UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF :	)	**Docket No. RCRA-02-2001-7110**
COUNTY OF BERGEN	)	
IN THE MATTER OF:	)	**Docket No. RCRA-02-2001-7108**
BETAL ENVIRONMENTAL CORPORATION, INC.	)	

Respondents

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S THIRD, FOURTH, FIFTH AND SIXTH AFFIRMATIVE DEFENSES AND GRANTING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S SECOND AFFIRMATIVE DEFENSE AND CROSS-CLAIMS

This proceeding was initiated by the filing of a Complaint and Notice of Opportunity for Hearing on October 3, 2001. The case against the respondent in this matter, the County of Bergen in the State of New Jersey ("Respondent"), was consolidated with an EPA action against Betal Environmental Corporation, Inc. via an Order issued on November 19, 2001, by the undersigned Administrative Law Judge. The complainant in this matter, the Region II Office of the United States Environmental Protection Agency ("Complainant"), alleged that Respondent committed four violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recycling Act and the Hazardous and Solid Waste Amendments (hereinafter collectively referred to as "RCRA"); its promulgating regulations and the New Jersey Administrative Code.[1] Complainant alleges in Count 1 of the Complaint that Respondent

[1] The State of New Jersey incorporated Parts 124, 260 through 266, 268 and 270 of RCRA's implementing regulations, by reference, into its Administrative Code on October 21, 1996. The EPA authorized New Jersey's hazardous waste program on August 2, 1999. *See* 64 Fed. Reg. 41823 (1999). However, this authorization was granted with certain exceptions on the basis that the State had not incorporated by reference the entirety of RCRA's implementing regulations nor had the State adopted substitute regulations. The EPA has the authority to enforce RCRA even in states that have adopted RCRA and whose programs are authorized by the EPA. *CID-Chemical Waste Management of Illinois, Inc.*, 2 E.A.D. 613, 615-620 (EAB,

violated Section 3010(a) of RCRA, Section 262.12(a) of the promulgating regulations, and Section 26G-12(1)(a) of the New Jersey Administrative Code by failing to file notification of its generation and storage of hazardous waste; and by failing to obtain an EPA hazardous waste identification number. In Count 2 Complainant alleges that Respondent violated Section 262.20(a) of the implementing regulations and Section 26G-7.1(a) of the New Jersey Administrative Code by failing to prepare a Hazardous Waste Manifest for the transportation of lead-contaminated soil waste from Respondent's Mahwah facility to another location. Complainant alleges in Count 3 of the Complaint that Respondent violated Section 265.31 of the regulations and Section 26G-9.1(a) of the New Jersey Code by failing to maintain and operate its facility in a manner which minimized the possibility of a fire or explosion or the unplanned release of hazardous waste. In Count 4 of the Complaint EPA alleges that Respondent violated Section 268.7(a)(1) of the regulations and Section 26G-11.1(a) of the New Jersey Code by failing to determine whether lead-contaminated soil waste in waste piles on its parking lot needed to be treated prior to disposal. Complainant proposes that a penalty of $100,800 be imposed against the Respondent for these alleged violations.

Complainant filed a motion dated November 13, 2001, in which it seeks to strike five of Respondent's six affirmative defenses and all three of Respondent's cross-claims which were raised in the Respondent's Answer of November 1, 2001. In response to this Motion to Strike the Respondent filed a response to Complainant's Motion in which Respondent opposes the striking of the affirmative defenses and cross-claims.

The first of Respondent's affirmative defenses is its contention that the Complainant failed to give reasonable notice to the Respondent and failed to provide the Respondent with a reasonable opportunity to "cure the alleged defect." Answer at 5. Respondent asserts as its Second Affirmative Defense that there was no privity between the Complainant and the Respondent. In both its Third Affirmative Defense and its Fourth Affirmative Defense the Respondent refers back to the contract between the Respondent and its co-respondent, Betal Environmental Corporation, Inc. and asserts its terms as defenses to this action. In its Fifth Affirmative Defense Respondent claims that the Complainant is estopped from proceeding with the instant cause of action. Respondent asserts the doctrine of laches as its Sixth Affirmative Defense.

Respondent's three cross-claims are related to its desire to obtain indemnification and contribution from its co-respondent in this matter, Betal Environmental Corporation, if a penalty is imposed on Respondent for the alleged RCRA violations. Respondent's First Cross-Claim alleges that Respondent is entitled to common law indemnity from Betal Environmental Corporation. As its Second Cross-Claim Respondent seeks a proportionate contribution from Betal for any penalties assessed against Respondent on the basis of New Jersey's Comparative Negligence Act. Respondent's Third Cross-Claim alleges that the terms of Respondent's

---

1988). *See also Bil-Dry Corporation,* 2001 EPA App. LEXIS 1, at *29-*31 (EAB, January 18, 2001).

agreement with Betal provided that Respondent would be held harmless for any and all claims and that Betal would indemnify the Respondent for all claims including the violations cited in the Complaint.

