UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STRONG STEEL PRODUCTS, LLC,	)	**Docket Nos. RCRA-5-2001-0016,**
	)	**CAA-5-2001-0020 &**
Respondent	)	**MM-5-2001-0006**

ORDER ON MOTIONS FOR LEAVE TO FILE AMENDED COMPLAINT AND TO STRIKE DEFENSES AND MOTIONS IN LIMINE

This proceeding was initiated by a Complaint filed on September 28, 2001, alleging that Respondent violated the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. §§ 6901 *et seq.* The Complaint was based on EPA's multimedia inspection of Respondent's scrap metal processing facility in Detroit, Michigan on July 22, 1999.

Counts 1 and 2 of the Complaint, alleging violations of regulations governing the proper evacuation of ozone depleting refrigerants prior to disposal, were dismissed by Order dated August 13, 2002. Counts 3 through 9 allege violations of RCRA, the EPA-authorized Hazardous Waste Management Regulations of the State of Michigan, codified in the Michigan Administrative Code, MAC Part 299, and the Federal Hazardous Waste Management Regulations, 40 C.F.R. Parts 260-279. On September 9, 2002, then-Presiding Judge Stephen J. McGuire issued an Order on the parties' cross motions for accelerated decision (Order on Cross Motions) as to the alleged RCRA violations. Judge McGuire granted Complainant's motion for accelerated decision as to liability for Counts 7 and 8, denied the motion as to Counts 3, 4, 5, 6 and 9, granted in part and denied in part Respondent's motion for accelerated decision as to Count 5, and denied Respondent's motion for accelerated decision as to Counts 6 and 9.

By Order dated April 11, 2003, this matter was scheduled for hearing, to commence on November 18, 2003. The Order also set a due date of September 5, 2003 for prehearing motions.

On August 1, 2003, Complainant submitted a Motion For Leave to Amend Complaint. In the Motion Complainant seeks to amend Counts 3 through 7 of the Complaint, to plead alternative and additional legal theories of liability, and to increase and decrease the proposed penalties. Respondent filed its Memorandum in Opposition to Complainant's Motion For Leave to Amend Complaint on or about August 18, 2003. On August 29, 2003, Complainant submitted a Memorandum of Law in Reply to Respondent's Opposition to the Motion to Amend.

On August 15, 2003, Complainant filed a Motion to Dismiss Respondent's Defenses and Motion in Limine Related to Witnesses and Documents. In that Motion, Complainant seeks to strike thirteen defenses raised by Respondent in its Answer and the testimony of 7 witnesses for Respondent and 2 of Respondent's proposed exhibits. On or about August 25, 2003, Respondent filed a Memorandum in Opposition to Complainant's Motion to Dismiss and Motion in Limine (Opposition). Complainant filed a Reply thereto on or about September 4, 2003, and Respondent submitted a Supplement to its Opposition on September 11, 2003.

On or about September 5, 2003, Respondent filed a Motion in Limine to Exclude Certain of Complainant's Witnesses and Certain Subjects of Proposed Testimony. In its Motion, Respondent seeks to prohibit certain of Complainant's witnesses from testifying on certain topics as proposed for their testimony in Complainant's Prehearing Exchange, on the grounds that the testimony is neither relevant nor material. Complainant filed a Response to Respondent's Motion in Limine on September 22, 2003, and Respondent submitted a Reply thereto on October 2, 2003.

I. Motion for Leave to Amend the Complaint

A. Standards for amending a complaint

The Consolidated Rules of Practice (Rules) provide at 40 C.F.R. § 22.14(c) that after the answer is filed, the Complainant may amend the complaint only upon motion granted by the Presiding Officer. No standard is provided in the Rules for determining whether to grant an amendment. The general rule, however, is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company,* MPRSA Appeal No. 91-1 at 41 (EAB, August 5, 1992); *see also, Lazarus, Inc.,* TSCA Appeal No. 95-2, slip op. at 22 (EAB, Sept. 30, 1997). The standard in Federal court for amendment of pleadings is set forth in *Foman v. Davis,* 371 U.S. 178, 181-82 (1962) as follows: "[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment," leave to amend pleadings should be allowed.

B. Discussion

Complainant seeks to amend the Complaint to include an alternative legal theory for Counts 3 and 4, add an additional basis for liability for Count 5, clarify Counts 6 and 7, increase the proposed penalty for Count 3, reduce the proposed penalty for Count 6, and "compress" the penalty for Count 4. Attached to Complainant's Motion is the proposed Amended Complaint.

In its Opposition to the Motion, Respondent asserts that granting the amendments would severely prejudice its ability to prepare for trial and comply with the prehearing schedule, and that Complainant excessively delayed seeking leave to amend, being fully aware of the factual and legal issues but choosing not to plead them in the Complaint. Respondent points out that the amendments would nearly double the proposed penalty, yet neither the Motion nor proposed

Amended Complaint specify the amount of penalty for each count of the Complaint. Complainant submitted the revised penalty calculation with its Reply, asserting that it mistakenly omitted to attach it to the motion to amend. Respondent points out that Complainant proposes the amendments two years after the initial Complaint was filed, and ten months after the Order denying Complainant's motion for accelerated decision, which denial was based, in part, on facts and legal theories being beyond the scope of the Complaint.

Respondent asserts that leave to amend a complaint "is routinely denied when the moving party seeks to add substantive claims shortly before a trial or hearing is set to begin," citing to an Environmental Appeals Board (EAB) opinion upholding the denial of EPA's motion to amend a complaint, *Carroll Oil Co.,* 2002 EPA App. LEXIS 14, RCRA (9006) Appeal No. 01-02 (EAB, July 31, 2002). Opposition at 5. The EAB in that decision quotes the Seventh Circuit: "Substantive amendments to the complaint just before trial are not to be countenanced and only serve to defeat these interests" of the parties in the speedy resolution of their disputes without undue expense. *Feldman v. Allegheny International, Inc.,* 850 F.2d 1217, 1225 (7th Cir. 1988)(quoted in *Carroll Oil*, slip op. at 21). Respondent also cites to several Federal court opinions which note as a factor in denying amendments the failure to offer a reasonable explanation for a delay of several months in moving to amend, where the movant knew of the facts underlying the proposed amendment much earlier, but inexplicably waited to request the amendment until near the date of trial.

