EPA ALJ LEXIS 95, *6-7 (Apr. 27, 1998) (applying § 2462 to an enforcement proceeding on an alleged EPCRA Section 313 reporting violation). As previously discussed, Complainant alleges that Respondent violated 42 U.S.C. § 11023 by failing to submit a completed Form R for copper for the calendar years of 2010 (Count One), 2011 (Count Two), and 2012 (Count Three). In accordance with the EPCRA Section 313 reporting requirements, an owner or operator of a covered facility must submit Form R to the Administrator annually by July 1 for the preceding calendar year. 42 U.S.C. § 11023(a). Accordingly, each count of the Complaint began accruing after July 1 of the year following the calendar year associated with the alleged failure to report. As a result, Count One began accruing after July 1, 2011; Count two began accruing after July 1, 2012; and Count Three began accruing after July 1, 2013. Complainant commenced this proceeding on June 4, 2015, well within the five-year statute of limitations set by 28 U.S.C. § 2462 for all three counts of the Complaint. Complainant's claims are, therefore, not barred by the appropriate statute of limitations. Accordingly, Respondent's Second Defense as to the statute of limitations fails as a matter of law, and is appropriately struck.

3. Third, Fourth, and Fifth Defenses

Respondent's Third, Fourth, and Fifth Defenses, are based upon equitable affirmative defenses. Specifically, in its Third Defense, Respondent states that "[t]he Complainant's claims may be barred, in whole or in part, by the doctrine of laches and/or waiver." Answer at 7. Likewise, in its Fourth Defense, Respondent asserts that "[t]he Complainant's claims may be barred, in whole or in part, by the doctrine of estoppel." Answer at 7. Finally, in its Fifth Defense, Respondent states that "[t]he Complainant's claims may be barred, in whole or in part, by its failure to provide timely notice and/or its unreasonable delay in asserting a claim." Answer at 7.

With regard to Respondent's Third and Fourth Defenses, Complainant argues that "[w]aiver, estoppel, and laches defenses are not applicable to the government when it is acting in a regulatory role." Comb. Mots. at 16. Complainant further argues that the Third and Fourth defenses fail because "Respondent has not shown any evidence of intentional conduct by Complainant that resulted in Respondent's detrimental reliance or waiver." Comb. Mots. at 17. Thus, Complainant contends, Respondent's Third and Fourth Defenses fail as a matter of law. Comb. Mots. at 16-17.

Addressing Respondent's Fifth Defense, Complainant indicates that to the extent this defense is based upon the statute of limitations, the statute of limitations does not bar its claims. Comb. Mots. 16-17. Complainant further argues that if this defense is based upon a lack of notice, it is akin to a laches defense, and therefore fails as "[l]atches is not an affirmative defense that can be raised against the United States Government." Comb. Mots. at 17 (citation omitted). Additionally, Complainant asserts that the period of time between its first enforcement contact with Respondent and the date the Complaint was issued was just over a year, and "[t]his relatively short period of time does not support an affirmative defense of unreasonable delay." Comb. Mots. at 18.

In its Response, Respondent indicates that its Third, Fourth, and Fifth Defenses are premised upon the Agency's failure to issue a notice of noncompliance related to the alleged reporting violations. Resp. at 13. Respondent argues that the facts at issue in this matter do not reflect a failure to file a Form R, but rather "a case of inaccurate reporting in one minor respect, i.e., the designation of the alloy as nickel." Resp. at 13. Respondent further asserts that the Section 313 Enforcement Policy allows for issuance of a notice of noncompliance for inaccurate reporting, and only provides for filing a civil administrative complaint for inaccurate reporting upon a failure to respond to such a notice of noncompliance. Resp. at 13. Respondent, therefore, argues that service of a notice of noncompliance on it is "a condition precedent to proceeding with an administrative complaint." Resp. at 13. Respondent concludes that the Agency's failure to issue a notice of noncompliance "is a bar to its proceeding with its complaint." Resp. at 13. Aside from this generalized and unsupported rationale, Respondent does not more specifically assert a basis for the asserted affirmative defenses in the Third, Fourth, and Fifth Defenses.

