UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	**Docket Nos.: CWA-07-2001-0052**
Iowa Turkey Growers Cooperative d/b/a/	**)**	**CERCLA-07-2002-0009**
West Liberty Foods,	**)**	**EPCRA-07-2002-0009**
	)	
RESPONDENT	**)**	

ORDER ON COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On October 25, 2001, Complainant United States Environmental Protection Agency (EPA) filed its Amended Complaint seeking penalties against Iowa Turkey Growers Cooperative (Respondent) for violations of various environmental laws and regulations. In Count I, EPA alleges that Respondent violated Sections 301 and 307 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311, 1317 and its implementing regulations. EPA alleges, in part, that Respondent violated its permit requirements of pre-treatment prior to discharging into a publicly-owned treatment works. Further, EPA alleges that those permit violations resulted in the "pass through" of pollutants and the "interference" with the POTW's treatment processes or operations. In Count II, EPA alleges that Respondent violated the release notification requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603, and its implementing regulations. In Count III, EPA alleges that Respondent violated the release notification requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045, and its implementing regulations.

In response, Respondent filed its Amended Answer, which asserts several affirmative defenses. EPA has now filed a motion to strike the fifth and ninth affirmative defenses. The Consolidated Rules of Practice governing the Court's procedures do not specify how to resolve a motion to strike. Nevertheless, an administrative law judge (ALJ) may refer to the Federal Rules of Civil Procedure (FRCP) by analogy. *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (E.P.A. 1997). Rule 12(f) of the FRCP provides that a court may strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Motions to strike are not favored and will be denied unless the legal insufficiency of the defense is clearly apparent. *In the Matter of Franklin and Leonhardt Excavating Co., Inc.*, Docket No. CAA-98-011, 1998 EPA ALJ LEXIS 126, at *10 ("Order Denying Complainant's Motion to Strike Affirmative Defenses," Dec. 7, 1998). As to the

insufficiency or immateriality of a defense, such motions are not to be granted when there remains genuine issues of disputed material fact. *In the Matter of Century Aluminum of W. Va, Inc.*, Docket No. CAA-III-116, 1999 EPA ALJ LEXIS 26, at *2 ("Order Granting Complainant's Motion to Strike Affirmative Defenses," June 25, 1999).

As a threshold matter, Respondent challenges the timeliness of EPA's motion to strike. Respondent premises this challenge on FRCP Rule 12(f), which requires motions to strike in *district court* actions to be filed within twenty (20) days after the pleading at issue is served. Although the Court may refer to the FRCP to inform it as to policy matters concerning such motions, it is not bound by the procedural rules of the FRCP. *Katzon Bros., Inc. v. U.S. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988); *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (E.P.A. 1998); *In re Lazarus, Inc.*, 7 E.A.D. at 330 n.25. In accordance with the Rules of Practice, the Court issued an Order providing that any motions in this case could be filed as late as March 18, 2002. EPA filed its motion to strike on March 18, 2002 in accordance with the Court's Order and the Rules of Practice; therefore, EPA's motion was filed in a timely manner.

I. Respondent's Fifth Affirmative Defense

Respondent's Fifth Affirmative Defense reads as follows:

> Respondent states that the failure of the Iowa Department of Natural Resources, as the state agency with authority to administer the federal NPDES [National Permit Discharge Elimination System] program in Iowa, to effectively administer the requirements of the federal NPDES program with the City of West Liberty, along with the failure of the EPA to intervene and administer the program, caused the unnecessary accruement of alleged permit violations, and corresponding proposed penalty, beyond the time any alleged deficiency could have been cured.

This defense appears to be directly primarily at the alleged CWA violations. EPA construes this defense as a laches defense and argues that laches is not a defense to government actions to enforce the law. Generally, the laches defense, which concerns delay in government action, does not bar litigation brought by the government. *Nevada v. U.S.*, 463 U.S. 110, 141 (1983); *Bostwick Irrigation Dist. v. U.S.*, 900 F.2d 1285, 1291 (8th Cir. 1990); *In the Matter of Century Aluminum of W. Va., Inc.*, 1999 EPA ALJ LEXIS 26, at *5-6.[1]

[1] In a narrow exception to the general rule, the laches defense does apply to the government when the government acts in a capacity not enforcing the public law, but rather to assert its rights as a party to a commercial transaction. *Clearfield Trust Co. v. U.S.*, 318 U.S. 363, 369 (1943).