Indeed, "where a party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial." *Las Vegas Ice & Cold Storage v. Far West Bank,*893 F.2d 1182, 1185 (10th Cr. 1990). The motion is not automatically denied, however. As stated by the Fifth Circuit, "[m]erely because a claim was not presented as promptly as possible . . . does not vest the trial court with authority to punish the litigant." *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982). The Eighth Circuit notes that when late-tendered amendments involve new theories of recovery *and* impose additional discovery requirements, courts are more likely to uphold findings of prejudice justifying denial of the amendment. *Bell v. Allstate Insurance Co.,* 160 F.3d 452, 454 (8th Cir. 1998). Similarly, in the cases cited by Respondent, beyond the movant's knowledge earlier in the proceeding of the facts underlying the proposed amendment, there were additional circumstances which would cause undue prejudice or there were procedural deficiencies.

In *Carroll Oil,* seven weeks before the hearing, EPA moved to add two new respondents to the complaint, which, the EAB observed, would unduly prejudice the original respondent as it would have likely required additional fact finding and investigation and presented new legal theories. In *Feldman,* the motion to amend was denied because the amendment would result in additional discovery, delayed litigation, and increased legal costs. *Lone Star Steakhouse and Saloon, Inc. v. Alpha of Virginia, Inc.,* 43 F.3d 922, 940 (4th Cir. 1995) involved a motion to amend an answer to add counterclaims, for which the defendant knew the underlying facts for four months, and the amendment would have delayed the resolution of the case, raising new issues that "would have required substantial new discovery." In *Southmark Corp. v. Shulte Roth*

& Zabel, 88 F.3d 311, 315-316 (5th Cir. 1996), the plaintiff knew of the facts supporting the amendment 13 months before filing its second motion to amend, and offered no reasonable explanation for the delay. A motion to amend a complaint to add class action allegations was denied in *Alsup v. International Union of Bricklayers and Allied Craftsmen of Toledo, Ohio, Local Union No. 3*, 1990 WL 67375 * 6 (6th Cir. 1990), not only for the delay in amending the complaint, but also because, *inter alia,* plaintiffs failed to state with particularity the grounds for the motion to amend as required by Federal Rule of Civil Procedure 7(b)(1), and made no attempt to satisfy their burden to demonstrate the existence of class members. In *Svoboda v. Trane Co.,* 655 F.2d 898, 900 (8th Cir. 1981), a motion to amend was filed 11 days before the date the trial was scheduled to begin and the delay in filing the motion was considered by the district court to be totally inexplicable. In *DeSaracho v. Custom Food Machinery, Inc.,* 206 F.3d 874, 878 (9th Cir. 2000) the new issue was proposed by defendants, who did not raise the issue until one week before the trial was scheduled to commence. *Frank v. U.S. West, Inc.,* 3 F.3d 1357, 1365-66 (10th Cir. 1993) involved a motion to amend which was filed four months after the court's deadline for amending pleadings. A motion filed by the defendant in *National Services, Inc. v. Vafla Corp.,* 694 F.2d 246, 249 (11th Cir. 1982) to add a defense to its answer was denied where the amendment would cause delay at a late stage in the proceedings.

The Consolidated Rules of Practice, 40 C.F.R. Part 22, accord significant deference to the presiding judge's efforts to assure judicial economy and avoid undue delay. *See, Carroll Oil,* slip op. at 20. The cases cited by Respondent are distinguishable from the case at hand, in which neither party has stated that it needs to conduct additional discovery, and there is no request or other basis for postponing the hearing. Complainant filed the Motion to Amend on August 1, 2003, well in advance of the deadline (September 5, 2003) set in the Order Scheduling Hearing, and three and a half months prior to hearing. Complainant filed a supplemental prehearing exchange on August 13, 2003, and states that it does not anticipate filing any further supplements to the prehearing exchange except to submit Respondent's further response to EPA's information request regarding the allegedly unlabelled drums, and any narrative explanation of the amended penalty, if requested by the undersigned. Reply n. 23.

A discussion of the arguments particular to each Count follows.

1. Count 3

Count 3 alleges that Respondent failed to stop, contain or clean up releases of *used oil* that EPA inspectors observed during an inspection on July 22, 1999, in violation of MAC § 299.9810(3) and 40 C.F.R. § 279.22(d). The inspectors observed puddles of liquid and saturated soils near the automobiles being recycled at Respondent's scrap processing operation. Complainant seeks to allege the alternate legal theory that Respondent did not respond adequately to releases of *hazardous waste*, under MAC § 299.9607(1) and (3) and 40 C.F.R. § 264.56(b), (e) and (g). Complainant explains that the actions giving rise to the two alternative violations stem from the mismanagement of gasoline, used oil, batteries, and other wastes from automobiles, resulting in releases to the environment.

Complainant also seeks to allege that the violations in Count 3 exceeded 180 days, asserting that this allegation can be inferred from the allegation in the existing Complaint that Respondent failed to comply with MAC § 299.9810(3) for at least one day. Complainant thus intends to increase the proposed penalty to account for multiple days of violation, which accounts for the large increase in the total proposed penalty.

Respondent asserts that the amendment would present additional legal issues at the hearing, requiring proof of many additional facts, such as whether the release "could threaten human health or the environment" and whether Respondent had any knowledge that any spill had reached surface water. The complicated legal and factual issue of whether the liquid constituted hazardous waste would have to be decided. Moreover, Respondent asserts, there is no evidence or testimony summary in the prehearing exchange with which to prove the additional allegations, so the amendment would be futile. Finally, there is no justification for increasing the penalty for multi-day violation, as there is no new evidence in support of a multi-day penalty.