Review of Respondent's Third, Fourth, and Fifth Defenses reflects that these defenses are insufficiently pleaded since Respondent fails to affirmatively state the affirmative equitable defenses it seeks to advance in its Third, Fourth, and Fifth Defenses. By stating that Claimant's claims "may" be barred by the equitable affirmative defenses stated in its Third, Fourth, and Fifth Defenses, Respondent merely asserts the possibility that such defenses may be applicable, and does not affirmatively state them. Moreover, the Third, Fourth, and Fifth Defenses are insufficient because they each fail to assert "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," as required by the Rules of Practice. 40 C.F.R. § 22.15(b). Respondent's Third, Fourth, and Fifth Defenses are devoid of facts or arguments that provide the grounds for these affirmative defenses. The generalized rationale for the Third, Fourth, and Fifth Defenses provided by Respondent in its Response is not reflected in its pleading. Instead, Respondent's Third, Fourth, and Fifth defenses are reflective of the "mere rote recitation of generally available affirmative defenses without citation to any other fact or premise from which an inference may arise that the stated defense is logically related to the case in any way," properly struck under Rule 12(f) for insufficiently satisfying fair notice requirements in pleading. *Mifflinburg Tel., Inc.*, 80 F. Supp. 3d at 574.

As an aside, I note that the equitable affirmative defenses of laches, waiver, and estoppel, have limitations within the context of this proceeding. With regard to laches, "[i]t is well established that the United States is not subject to the defense of laches in enforcing its rights." *United States v. St. John's Gen. Hosp.*, 875 F.2d 1064, 1071 (3d Cir. 1989) (citing *United States v. Summerlin*, 310 U.S. 414, 416 (1940)). Likewise, the affirmative defense of waiver may be limited in this matter, as "[g]enerally speaking[,] public officers have no power or authority to waive the enforcement of the law on behalf of the public." *B.J. Carney Indus.*, 7 E.A.D. 171, 202 (EAB 1997) (second alteration in original) (quoting *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984)). Additionally, with regard to the affirmative defense of estoppel, "a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment." *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 522 (citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 61 (1984)). To the extent that Respondent's Third, Fourth, and Fifth Defenses rely on the affirmative defenses of laches, waiver, and estoppel, it is possible such defenses would be

limited, or fail as a matter of law, even if they had been sufficiently pleaded. However, as Respondent's Third, Fourth, and Fifth defenses are insufficiently pleaded, further analysis of the potential of such defenses is not warranted and it is appropriate to strike Respondent's Third, Fourth, and Fifth defense on this basis alone.

4. Sixth and Seventh Defenses

Respondent's Sixth and Seventh Defenses are premised on alleged deficiency of Form R, and the Agency's instruction or guidance on execution and submission of Form R. In the Sixth Defense, Respondent asserts that "[t]he Complainant's claims may be barred, in whole or in part, by the Complainant's failure to properly design a Toxic Chemical Release Form (Form R) that provides the facility with clear notice as to the information to be submitted to the Complainant." Answer at 8. Similarly, in its Seventh Defense, Respondent asserts that "[t]he Complainant's claims may be barred, in whole or in part, by the Complainant's failure to properly give instruction or guidance to facilities on the proper execution and submission requirements of Toxic Chemical Release Forms (Form R)." Answer at 8.

Complainant, in challenging Respondent's Sixth and Seventh Defenses, concludes that such defenses fail as a matter of law. Comb. Mots. at 19-20. With regard to Respondent's Sixth Defense, Complainant states that the design of Form R is not a defense to liability for the alleged reporting violations. Comb. Mot. at 18. Complainant argues that to the extent that Respondent is attempting to allege impossibility of performance as a defense to liability, such a defense fails, as Respondent, as well as numerous other facilities, were able to file Form Rs, and Respondent was required to file a Form R "by force of statute, not contract." Comb. Mots. at 18. Complainant further notes that EPCRA is a strict liability statute, and "Respondent's complaint as to the design of the [Form R] would not relieve it of its duty to comply with the law." Comb. Mots. at 19. Likewise, addressing Respondent's Seventh Defense, Complainant indicates that Respondent's liability for the alleged reporting violations cannot be excused by the Agency's Form R instructional materials. Comb. Mots. at 19-20. Complainant asserts that "[e]ven if EPA had never published any instructional materials, Respondent's [reporting] duty would still not have been excused." Comb. Mots. at 19. Furthermore, Complainant indicates that it provides adequate instruction regarding Form R, including "detailed instructions on how to complete and file the Form R," Comb. Mots. at 19, as well as two telephone help lines and a website with links to guidance and instructional documents, Comb. Mots. at 19-20. Respondent, in its Response, provides no discussion or argument in support of either its Sixth or Seventh Defenses.