Nevertheless, Respondent submits that EPA has misconstrued its defense. Respondent explains that its defense is not that governmental authorities delayed their actions but that those authorities' "absolute failure" to administer the NPDES program "caused the unnecessary accruement of permit violations." Respondent also claims there is a dispute of fact as to whether Respondent was a source or cause of the alleged violations. A reading of the text of Respondent's fifth affirmative defense indicates that it may in fact be more expansive than a mere laches defense. In counterpoint, EPA argues that Respondent's defense is at least analogous to laches and that the governments' neglect of duties does not affect Respondent's duties.

The Court wishes to explore the details in the evidentiary record as to this alleged failure by EPA and the Iowa Department of Natural Resources. A greater development of this defense, which appears somewhat ambiguous at this point, would provide for a more complete record. Furthermore, this defense raises issues that may be relevant at least to the determination of the appropriate amount of penalty to be imposed, if any. Facts relating to this defense may be relevant to penalty factors such as "seriousness" and "other matters as justice may require." *See* CWA § 309(d) (listing civil penalty factors).[2] Accordingly, **EPA's Motion to Strike Respondent's fifth affirmative defense is DENIED.**

II. Respondent's Ninth Affirmative Defense

Respondent's Ninth Affirmative Defense focuses on the reporting violations. Respondent asserts as a defense that it does not have to report a release of regulated substances unless the release extends beyond the boundaries of its facility. EPA agrees in principle that such a defense exists, although EPA sees this as a narrow defense.

The defense claimed by Respondent may be asserted in some cases as a defense to EPCRA notification requirements. EPCRA § 304(a)(4), 42 U.S.C. § 11004(a)(4); 40 C.F.R. § 355.40(a)(2)(i). The Environmental Appeals Board (EAB) has construed this to be a narrow defense, limited to situations where a respondent can show that a release did not leave the facility: "[i]f the release does not extend off-site, and thus the only persons potentially exposed were on-site, the reporting requirement does not apply." *In re Genicom Corp.*, 4 E.A.D. 426, 437 (E.P.A. 1992).

Nevertheless, EPA states that Respondent's chemical release questionnaire, which is certified by Respondent, indicates that a release did reach beyond the boundaries of Respondent's facility. Motion to Strike at 5-6, *citing*, RX 46. This document indicates that Respondent's defense is inapplicable in the case at hand. Nevertheless, Respondent states that discovery is ongoing and that its ongoing forensic investigation may reveal evidence to the contrary, thus showing that the release did not extend beyond the boundaries of the facility. Generally, courts are to refrain from evaluating

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[2] *See also e.g. In the Matter of Franklin and Leonhardt Excavating Co., Inc.*, 1998 EPA ALJ LEXIS 126, at *10.

the merits of a defense where the background of a case is not adequately developed. *In the Matter of Franklin and Leonhardt Excavating Co., Inc.*, 1998 EPA ALJ LEXIS 126, at *10-11.

Accordingly, **the Court defers ruling on the Motion to Strike the ninth affirmative defense.** However, the Court expects that at the outset of the hearing if Respondent has no fruits from its ongoing forensic investigation, counsel for Respondent will withdraw this defense on its own.

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William B. Moran
United States Administrative Law Judge

Dated: May 20, 2002
Washington, DC

In the Matter of Iowa Turkey Growers Cooperative
d/b/a West Liberty Foods, Respondent
Docket No. CWA-07-2001-0052

CERTIFICATE OF SERVICE

I certify that a true copy of **Order on Complainant's Motion to Strike Affirmative Defenses,** dated May 20, 2002 was sent this day in the following manner to the addressees listed below.

_____
Nelida Torres
Legal Staff Assistant

Dated: May 20, 2002

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