In its Reply (at 5-6), Complainant points out that liability under MAC §§ 299.9607(1) and (3) and 40 C.F.R. § 264.56(b) is not dependent on findings that there was a release to surface water or that it could threaten human health or the environment. Complainant asserts that it will use the same witnesses and documents in support of the amendments. Reply at 7. Complainant points out that in its Prehearing Exchange it considered assessing a multi-day penalty and stated that the penalty could be much greater than the proposed penalty, and that this provided notice to Respondent of an increased penalty.

Judge McGuire already ruled in the Order on Cross Motions (at 26) that Respondent generated hazardous wastes, consisting of the fluids which drained out from automobiles at its site and which contaminated the soil on the property. Respondent does not assert that any additional discovery would be required as to the additional legal issues, or the multi-day penalty, in order to prepare for hearing.

2. Count 4

Count 4 alleges that Respondent failed to properly *store* used oil, by accumulating puddles of used oil on the ground. The applicable Michigan regulation, MAC § 299.9810(4) states that a "used oil generator shall not store used oil in units other than containers or tanks."

Complainant seeks to amend Count 4 the Complaint to allege in the alternative that Respondent's actions constituted *disposal* of used oil in violation of MAC § 299.9816, because Complainant believes that the facts support a conclusion that there was either illegal storage or illegal disposal of used oil. Although the Complaint alleges that the acts constituted "at least one day of violation," Complainant also seeks to "clarify" that the violations possibly continued from July 22, 1999 until April 11, 2000.

Respondent states that the proposed amendment is not based on any newly discovered

evidence, but with the same evidence it has now, Complainant chose to allege in the Complaint illegal storage. When the Order on the motion for accelerated decision indicated that the facts do not establish illegal storage, Respondent points out, the Complainant waited for ten months before moving to amend the Complaint. The difference between storage and disposal presents numerous legal and factual issues "that will certainly complicate both trial preparation and the conduct of the hearing," according to Respondent. Opposition at 11. Respondent also questions, and deems futile, the Complainant's "clarification" that the violation continued possibly until April 11, 2000, where Complainant also intends to *decrease* the proposed penalty.

Complainant replies that the multiple days of violation is related to the determination of the seriousness of the violations. Further, Complainant asserts, the facts in support of the proposed amended allegations are supported by documents and testimony of witnesses in its prehearing exchange, and that there is only the legal question to be briefed and decided as to whether the facts support a finding of storage or disposal.

Respondent does not assert that it would need to conduct additional discovery or that the hearing must be postponed in order for it to be adequately prepared for hearing. As to amending the Complaint to alleged multiple days of violation, such amendment is not futile. The Presiding Judge considers all facts relevant to the penalty, including the number of days of violation, regardless of whether Complainant calculates a multi-day proposed penalty.

3. Count 5

Count 5 alleges that Respondent failed to properly label containers of used oil, including a 250 gallon above-ground storage tank (AST), the automobiles at the site, and their engine oil pans. The Michigan regulations, at MAC § 299.9810(3), require compliance with 40 C.F.R. § 279.22, which states that "[c]ontainers and above ground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words, 'Used oil.'" Complainant proposes to add an additional basis for liability by adding an allegation that Respondent stored used oil in *drums* without labeling the drums "used oil."

Respondent asserts that Complainant knew more than two years before the Complaint was filed that drums photographed on July 22, 1999 by the inspector, Ross Powers, may have contained used oil but had no "used oil" labels on them, as evidenced by the description of Photograph # 3 on his list of photographs. Opposition, Exhibit B. Respondent points out that Judge McGuire ruled that accelerated decision would violate due process if based on an expansion, in the motion for accelerated decision, of the factual basis for Count 5 to include the drums. Respondent argues that any amendment of the Complaint to include the drums would be futile because there is no evidence, such as samples of the liquid in the drums, that they contained used oil. To the contrary, an affidavit presented by Respondent with its opposition to the motion for accelerated decision states that the drums contained either anti-freeze or new hydraulic oil. Opposition, Exhibit C; Opposition to Motion for Accelerated Decision, Exhibit A.

That Complainant proposes the amendment now, although it had knowledge prior to

filing the Complaint that the drums may have contained used oil, is no surprise to Respondent and does not unduly prejudice Respondent. The Order on Cross Motions noted that Complainant sought judgment as to Respondent's liability for failing to label the drums in its Motion for Accelerated Decision, and that Respondent also sought accelerated decision on that issue, based on lack of evidence. Judge McGuire did not rule on the issue of the drums by accelerated decision, but did not preclude the parties from addressing the issue at hearing. Furthermore, the proposed amendment to Count 5 cannot be deemed futile at this point in the proceeding, as testimony may be adduced at hearing on the issue of whether the drums contained used oil.

4. Count 6

Count 6 alleges that Respondent failed to properly notify the Michigan Department of Environmental Quality (MDEQ) of hazardous waste activity as required by Section 3010 of RCRA. As stated in the Order on Cross Motions, Respondent notified the MDEQ in 1997 that it was a Large Quantity Generator of hazardous wastes D008 (Lead) and D006 (Cadmium), but did not notify that it generated hazardous wastes D001, D004, D005, D007, D018, D021, D027, D028, D039, and D040. In 2001, Respondent submitted to MDEQ a Notification that it was a Large Quantity Generator of D008, D018, D021, D028, D039 and D040. The Order on Cross Motions (slip op. at 28, 30) concluded that Respondent was not obligated under applicable regulations to file a subsequent notification, after the initial one in 1997, identifying newly generated hazardous wastes. The Order indicated that the factual issue of whether in 1997 Respondent was generating hazardous wastes that were not listed in the 1997 Notification, remained for determination at the hearing.