As a matter of pleading, Respondent's Sixth and Seventh Defenses are insufficiently pleaded, as they merely assert the possibility that the Complainant's claims are barred by the stated defenses, and fail to affirmatively state such defenses. Additionally, Respondent's Sixth and Seventh Defenses do not sufficiently state the circumstances or arguments constituting the grounds of these defenses, as required by the Rules of Practice at 40 C.F.R. § 22.15(b). For example, it is unclear from Respondent's Sixth Defense how the design of Form R fails to provide notice to regulated parties. Likewise, it is not clear from Respondent's Seventh Defense how the Agency failed to "properly give instruction or guidance to facilities" regarding Form R.

Aside from the aforementioned pleading deficiencies, Respondent's Sixth and Seventh Defenses are otherwise substantively insufficient. As Form R is published in the Code of Federal Regulations and subject to the rulemaking process, 40 C.F.R. § 372.85; *see also* 71 Fed. Reg. 32464 (June 6, 2006); 72 Fed. Reg. 26544 (May 10, 2007) (final rulemaking amending Form R), Respondent's Sixth Defense is consistent with a constitutional due process challenge to the validity of the EPA's regulation. "[C]onstitutional challenges to regulations, even challenges based upon due process claims, are rarely entertained in Agency enforcement proceedings, and there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding." *B.J. Carney Indus.*, 7 E.A.D. at 194. Review of regulation on the basis of constitutional challenges in administrative enforcement proceedings "will not be granted absent the most compelling circumstances." *Echevarria*, 5 E.A.D. 626, 634 (EAB 1994). Here, Respondent has not provided compelling circumstances for entertaining such a challenge to the regulations.

As noted by Complainant, EPCRA is a strict liability statute. *Steeltech, Ltd.,* 8 E.A.D. 577, 586 (EAB 1999). As such, "Congress determined that failure to comply with the reporting requirements of [S]ection 313 alone is sufficient for liability and assessment of a civil penalty." *Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 780 (EAB 1998). Thus, even if Respondent's Seventh Defense were proven true, this defense would not preclude a finding of liability, or assessment of penalty. As Respondent's Sixth and Seventh Defenses are insufficiently pleaded, and are further substantively insufficient, these defenses are properly struck.

5. Eighth, Tenth, and Eleventh Defenses

Similar to its Third, Fourth, and Fifth Defenses, Respondent's Eighth, Tenth, and Eleventh Defenses relate to arguments surrounding the lack of a notice of noncompliance issued to Respondent from Complainant for the alleged violations. In its Eighth defense, Respondent asserts that "[t]he Complainant's claims may be barred, in whole or in part, by the doctrine of vested rights due to its prior acceptance of Form R from the Respondent without issuance of a notice of noncompliance." Answer at 8. Respondent, in its Tenth Defense concludes that "[a]t best, the facts and circumstances contained in the Complaint, if true, give rise to a notice of non-compliance." Answer at 9. Additionally, in its Eleventh Defense, Respondent asserts that "[t]he Complainant has waived any civil administrative penalties by failing to issue a notice of non-compliance." Answer at 9.