Complainant asserts in its Motion that the named defenses and cross-claims should be stricken because they "present no question of law or fact that needs to be considered by this Court." Complainant's Memorandum at 5. Complainant argues that Respondent's Second Affirmative Defense should be stricken because the issue of privity is "irrelevant to the issue of whether Respondent committed the violations alleged in the Complaint or whether the Respondent should be assessed a penalty."*Id*. Complainant contends that Respondent's Third and Fourth Affirmative Defenses should be stricken because Respondent is a generator, as that term is defined by Section 260.10 of the implementing regulations and is thus, subject to the regulatory requirements. *Id.* at 6. Complainant also points out that RCRA is a strict liability statute and Respondent, as a generator, cannot "use a contract to avoid the consequences of purportedly violating a statutory duty that has been imposed for the protections of others."*Id.* at 7. With regard to both Respondent's Fifth and Sixth Affirmative Defenses Complainant argues that both estoppel and laches are, as a general rule, unavailable defenses against the federal government. *Id* at 8-9. Complainant argues that Respondent's cross-claims should be stricken because they "relate to matters of State law which fall outside the scope of the instant proceedings." *Id.* at 11.

The Consolidated Rules of Practice do not specifically provide for the use of motions to strike in administrative hearings. The only applicable provision is Section 22.16 which addresses the general subject of filing motions in administrative hearings. As a result, it has been the practice in the administrative context to look to the Federal Rules of Civil Procedure for guidance. While these rules are not binding in the present context, they are instructive. Rule 12(f) of the Federal Rules governs the filing of motions to strike in federal courts. This Rule states:

> Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FED. R. Civ. P. 12(f).

Motions to strike are "generally disfavored because they are a drastic sanction and because they are often employed as a delay tactic." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d §1380 (1990) *quoted in Century Aluminum of West Virginia, Inc. & Ohio Valley Insulating Company, Inc.*, 1999 WL 504703 (ALJ, June 25, 1999). *See also Oliner v. McBride's Industries, Inc.*, 106 F.R.D. 14, 17 (S.D.N.Y. 1985). In addition, such motions are contrary to the "general policy that pleadings should be treated liberally, and that a party should have the opportunity to support his contentions at trial."*Oliner,* 106 F.R.D. at 17. As a result, a motion to strike a defense can only be granted if that defense is clearly

insufficient as a matter of law. *Oliner*, 106 F.R.D. at 17. S*ee also Aluminum and Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1057 (5th Cir 1982), *reh'g denied*, 683 F.2d 1373 (1982), *and cert. denied*, 459 U.S. 1105 (1983).

Complainant's Motion is **GRANTED** as it applies to Respondent's Second Affirmative Defense. Respondent asserts as its Second Affirmative Defense that there was no privity between the Complainant and Respondent. As Complainant points out, privity is irrelevant to the instant proceeding. Black's Law Dictionary defines the term "privity" as: "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest." BLACK'S LAW DICTIONARY 1217 (7th ed. 1999). As is apparent from this definition, privity is irrelevant to this matter. The focus in this case is whether Respondent is liable for the alleged RCRA violations; it is not relevant whether privity exists between the EPA and Respondent – this is not a contract case nor does it involve any transactions between the EPA and Respondent nor does it touch on any property issues between Complainant and Respondent. Whether or not there is a relationship between the EPA and the Respondent is not an issue which is relevant to the instant matter. Consequently, Respondent's Second Affirmative Defense will be stricken.

Complainant has raised some compelling arguments in regard to Respondent's claims of equitable estoppel and laches. Complainant asserts that both laches and equitable estoppel are typically not available as defenses against the Federal government. While precedent has established that it is unlikely that these defenses can be successfully employed against the government, the possibility exists that once the record has been more fully established and Respondent is able to further develop its arguments, Respondent could successfully prove its case. *See Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (the Court left open the possibility that an estoppel claim could succeed against the Federal government and limited that possibility to cases which do not involve a payment from the Treasury). *See also Martin v. Consultants and Administrators, Inc*., 966 F.2d 1078 (7th Cir. 1992). Furthermore, the issues underlying Respondent's claims of equitable estoppel and laches may be relevant to a penalty assessment (if such an assessment proves necessary).

In its Third and Fourth Affirmative Defenses Respondent relies on the terms of its contract with Betal Environmental Corporation, Inc.. While Complainant is accurate in its assertion that a company cannot contract around its duty to comply with federal environmental statutes, the terms of Respondent's contract with Betal could help to determine the extent of its liability and could bolster arguments relevant to the assessment of a penalty if liability is established and such an assessment is determined to be appropriate.