Count 6 also alleges that, although Respondent notified MDEQ that it was a generator of hazardous waste, it did not identify itself as a facility which disposes of hazardous waste. The Order on Cross Motions (at 32-33) concluded that Respondent disposed of hazardous wastes at the site, but reserved for the hearing the factual question of whether Respondent owns or operates a "facility for the treatment, storage or disposal" of hazardous waste (TSD facility), as defined in RCRA § 3010(a), 40 C.F.R. § 261.10 and MAC § 299.9103(1), because the facts were not clear whether Respondent operates a TSD facility and the Complaint did not allege that Respondent operates such a facility. Order on Cross Motions September 9, 2002, slip op. at 33.

In addition, Count 6 alleges that Respondent failed to obtain an EPA identification number, but Complainant withdrew that allegation in its Memorandum of Law in support of its Motion for Accelerated Decision (at 34).

Complainant seeks to amend Count 6 to withdraw the latter allegation, to allege that Respondent did not notify of *all* of the hazardous wastes it generated, to allege that Respondent's site was a "facility for the treatment, storage or disposal" (TSD facility) of hazardous waste and that Respondent failed to notify that it *either* disposed of *or stored* hazardous waste without a permit, and to reduce the proposed penalty.

Respondent states that it does not object to the proposed amendment that the 1997 notice

was deficient, but does object to the proposed amendment that Respondent failed to notify that it *stored* hazardous waste. Respondent asserts that Judge McGuire's denied accelerated decision on Count 6 due to Complainant's failure to allege that Respondent operates a "disposal facility," which is defined in 40 C.F.R. § 260.10 as a facility or part thereof at which "hazardous waste is *intentionally* placed into or on any land or water, and at which waste will remain after closure" (emphasis added). Respondent argues that it relied on its understanding that the issue of whether the site is a "disposal facility" is not an issue in this case, and it should not be injected into the case at this late stage in the proceedings.

Respondent's reading of Judge McGuire's Order dated September 9, 2002 is incorrect. Judge McGuire stated in the Order on Cross Motions (slip op. at 33) that the "inquiry is whether Respondent is the owner or operator 'of a facility for the treatment, storage or disposal' of hazardous waste," and denied accelerated decision as to Count 6 on this theory because "Complainant failed to allege in the Complaint that Respondent operates a 'facility' that subjects it to the notification requirements" and the facts were not clear on this issue. Judge McGuire did not make a ruling as to a "disposal facility," which, as he noted (slip op. at 33) is a "more specific definition" than that for a TSD facility.

Respondent therefore cannot rely on any such ruling. The amendments proposed by Complainant should not cause any prejudice to Respondent, as Judge McGuire stated in the Order on Cross Motions (slip op. at 34), that "[t]he Complaint is pled broadly enough to put Respondent on notice that EPA considered it to have stored hazardous waste without a permit." Although he stated this in the discussion of Count 7, it applies as well to Count 6. *See*, Complaint ¶¶ 60, 63-66, 113, 114.

5. Count 7

Count 7 alleges that Respondent *disposed* of hazardous waste without a permit, in violation of Section 3005 of RCRA, which requires each owner or operator of a TSD facility to have a permit. Complainant alleges that the fact that Respondent allowed automotive fluids to drain onto the ground constituted disposal of hazardous waste. Judge McGuire granted accelerated decision, finding Respondent liable on Count 7. Order on Cross Motions, slip op. at 37.

Complainant seeks to amend Count 7 to allege that Respondent illegally *stored* hazardous waste without a permit, and to include facts in support of the allegation, such as the time period for storage and number of drums transported off-site. Complainant also seeks to allege "at least one violation" rather than one violation.

Respondent asserts that EPA was aware of the facts indicating that the remediation waste on the site (contaminated soil in drums) that was shipped off-site for disposal, might constitute illegal storage of hazardous waste. EPA in the Complaint knowingly alleged only illegal disposal, and has no excuse why it should be allowed to change its mind now. Respondent points out that EPA already won accelerated decision on liability and does not seek to increase

the penalty for this count, and asserts that the amendment would make no practical difference, but "would only complicate and possibly delay the hearing." Opposition at 18.

In its Reply (at 15-16), Complainant denies that at the time of the Complaint it had information as to the disposal of the drummed wastes off site, and that they were shipped off site after the Complaint was filed. Complainant points out that the amendment would be relevant to assessment of a penalty, and that in such assessment all relevant facts must be considered by the Presiding Judge.

Respondent does not support its vague assertion that the amendment would possibly delay the hearing, and Respondent acknowledges that it fully reported to EPA the details of the remediation project and off-site disposal (Complainant's Prehearing Exchange Exh. 18). Complainant asserts that unless Respondent provides new information, Complainant "does not anticipate that it will need additional witnesses to testify regarding the underlying liability." Reply at 14. Therefore the record does not indicate at this point that any additional discovery is needed as to the proposed amendment for Count 7. If any such discovery is requested by Complainant, it may be denied if it would delay the hearing or prejudice Respondent.

C. Order

Complainant's Motion to Amend the Complaint is **GRANTED.** Complainant shall serve and file the Amended Complaint with the Regional Hearing Clerk **on or before October 31, 2003** and Respondent shall file an Answer to the Amended Complaint **on or before November 7, 2003.**

II. Complainant's Motion to Strike Respondent's Defenses

A. Discussion

In its "Motion to Dismiss Respondent's Defenses," Complainant requests that Respondent's thirteen "Affirmative Defenses" in its Answer be stricken. This is more properly termed a motion to strike defenses, and is hereinafter referenced as "Motion to Strike." Complainant asserts that the Answer fails to provide sufficient circumstances or arguments in support of the "Affirmative Defenses," that Respondent has otherwise failed to support the defenses, and that certain defenses are moot or inaccurate. In the alternative, Complainant requests that Respondent be ordered to provide specific circumstances and arguments related to each defense it intends to pursue.