Complainant argues that Respondent's Eighth, Tenth, and Eleventh Defenses fail as a matter of law. Comb. Mots. at 20-21. With regard to Respondent's Eighth Defense, Complainant indicates that Respondent's alleged Section 313 violations are not protected under the doctrine of vested rights, as there has not been a court judgment endorsing such violations. Comb. Mots. at 20. Further, Complainant argues that to the extent that Respondent's Eighth Defense is based upon an affirmative defense of equitable estoppel, the circumstances of this matter do not support equitable estoppel, and additionally, equitable estoppel is unavailable as an affirmative defense against the United States government. Comb. Mots. at 20-21. In response to Respondent's Tenth and Eleventh Defenses, Complainant simply asserts that "[a] Notice of Noncompliance is not prerequisite to an administrative action seeking the imposition of a civil penalty for violations of EPCRA." Comb. Mots. at 21.

As with its Third, Fourth, and Fifth Defenses, Respondent indicates that its Eighth, Tenth, and Eleventh Defense relate to the Agency's failure to issue a notice of noncompliance for the alleged reporting violations. Resp. at 13. As previously discussed, Respondent contends that the facts at issue support inaccurate reporting, rather than a failure to report, and argues that the Section 313 Enforcement Policy provides for issuance of a notice of noncompliance for inaccurate reporting. Resp. at 13. Respondent further argues that the Section 313 Enforcement Policy allows for filing a civil administrative complaint for inaccurate reporting only after failure to respond to a notice of noncompliance. Resp. at 13. Accordingly, Respondent concludes that issuance of a notice of noncompliance is a condition precedent to proceeding with an administrative complaint, and Complainant's failure to issue a notice of noncompliance, therefore, precludes it from proceeding on the Complaint. Resp. at 13.

Respondent's Eighth, Tenth, and Eleventh Defenses are insufficiently pleaded, as these defenses do not state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," required by the Rules of Practice. 40 C.F.R. § 22.15(b). The rationale provided by Respondent in its Response for the Eighth, Tenth, and Eleventh Defenses does not appear in the Answer, and cannot be inferred from the content of the Answer. In its Eighth Defense, Respondent fails to not only assert the basis for the Defense, but also fails to affirmatively state the affirmative defense of vested rights, merely indicating that such a defense may be applicable. Likewise, Respondent's Tenth Defense consists merely of a conclusory statement, devoid of any support in argument or fact. Additionally, Respondent's Eleventh Defense fails to set forth its basis, and notably does not even make reference the Section 313 Enforcement Policy.[19] As a result, Respondent's Eighth, Tenth, and Eleventh Defenses are reflective of the kind of bare bones, conclusory allegations properly struck as inadequate under Rule 12(f). *See supra* at p. 17; *see also Dann*, 274 F.R.D. at 145-46; *Fesnak & Assocs., LLP*, 722 F. Supp. 2d at 503; *Sun Microsystems, Inc.*, 630 F. Supp. 2d at 408; *Modular Homes*, 859 F. Supp. at 121 (finding affirmative defenses consisting of bare bones, conclusory allegations insufficient and properly struck under Rule 12(f)). Accordingly, Respondent's Eighth, Tenth, and Eleventh Defenses are properly struck as insufficiently pleaded defenses.

6. Twelfth Defense

In its Twelfth Defense, Respondent states that to "[t]he extent applicable, any civil penalty asserted by the Complainant has been incorrectly calculated." Answer at 9. Addressing this defense, Complainant asserts that the proposed penalty reflected in the Complaint was calculated based upon the Section 313 Enforcement Policy, and further argues that under the Rules of Practice, this Tribunal will determine the penalty in this matter if liability is established, and will not be bound by the Section 313 Enforcement Policy, which does not have the force of law. Comb. Mots. at 21 (citing 40 C.F.R. § 22.27(b)). Complainant concludes that "[n]othing asserted by Respondent's Twelfth Affirmative Defense offers any evidence that would excuse Respondent's failure to timely file Form Rs for copper for the calendar years 2010-2012 and as

[19] As previously discussed, there may be limitations on an affirmative defense of waiver in this proceeding. *See supra* at p. 20-21. However, as Respondent's Eleventh Defense is insufficient as pleaded, further discussion of this issue is not warranted.

such, the Twelfth Affirmative Defense fails as a [m]atter of [l]aw." Comb. Mots. at 21. Respondent does not provide support for its Twelfth Defense in its Response.