At this juncture in the instant matter the parties have yet to file their respective prehearing exchanges. It would, therefore, be premature to grant Complainant's Motion at this stage in the proceeding with regard to Respondent's Third, Fourth, Fifth and Sixth Affirmative Defenses. *See, e.g., Cipollone v. Liggett Group*, 789 F. 2d 181, 188 (3d Cir. 1986), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 504 (1992) ("[A] court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent'. . . The underpinning

of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where, as here, the factual background for a case is largely undeveloped.") (citation omitted). Complainant's Motion will, therefore, be **DENIED** with regard to the striking of these four defenses.

Complainant's Motion to Strike Respondent's Cross-Claims is **GRANTED**. As stated earlier the focus of the instant proceedings is on whether Respondent violated RCRA and whether the imposition of a penalty is appropriate given the facts of this matter. Respondent, via its cross-claims, seeks adjudication of its claims of indemnification and contribution against its co-respondent, Betal Environmental, Corporation, Inc. The adjudication of these cross-claims is beyond the scope of the instant proceeding. *See* 40 C.F.R. §22.1. As outlined previously in this Order, Respondent seeks common law indemnity from Betal Environmental in its First Cross-Claim. Respondent attempts to proceed under the New Jersey Comparative Negligence Act in its Second Cross-Claim; and in its Third Cross-Claim Respondent seeks the enforcement of a contract provision which allegedly provides for Respondent's indemnification/contribution from Betal Environmental in the event of a penalty assessment. Neither of these claims raise issues which can be resolved in this proceeding.

The instant administrative proceeding is authorized by Section 3008 of RCRA, 42 U.S.C. § 6928, and is governed by the Consolidated Rules of Practice ("Rules of Practice"), 40 C.F.R. Part 22. Adjudicatory proceedings governed by the Rules of Practice are limited in jurisdiction to the enforcement of environmental statutes and regulations. Disputes arising solely in state or federal common law or under state statutes (unrelated to federal environmental statutes), like Respondent's cross-claims, are not appropriate for resolution in the instant administrative proceeding. *See* 40 C.F.R. 22.1. Furthermore, RCRA is a strict liability statute which does not provide for indemnification or contribution as criteria to be considered in the assessment of penalties. *See* RCRA Section 3008(g), 42 U.S.C. § 6928(g). *See also* RCRA Civil Penalty Policy, 1990 CPP LEXIS 17 (October, 1990).

Thus, the relief sought by Respondent, namely its indemnification by Betal Environmental or Betal's contribution to a potential penalty, is not directly authorized by RCRA and thus, cannot be granted in the instant administrative proceeding. In addition, the issues of indemnification and contribution will only become relevant if a penalty has been imposed against Respondent. It is this potential penalty amount for which Respondent can later seek indemnification or contribution. Thus, indemnification and contribution will only become relevant subsequent to the instant proceeding and in the appropriate forum. *See In re: Jerry C. Carter, Inc., and Michael K. Joseph*, 2001 EPA ALJ LEXIS 9, at *18 n.10 (ALJ, January 8, 2001). [2] Consequently, for the reasons discussed above, Complainant's Motion to Strike will be

[2] While RCRA does not prohibit the application of indemnification or contribution to the apportionment of civil penalties in proceedings before an appropriate adjudicatory body, both indemnification and contribution may be inapplicable to RCRA penalties. The Administrative Law Judge in *Alliant Techsystems, Inc.*, 1997 EPA ALJ LEXIS 142 (ALJ, December 4, 1997)

GRANTED with regard to each of Respondent's cross-claims.

Having so held, the issues of contribution and indemnification might be considered in this matter insofar as they relate to Respondent's Third and Fourth Affirmative Defenses and thus, may aid in the mitigation or determination of the extent of Respondent's liability and the appropriate penalty amount should a penalty be assessed.

Complainant's Motion is hereby **GRANTED** as it applies to Respondent's Second Affirmative Defense and all of Respondent's Cross-Claims; and is **DENIED** as it applies to Respondent's Third, Fourth, Fifth and Sixth Affirmative Defenses.

_____

Stephen J. McGuire
United States Administrative Law Judge

March 7, 2002
Washington, D.C.

---

questioned the applicability of indemnification to the Clean Air Act which is, like RCRA, a strict liability statute. The Judge in that matter, relying on *Beerman Realty Company v. Alloyd Asbestos Abatement Company*, 653 N.E. 2d 1218, 1223 (1995) ("Upon reviewing the legislative history of the civil penalty provisions of the Act and case law interpreting the purpose, we find that allowing indemnification for civil penalties would violate the public policy and contravene the purpose of the Clean Air Act.") and *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153 (1997), noted that indemnification should not be available in instances where its application would defeat the underlying public policy of the statute involved. *Alliant,* 1997 EPA ALJ LEXIS 142, at *3 .