In its Opposition to the Motion, Respondent asserts that it does not intend to pursue Defenses 1, 2, 10 and 13. Therefore, these defenses are deemed withdrawn and only the remaining defenses are addressed below.

Because motions to strike are not addressed in the applicable procedural rules (40 C.F.R.

Part 22), Federal court practice as established by the Federal Rules of Civil Procedure (FRCP) may be looked to for guidance. FRCP 12(f) provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

Complainant argues that the defenses are legally insufficient because they do not include "the circumstances or arguments which are alleged to constitute the grounds of any defense" and the "basis for opposing any proposed relief," as required by Section 22.15(b) of the Consolidated Rules of Practice. Respondent's Affirmative Defenses do state the bare circumstances or arguments, but do not include specific facts. For example, Affirmative Defense 4, stating "Several Counts in the Complaint seek duplicative penalties for the identical conduct alleged in other Counts," sets forth an argument which may constitute grounds for a defense to one or more counts, but does not specify *which* counts. Similarly, other Affirmative Defenses refer to alleged violations, records, EPA employees, and data, but do not specify *which* violations, records, EPA employees, and data. However, section 22.15(b) does not require a respondent's answer to include the specific facts in support of the defense, but merely the "circumstances or arguments which are alleged to constitute the grounds" for the defense. Similarly in Federal court, FRCP 8(b) merely requires that "a party shall state in short and plain terms the party's defenses." An affirmative defense "must sufficiently apprise the opposing party of the nature of the defense, providing the opposing party with adequate notice of the relevant elements of the defense." *D.S. America (East), Inc. v. Chromagrafx Imaging Systems, Inc.*, 873 F. Supp. 786, 798-99 (E.D. N.Y. 1995)(pleading the words "estoppel" and "unclean hands," without more, is not a sufficient statement of those defenses, so they were stricken without prejudice to the defendant's right to amend them). An affirmative defense is legally "insufficient" if, as a matter of law, it cannot succeed under any circumstances; on the other hand, where a defense is inadequately pled, it may be dismissed without prejudice to enable the pleader to correct the technical deficiency. *Id.* In the case at hand, to the extent that Respondent has supported Affirmative Defenses in the Opposition to the Motion or Prehearing Exchange, those Affirmative Defenses will not be stricken on the basis of insufficiency.

Respondent argues that the Motion to Strike should be denied because it is actually a motion for partial accelerated decision, and was filed over a year after the deadline for such motions set forth in the Amended Prehearing Order. Respondent acknowledges that the Motion to Strike "may be analogous to a motion to strike affirmative defenses under FRCP 15(f)." Opposition at 3. However, matters outside of the pleadings are normally not considered, and where they are presented in the motion, testing the factual or evidentiary as well as legal basis for the affirmative defense, motions to strike under FRCP 15(f) may serve the same function, and therefore may be treated, as a motion for partial summary judgment. 5A Charles A. Wright and Arthur R. Miller, 5A Federal Practice & Procedure: Civil 2d § 1380 at 650 (1990); *see*, *County of Hennepin v. Aetna Casualty & Surety,* 587 F.2d 945, 946 (8th Cir. 1978)(granting partial summary judgment which strikes two affirmative defenses). Complainant recognizes that consideration of the quality of evidence "effectively would convert the Motion [to Strike] into a Motion for Accelerated Decision." Reply n. 15. To the extent that the factual or evidentiary basis for an Affirmative Defense is challenged, it could have been raised in a motion for

accelerated decision, and because the deadline for such motions has passed, it may be addressed at the hearing. Therefore any such defenses will not be stricken.

Respondent also argues that Complainant violated the Amended Prehearing Order's direction that each party contact the other before filing a motion and determine whether it objects to the relief sought.[1] Although the Motion to Strike indeed has this technical defect, it will not be rejected on that basis in the circumstances of this case.

Complainant also sets forth other grounds for individually dismissing the defenses, as set out below. In response, Respondent argues further that the defenses are potentially meritorious.

As to Defense 3, Complainant asserts that Respondent has the burden to support, but has not supported this defense, a statute of limitations claim, and moreover, that penalties are not barred by the statute of limitations because the alleged violations occurred within five years of the date the Complaint was filed, in September 2001. Respondent asserts that the Complaint's allegations that the violations occurred "on and prior to at least July 22, 1999" does not adequately define when the violations occurred. However, Complainant's assertion now that it does not seek a penalty for any violations more than five years before the Complaint is sufficient to render Defense 3 moot.

Complainant points out that Defense 4, asserting that several counts seek duplicate penalties for identical conduct charged in other counts, was already addressed by Judge McGuire in the Order on Cross Motions. The fact that Judge McGuire ruled that Counts 3 and 4 were not duplicative does not resolve Defense 4, Respondent argues, because the Defense may be considered as to any potentially duplicative counts, and Respondent may appeal Judge McGuire's ruling after the Initial Decision is issued.

Generally, "[i]n order to prevail on a motion to strike, a plaintiff must show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by the inclusion of the defense." *SEC v. McCaskey*, 56 F. Supp.2d 323, 326 (S.D. N.Y. 1999). As to prejudice, "[a]n increase in the time, expense and complexity of a trial may constitute sufficient prejudice to warrant granting a plaintiff's motion to strike." *Id.*

Respondent's failure to specify at this late point in the proceeding which remaining counts of the Complaint it believes are duplicative is inexcusable, and on this basis Defense 4 could be stricken as inadequately pleaded. However, it presents a legal question which may be

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[1] Respondent also argues that Complainant's Motion violates the spirit of the provision in the Order Scheduling Hearing for the parties to stipulate as much as possible to uncontested matters. This argument is insufficient to deny the Motion, as it is unclear how striking insufficient or immaterial defenses interferes with the parties' stipulations of fact, exhibits or testimony.

simply addressed in post-hearing briefs and need not take any time at the hearing, and thus does not prejudice Complainant. Moreover, it is noted that "where the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike." 5A Charles A. Wright and Arthur R. Miller, 5A Federal Practice & Procedure: Civil 2d § 1381 at 672-678.