Respondent's Twelfth Defense is not an affirmative defense to liability, but rather, a defensive argument with regard to penalty. As the Rules of Practice require that an answer to a complaint contain "the basis for opposing any proposed relief," such a penalty argument is properly asserted by Respondent in its Answer. 40 C.F.R. § 22.16(b). Therefore, Respondent's Twelfth Defense is not, as Complainant suggests, insufficient because it addresses penalty only and does not preclude liability.

As Complainant correctly indicated, the Section 313 Enforcement Policy does not have the force of law. *See Steeltech, Ltd.*, 8 E.A.D. at 585. Pursuant to the Rules of Practice, if liability is established, I shall independently make a determination with regard to the amount of the civil penalty, apart from Complainant's proposed penalty. 40 C.F.R. § 22.27(b). Nevertheless, the Rules of Practice require that, in making a penalty determination, I "consider any civil penalty guidelines issued under the act." 40 C.F.R. § 22.27(b). In accordance with this provision, I must consider the Section 313 Enforcement Policy in making a penalty determination. *See Steeltech, Ltd.*, 8 E.A.D. at 585 (finding that a presiding officer was required to consider Section 313 enforcement policy guidance in making a penalty determination for a Section 313 reporting violation). As a result, it is appropriate for Respondent to assert arguments regarding penalty calculation under the Section 313 Enforcement Policy. As Respondent's Twelfth Defense raises an allowable, and not otherwise insufficient defensive penalty argument, it would be inappropriate to strike this material from the Answer.

7. Thirteenth Defense

Respondent, in its Thirteenth Defense, asserts that "[t]he civil penalty asserted and alleged in the Complaint is excessive, unconscionable, and inequitable under the facts and circumstances of this case." Answer at 9. In its Motion to Strike, Complainant argues that Congress authorized civil penalties for violation of EPCRA Section 313 in 42 U.S.C. § 11045(c). Comb. Mots. at 22. Complainant further states that "[w]hile the imposition of penalty is the purview of the Court after a finding of liability, the proposed penalty in the Administrative Complaint does not suggest a sum in excess of that authorized by Congress." Comb. Mots. at 22. To the extent that the Thirteenth Defense addresses an Eighth Amendment challenge to the proposed penalty, Complainant asserts that "there is no question that the law would permit the Court to impose a penalty far greater than what is proposed by Complainant." Comb. Mots. at 22.

Respondent, in its Response, indicates that the Thirteenth Defense, along with its Fourteenth, Fifteenth, and Sixteenth Defenses, is an as-applied statutory constitutional challenge. Resp. at 14-15. Respondent argues that "[t]he EPA is seeking to impose an astronomical fine for failure to fill in one box on a form they created incorrectly. The Respondent contends now and will continue to contend for so long as necessary, that it is constitutionally prohibited. It is penal

in nature and excessive."[20] Resp. at 15. However, Respondent does not more specifically identify the constitutional basis for its Thirteenth Defense, or the facts and circumstances upon which its Thirteenth Defense is premised.

Respondent's Thirteenth Defense fails to set forth the "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," as required by the Rules of Practice. 40 C.F.R. § 22.15(b). Although Respondent, in its Response, indicates that this defense is based upon an as-applied statutory constitutional challenge, this basis is not apparent from the text of the Thirteenth Defense. Furthermore, the Thirteenth Defense fails to identify the "facts and circumstances" for which it is relying for its defense. As a result, Respondent's Thirteenth Defense consists of bare bones, conclusory allegations, which fail to provide sufficient notice to Complainant of its Thirteenth Defense. As Respondent's Thirteenth Defense is insufficiently pleaded pursuant to the Rules of Practice, this defense is appropriately struck as insufficient on this basis.