Complainant asserts that Defense 5, claiming that civil penalties for some or all violations are barred by the Paperwork Reduction Act (PRA), was addressed by Complainant it its Prehearing Exchange, and Respondent has not raised the issue in any motions or otherwise supported it. Complainant asserts that Defense 5 has therefore been abandoned. Motion to Strike n. 3, Attachments 1 and 2. Respondent asserts that the PRA applies to part of Count 6, as explained in its Reply Memorandum in Support of Motion to Strike Certain Exhibits, and to the part of Count 9 that alleges a violation of 40 C.F.R. § 262.11, as stated in Exhibit A page 3 of Respondent's Prehearing Exchange. However, Respondent points out that Complainant had committed to seek penalties under Count 9 only for a violation of 40 C.F.R. § 268.7(a)(6) and not § 262.11. Complainant confirms this commitment in its Reply (at 8), but asserts that compliance with § 262.11 may be a factor in establishing liability and determining the penalty, because the failure to retain the records of a hazardous waste determination or analysis for land disposal required under § 262.11 depends on whether Respondent was required to comply with § 262.11. Reply at 11; Complainant's Prehearing Exchange Exhibit B, p. 6. Complainant argues that Respondent has not shown which part of Count 6 the PRA defense applies to, and has not provided factual and legal support for the Defense. Reply at 7, 12. Respondent attaches to its Supplement the support it had provided for the Defense in its August 5, 2002 Reply Memorandum in Support of Respondent's Motion to Strike Certain Exhibits.

The PRA Defense presents legal issues, which, as well as any challenge to Respondent's factual support of this Defense, are more appropriate to present in a motion for accelerated decision or in post-hearing briefs, rather than on a motion to strike. *See*, *Nwakpuda v. Falley's, Inc.,* 14 F. Supp. 2d 1213 (D.C. Kan. 1998)(A motion to strike matters in the pleading is not the appropriate method to challenge the factual support for an allegation). Defense 5 will not be stricken.

Defense 6 asserts that Respondent cannot be liable for failure to retain a record that never existed, or for which the retention period had expired. Complainant points out it appears to be pertinent to Count 9 (failure to retain records of hazardous waste determination and of analysis that waste has to be treated before land disposal), and that the regulations specifically state that the records are to be retained for three years and during the pendency of an enforcement proceeding. 40 C.F.R. §§ 262.40(c) and (d); 268.7(a)(7). Respondent argues that Complainant has not clearly identified the records Respondent allegedly failed to retain, so the applicability of the defense depends on what Complainant presents at the hearing. Respondent states that it has submitted affidavits, of Mr. Beaudoin and Mr. Benequisto (Opposition, Exhibits C and D), denying that the EPA inspector ever requested documents relating to whether the wastes were restricted from land disposal. Complainant argues that if Respondent did not conduct the analysis then it could be liable for both the failure to conduct the analysis and failure to retain

records thereof, and that liability for Count 9 rests on evidence that Respondent did not present a copy of the records at the inspection. Reply at 11 and n. 16.

The parties present legal and factual issues as to Defense 6, which depend upon facts presented the hearing. Accordingly Defense 6 will not be stricken.

Defense 11, asserting that the materials allegedly disposed of were not solid wastes but useful items, was already addressed by Judge McGuire in the Order on Cross Motions, granting judgment as to Respondent's liability for Counts 7 and 8, Complainant argues. Respondent states that Judge McGuire did not address the issue of whether batteries were useful items or wastes, and that Respondent is entitled to appeal Judge McGuire's ruling if incorporated in the Initial Decision. Complainant states in reply that Respondent has not explained the circumstances and facts in support of its position. As noted above, to the extent that the factual or evidentiary basis for an Affirmative Defense is challenged, it could have been raised in a motion for accelerated decision, and because the deadline for such motions has passed, it may be addressed at the hearing.

Respondent points out that Complainant does not make specific objections to Defenses 7 (asserting that EPA never asked to see documents Respondent allegedly failed to maintain), 8 (asserting that EPA employee who requested documents did not have properly delegated authority), 9 (asserting that violations are based on overly broad interpretations of regulations and that they do not provide fair notice of such interpretations), and 12 (asserting EPA misrepresented data characterizing conditions at the facility).

Respondent has submitted affidavits in support of Defense 7 (Opposition, Exhibits C and D). In its Reply, Complainant withdraws its Motion to Strike Defense 7, but does not concede the merits of the Defense. Reply at 12-13 and n.18.

Respondent asserts that facts as to Defense 8 are "uniquely within Region 5's own knowledge. . . of its own delegations of authority manual." Opposition at 8. Respondent has the burden of proof on its Affirmative Defenses, and appears to depend merely on EPA's Delegations Manual as support for Defense 8. Therefore the Defense will not be stricken as it does not appear that Complainant would be prejudiced with any expenditure of time and resources at the hearing.

As pointed out by Respondent and conceded by Complainant, Defense 9 is essentially a legal argument, which would not require expenditure of time and resources at the evidentiary hearing, and moreover, Judge McGuire ruled in Respondent's favor on this Defense as to whether automobile pans are "containers" and whether there is a regulatory duty to notify regarding newly generated hazardous wastes. Opposition at 8; Reply at 14. Complainant withdraws its request to strike Defense 9 if it is limited to those issues, but does not withdraw if Respondent intends to expand the Defense to other issues. Reply at 14.

Complainant states that it withdraws its Motion to Strike Defense 12 if it is limited to

asserting that the samples do not show that used oil has been released, but does not concede the merits of the Defense, and does not withdraw its request to strike Defense 12 if Respondent intends to question the quality of EPA's sample collection or analysis. Reply at 13 and n. 19. Complainant requests that Respondent identify any problems with the sample collection or analysis forthwith, so it can adequately prepare for hearing.

B. Order

Accordingly, Complainant's Motion to Dismiss Affirmative Defenses is **DENIED**. However, with its Answer to the Amended Complaint, or by separate document, **on or before November 7, 2003**, Respondent shall submit a narrative statement in support of its Affirmative Defenses, identifying the specific facts in support of Affirmative Defenses 4, 5, 8, 9, 11, and 12.

III. Complainant's Motion in Limine

A. Discussion as to Striking Testimony and Exhibits

In its Motion in Limine Related to Witnesses and Documents (Motion in Limine), Complainant requests that the testimony of all seven of Respondent's proposed witnesses (Messrs. Benequisto, Beaudoin, Thomlinson, Prokes, Morresey, and Ring, and Ms. Carroll), documents related to complaints and settlement for other facilities, and photographs in Respondent's prehearing exchange, be stricken from the record. In the alternative, Complainant requests that Respondent be ordered to provide specific summary of testimony of each proposed witness and proper documentation as to circumstances and relevancy of the photographs. In addition, Complainant requests that as to summaries of testimony referencing corporate policies and remediation activities and costs, Respondent be ordered to provide copies of the relevant corporate policies, procedures and practices, remedial measures taken and dates and costs thereof, and dates Respondent became aware of the need to take such measures.

The Consolidated Rules of Practice provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). In Federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan,* 116 F.Supp. 2d 966, 969 (N.D. Ill. 2000).

Complainant argues that Respondent has identified duplicative testimony in its Prehearing Exchange: five witnesses all testifying as to corporate policies, practices and procedures, and six witnesses testifying as to observations and knowledge of Respondent prior to and during EPA's investigations. Complainant argues that it must prepare for cross examination of all of these witnesses when only one may be called at hearing. Complainant claims that this "is not consistent with the Consolidated Rules" (Reply at 19) but does not cite to a provision in

the Rules or otherwise explain how it is inconsistent. Complainant also argues that certain witnesses occupied managerial positions, and the view of corporate policies by management is irrelevant; rather, the actual activities of employees is relevant. Complainant states that testimony described by Respondent merely as testimony as to the existence of citizen complaints, and as to remedial measures and costs, and expert opinion as to protections taken by Respondent and RCRA alternatives, is unreliable without further explanation of facts. Furthermore, Complainant argues, the policies are irrelevant because they are not followed, according to Judge McGuire's finding that Respondent's assertion that a certain policy "has always been" Respondent's policy is "seemingly contradicted by" a letter stating that it "will now only" comply with such policy. Order on Cross Motions at 24-25. Complainant asserts that Respondent did not identify the remediation or costs in response to its Rebuttal Prehearing Exchange or to EPA's July 15, 2003 Information Request. Reply at 20; Opposition, Exhibit E.

At this point in the proceeding, it cannot be determined that the testimony described is irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. For example, each witness may testify to a different corporate policy, practice, procedure, or observation; and witnesses who were managers may testify to their actual practices as employees. Remedial measures, costs, protections and RCRA alternatives taken or considered by Respondent may be relevant to the assessment of a penalty, and a foundation for such testimony may be presented at the hearing; it is premature at this point in the proceeding to determine the reliability of such testimony.[2] If Complainant wished to have more information about the remedial measures, costs, protections and RCRA alternatives, a timely motion for discovery would have been the appropriate remedy.

Mr. Morressey's proposed testimony as to the purchase of the facility, Complainant asserts, is also irrelevant. Respondent's Prehearing Exchange states that he will "testify as to the existence of any citizen complaints at Strong Steel and as to requests from neighboring facilities to purchase their facilities." Respondent clarifies that his testimony is to rebut Complainant's allegations that citizens have complained about Respondent's facility. In its Reply, Complainant asserts that it cannot prepare to cross-examine Mr. Morressey without knowing the specifics of his testimony, and that without more information, the testimony should be stricken. This argument, which is essentially deficiency of the summary of testimony, is addressed below.

Complainant asserts that the summaries of testimony are legally deficient because there is no specific information provided, which may lead to last minute surprises, they deprive Complainant of an opportunity to identify witnesses and documents in rebuttal, and force Complainant to request depositions, which should be reserved until after Respondent identifies "in more detail and scope the content of its witnesses' testimony." Reply at 17. Complainant noted such alleged deficiencies in its Rebuttal Prehearing Exchange, and requested therein, but did not receive, any copies of corporate policies and procedures, and contracts for clean-up.

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[2] Respondent's failure to provide information requested in EPA's Information Request, may be examined and considered at the hearing.

Indeed, Complainant, in its Rebuttal Prehearing Exchange dated April 19, 2002, requested that Respondent provide a more detailed and specific description of testimony of its witnesses, as well as the documents noted above.

There is no standard for the degree of specificity required for a summary of testimony, so there is no authority for precluding testimony at hearing on the basis of failure to provide a sufficiently specific summary of testimony in the prehearing exchange. The Consolidated Rules of Practice only require a "brief narrative summary" of expected testimony. 40 C.F.R. § 22.19(a)(2)(i). The remedy for a failure of Respondent to provide voluntarily the information requested is a motion to compel discovery (which may include interrogatories and/or requests for admission) under 40 C.F.R. § 22.19(e), rather than a motion to strike testimony.[3] The failure to provide more specific summaries of testimony, or to provide copies of corporate policies and procedures, does not lead to the conclusion that such testimony is "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." Therefore the testimony will not be stricken on the basis of being legally deficient.