8. Fourteenth and Fifteenth Defenses

Respondent's Fourteenth and Fifteenth Defenses are premised upon challenges to the proposed civil penalty under the United States Constitution and the Pennsylvania Constitution. In its Fourteenth Defense, Respondent states that "[t]he civil penalty asserted and alleged in the [C]omplaint is an excessive fine and therefore, violates the Respondent's rights under the 8th Amendment of the United States Constitution and under the Pennsylvania Constitution." Answer at 9. Respondent, in its Fifteenth Defense, states:

> The civil penalty asserted and alleged in the Complaint violates the Respondent's constitutional rights under the 5th, 6th, and 14th Amendments of the United States Constitution and under the Pennsylvania Constitution in that they are penal in nature and are tantamount to the imposition of a criminal fine, and the guidelines, standards and/or instructions ("Guidelines") for the imposition of the civil penalty are vague, indefinite, and uncertain. Furthermore, these Guidelines do not appraise the Respondent of the conduct that will be subject to criminal penalties, and exposes the Respondent to multiple punishments and fines for the same acts, thereby discriminating against the Respondent on the basis of wealth and that different amounts can be awarded for the same acts against respondents who differ only in material wealth.

Answer at 9-10.

Addressing Respondent's Fourteenth and Fifteenth Defenses, as well as Respondent's constitutionally-based Sixteenth Defense, Complainant argues that constitutional defenses are

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[20] It is worth noting that this is an inaccurate characterization of the claims in the Complaint. As previously discussed, the Complaint alleges that Respondent violated 42 U.S.C. § 11023 and 40 C.F.R. § 372.30 by failing to submit a completed Form R, toxic chemical release form, for copper for the calendar years of 2010 (Count One), 2011 (Count Two), and 2012 (Count Three). Compl. ¶¶ 15-16, 19-20, 23-24. Such claims are not reflective of claims for "failure to fill in one box on a form," as Respondent asserts. Resp. at 15.

unavailable in administrative proceedings. Comb. Mots. at 22-23. In so arguing, Complainant broadly states that "constitutional issues are outside the jurisdiction of administrative agencies." Comb. Mot. at 22. Additionally, Complainant asserts that it has statutory authority to bring this action pursuant to 42 U.S.C. § 11045(c), and that "the proposed penalty is well within the penalties set by statute." Comb. Mots. at 23.

Respondent disputes Complainant's contention that constitutional defenses are unavailable in administrative proceedings. Resp. at 14. Furthermore, Respondent asserts that such constitutional defenses must be raised for purposes of preservation upon subsequent review. Resp. at 14. Respondent indicates that its Fourteenth and Fifteenth Defenses are as-applied statutory constitutional challenges, along with its Thirteenth and Sixteenth Defenses. Resp. at 14-15. Without specifically identifying the statutory provisions it is challenging in its Fourteenth and Fifteenth Defenses, Respondent states in its Response that it "contends that these laws are being applied unconstitutionally under the circumstances of this case." Resp. at 14. Respondent further asserts that the civil penalty proposed by Complainant is constitutionally prohibited. Resp. at 15.

Adjudication of constitutional challenges is limited within the context of administrative enforcement proceedings. With regard to statutory challenges, the United States Supreme Court has stated that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2136 (2012) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U. S. 200, 215 (1993)).[21] Additionally, as previously discussed, constitutional challenges to regulations "are rarely entertained in Agency enforcement proceedings, and there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding." *B.J. Carney Indus.*, 7 E.A.D. at 194; *see also Echevarria*, 5 E.A.D. at 634 (finding that review of regulation on the basis of constitutional challenges in administrative enforcement proceedings "will not be granted absent the most compelling circumstances."); *Am. Ecological Recycle Research Corp.*, 2 E.A.D. 62, 64, (CJO 1985) (finding as a "general rule" that "challenges to rulemaking are rarely entertained in an administrative enforcement proceeding."). However, although adjudication of constitutional challenges may be limited, it is not the case, as Complainant asserts, that all constitutional defenses are unavailable in administrative enforcement proceedings. Within administrative enforcement proceedings, constitutional challenges will be entertained "where the constitutionality of the statute or regulation is not at issue, but instead where the issue is whether the statute or regulation is being applied in a manner that satisfies constitutional requirements." *Ocean State Asbestos Removal*, 7 E.A.D. 522, 557-58 (EAB 1998). Notably, relevant to Respondent's Fourteenth Defense, the Environmental Appeals Board has previously addressed a challenge made under the Eighth Amendment's Excessive Fines Clause to a civil penalty for EPCRA Section 313 violations. *Woodcrest Mfg.*, 7 E.A.D. at 781-82.

Nevertheless, although certain constitutional defenses may be available to Respondent, Respondent's constitutionally-based Fourteenth and Fifteenth Defenses are insufficient, and thereby properly struck. With regard to Respondent's Fourteenth Defense, the asserted language

[21] Notably, however, the Court has found that application of this rule is not mandatory. *Thunder Basin Coal Co.*, 510 U. S. at 215.

merely states a conclusory allegation, and fails to assert "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," required by the Rules of Practice. 40 C.F.R. § 22.15(b). Respondent does not assert the circumstances or arguments which support its allegation that Complainant's proposed civil penalty is an excessive fine in violation of the Eighth Amendment of the United States Constitution and the Pennsylvania Constitution. Without such information, the nature of Respondent's Fourteenth Defense is unclear from its pleading. Accordingly, Respondent's Fourteenth Defense is insufficient as pleaded.

Likewise, Respondent's Fifteenth Defense is insufficient as pleaded. Within this defense, Respondent concludes that Complainant's proposed civil penalty violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the Pennsylvania Constitution because the proposed penalty is "penal in nature" and "tantamount to the imposition of a criminal fine," and the "guidelines, standards and/or instructions for the imposition of the civil penalty" are deficient. Answer at 10. Respondent's Fifteenth Defense does not provide a basis for its conclusion that the proposed civil penalty is "penal in nature" and "tantamount to the imposition of a criminal fine." Furthermore, it is unclear as to what specifically Respondent is referring with its reference to the "guidelines, standards and/or instructions for the imposition of the civil penalty" in its Fifteenth Defense. Although Respondent indicates in its Response that its Fifteenth Defense is an as-applied statutory constitutional challenge, Resp. at 14-15, this is not conveyed in the language of this defense. As Respondent's Fifteenth Defense fails to provide adequate notice to Complainant, it is insufficient as pleaded. Additionally, to the extent that Respondent's Fifteenth Defense may be premised upon a challenge to the Section 313 Enforcement Policy, rather than statute, it is notable that the Section 313 Enforcement Policy, as previously discussed, does not have the force of law. *See supra* at p. 24; *Steeltech, Ltd.*, 8 E.A.D. at 585.

As Respondent's Fourteenth and Fifteenth Defenses are insufficient as pleaded, these Defenses are appropriately struck upon Complainant's Motion to Strike.

9. Sixteenth Defense

In its Sixteenth Defense, Respondent asserts various legal standards for which it requires Complainant to prove its claims. Specifically, Respondent states:

> The Respondent requires the Complainant to prove its claim for a civil penalty by a minimum standard of clear and convincing evidence, as required by the 4th, 5th, 6th, and 14th Amendments of the United States Constitution and by the Pennsylvania Constitution. The Respondent further required the Complainant to prove its claim for a civil penalty beyond a reasonable doubt, as required by the 4th, 5th, 6th, and 14th Amendments of the United States Constitution and by the applicable provisions of the Pennsylvania Constitution.

Answer at 10.

As with the Fourteenth and Fifteenth Defenses, Complainant characterizes Respondent's Sixteenth Defense as a constitutional defense, and generally objects to this defense on the grounds that constitutional defenses are not available in administrative proceedings. Comb. Mots. at 22-23. Complainant does not specifically address the standards Respondent seeks to apply to this proceeding in its Motion to Strike.

Respondent, as previously discussed, disputes Complainant's contention that constitutional defenses are unavailable in administrative proceedings, and argues that such defenses must be raised for purposes of preservation upon subsequent review. Resp. at 14-15. Respondent indicates that it is advancing an as-applied statutory constitutional challenge in its Sixteenth Defense, and argues that the penalty sought by Complainant is constitutionally prohibited. Resp. 14-15. However, Respondent does not more specifically address the basis for its demand to apply the standards stated in the Sixteenth Defense to this proceeding.

Respondent's Sixteenth Defense is not a defense, but rather a statement requiring Complainant to comply with various standards in proving its claims on the basis that use of such standards is required by the 4th, 5th, 6th, and 14th Amendments of the United States Constitution and by the Pennsylvania Constitution. The Rules of Practice provide that "[e]ach matter of controversy shall be decided by the Presiding Officer upon a preponderance of evidence." 40 C.F.R. § 22.24(b). Accordingly, the appropriate standard applied to Complainant's claims is the preponderance of evidence standard. Respondent notably has not provided a rationale as to how the United States Constitution and the Pennsylvania Constitution require that the differing standards stated in its Sixteenth Defense be applied to Complainant's claims. Additionally, Respondent does not provide an explanation as to which of the two standards it asserts in its Sixteenth Defense it seeks to have applied to this proceeding. As the Rules of Practice unambiguously establish the preponderance of evidence standard as the applicable standard for this proceeding, and do not grant Respondent authority to demand a differing standard, Respondent's Sixteenth Defense fails as a matter of law. Accordingly, Respondent's Sixteenth Defense is appropriately struck.

10. Seventeenth Defense

In its Seventeenth Defense, Respondent states that it "expressly reserves the right to assert additional affirmative defenses at such time and to such extent as warranted by the factual developments in this case." Answer at 7. Complainant, in its Motion to Strike, argues that this defense fails as a matter of law because the Rules of Practice "require that Respondent's answer set forth the 'circumstances or arguments which are alleged to constitute the grounds of any defense.'" Comb. Mots. at 23 (quoting 40 C.F.R. § 22.15(b)). Additionally, Complainant asserts that defenses not asserted in responsive pleading are waived. Comb. Mots. at 23. In its Response, Respondent does not provide an argument in defense of its Seventeenth Defense.

Respondent's Seventeenth defense is not a defense, but rather a general reservation to assert additional affirmative defenses in the future. *See, e.g.*, *Vazquez v. Triad Media Solutions, Inc.*, 2016 U.S. Dist. LEXIS 3912, *15-16 (D.N.J. Jan. 13, 2016); *United States v. Consolidation Coal Co.*, 1991 U.S. Dist. LEXIS 15229, *26-27 (W.D. Pa. July 5, 1991) (discussing general reservations of defenses and finding such reservations appropriately struck under the FRCP). As

noted by Complainant, and previously discussed, the Rules of Practice provide that an answer shall state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). Additionally, the Rules of Practice further provide that a respondent may amend its answer "upon motion granted by the Presiding Officer." 40 C.F.R. § 22.15(e). Therefore, the Rules of Practice require Respondent to state the circumstances or arguments that constitute the grounds for an affirmative defense in its Answer, and only allow for Respondent to amend its Answer with leave granted by this Tribunal. Accordingly, pursuant to the Rules of Practice, Respondent would only be able to properly assert affirmative defenses in addition to those contained in its Answer by amending its Answer with leave granted by this Tribunal. As the general reservation contained in Respondent's Seventeenth Defense allows for Respondent to assert additional affirmative defenses outside of these parameters, in contradiction to the Rules of Practice, it is inappropriate, and therefore, properly struck.

V. ORDER

1. Complainant's Motion for Partial Accelerated Decision is **DENIED**.

2. Complainant's Motion to Strike is **GRANTED IN PART**, and **DENIED IN PART**, as follows:

    A. Complainant's Motion to Strike is **GRANTED** with regard to Respondent's Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Seventeenth Defenses. These defenses are hereby struck.

    B. Complainant's Motion to Strike is **DENIED** with regard to Respondent's First, Ninth, and Twelfth Defenses.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: December 21, 2016
Washington, D.C.

In the Matter of *Eagle Brass Company*, Respondent.
Docket No. EPCRA-03-2015-0127

Certificate of Service

I hereby certify that the forgoing Order on Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike Affirmative Defenses, dated December 21, 2016, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Andrea Priest
Attorney Advisor

Original and One Copy by Hand Delivery
Mary Angeles
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic and Regular Mail to:
Joyce A. Howell, Esq.
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103
Email: howell.joyce@epa.gov

Copy by Electronic and Regular Mail to:

James E. Gavin, Esq.
Masano Bradley, LLP
1100 Berkshire Boulevard, Suite 201
Wyomissing, PA 19610
Email: jgavin@masanobradley.com

Dated: December 21, 2016
Washington, D.C.