Complainant asserts that the 12 photographs in Respondent's Prehearing Exchange are unauthenticated and irrelevant, without information as to who took the photos, what they depict, and the relevance to the alleged violations. Complainant argues that Respondent is thereby refusing to comply with Section 22.19(a)(2) of the Consolidated Rules of Practice, and forcing Complainant to seek discovery or "prepare to cross examine an unknown witness on irrelevant photos," prejudicing Complainant. Reply at 21.

A party is not required to explain the relevancy of its prehearing exhibits to the issues presented, or to authenticate them, prior to hearing. Consolidated Rules of Practice only require "Copies of all . . . exhibits . . . ." 40 C.F.R. § 22.19(a)(2)(i). The relevancy of a document or photograph may not be readily apparent on its face. The photographs in Respondent's Prehearing Exchange may be relevant to Respondent's witnesses' testimony, or the seriousness of alleged violations. It cannot be determined at this time that the photographs in Respondent's Prehearing Exhibits are irrelevant, immaterial, unreliable or of little probative value to this case. If Complainant wished to obtain more information about the photographs, the appropriate procedure would be a motion for discovery under 40 C.F.R. § 22.19(e).

Complainant asserts that information as to settlements and litigation related to another facility, in Respondent's Prehearing Exchange Exhibit 3, is inadmissable because the factors and site specific information considered in each complaint or settlement are unique. *Chatauqua Hardware Corp.*3 E.A.D. 616, 626-627 (EAB 1991). Respondent contends that such documents show how failure to label is treated under the penalty policy. Response at 12. Complainant's point is well taken.

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[3] Complainant's suggestion that a complete prehearing exchange obviates the need for extensive discovery and motion practice is consistent with this remedy, no less than Complainant's chosen remedy of a motion to strike testimony.

B. Discussion as to Alternative Requests

Complainant's alternative request that Respondent provide specific summaries of the testimony of its proposed witnesses, that Respondent provide proper documentation of circumstances and relevancy of the photographs in its Prehearing Exchange, and that Respondent be ordered to provide copies of the relevant corporate policies, procedures and practices, remedial measures taken and dates and costs thereof, and dates Respondent became aware of the need to take such measures, is, in essence, a request to compel discovery. Such motions may only be granted if the discovery "(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) Seeks information that is most reasonably obtained from the non-moving party; and (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." 40 C.F.R. § 22.19(e)(1). Criterion (ii) is clearly satisfied. Criterion (i) is also satisfied, as Respondent has been requested since April 2002 in the Rebuttal Prehearing Exchange to produce the information and documents, and is or will soon be preparing for the hearing and consequently should be aware of the specifics of its witnesses' testimony and photographs to be presented at hearing.

Respondent presumably believes that the testimony and photographs it proposes to present have significant probative value on issues of material fact, and even if Complainant does not agree, Criterion (iii) will be deemed satisfied to the extent that Complainant presumably would not object to this criterion being met.

Complainant's request that Respondent provide specific summaries of testimony of it proposed witnesses and provide proper documentation of circumstances and relevancy of the photographs in its Prehearing Exchange satisfies 40 C.F.R. § 22.19(e)(1).

Corporate policies, procedures and practices, remedial measures taken and dates and costs thereof, and dates Respondent became aware of the need to take such measures, are related to Respondent's defenses and mitigation of the penalty, upon which Respondent has the burden of proof. 40 C.F.R. § 22.24(a). Any failure of Respondent to provide such documents or reliable evidence thereof in the prehearing exchange will affect the admissibility thereof, or may affect at least the weight and credibility of its defending and/or mitigating arguments. 40 C.F.R. § 22.19(a)("Except a provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify."). Therefore it is not necessary to compel such discovery.

C. Order

Accordingly, Complainant's request to exclude testimony of Respondent's witnesses and Respondent's Prehearing Exhibits is **DENIED**, except with respect to the request to exclude Respondent's Prehearing Exhibit 3, or any complaints or settlement agreements in other cases, which request is **GRANTED**.

Complainant's alternative requests that Respondent provide specific summaries of testimony of its proposed witnesses and that Respondent provide documentation of circumstances and relevancy of the photographs in its Prehearing Exchange is **GRANTED**. Respondent shall provide such information **on or before November 7, 2003**.

Complainant's alternative request that Respondent be ordered to provide copies of the relevant corporate policies, procedures and practices, remedial measures taken and dates and costs thereof, and dates Respondent became aware of the need to take such measures, is **DENIED**.

IV. Respondent's Motion in Limine

Respondent requests an order excluding the testimony of Complainant's proposed witnesses Michael Beedle and Sue Rodenbeck-Brauer, and excluding testimony regarding alleged "complaints" regarding Respondent's operations, and regarding the nature and "importance" of multi-media inspections.

A. Mr. Beedle's Testimony

1. Arguments of the parties

Respondent objects the testimony of Michael Beedle as to penalty issues, on the basis that he has no personal knowledge of the facts on which he would base the testimony. Complainant had identified George Opek, the EPA RCRA inspector who conducted the inspection of Respondent's facility on July 22, 1999, as a proposed witness, to testify about his observations and his calculation of the proposed penalty. However, when Mr. Opek was involved in a near fatal car crash in the Spring of 2002, Complainant stated in its Rebuttal Prehearing Exchange that it might call Mr. Beedle as a potential alternate witness to Mr. Opek, and that Mr. Beedle's testimony would be similar in scope to that of Mr. Opek.

Respondent cites to Federal Rule of Evidence (FRE) 602 as "guidance" for administrative tribunals, which Rule states, in part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . . . This rule is subject to the provisions of Rule 703 . . . .

In turn, FRE 701 states, in pertinent part:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness . . . .

Respondent argues that such opinion testimony must be based upon a foundation showing that the witness has personal knowledge of the facts that form the basis for his opinion, and that without such personal knowledge, the testimony is unreliable and of little or no probative value. Respondent points out that Mr. Beedle is a fact witness, as EPA has not provided a resume showing that he is an expert witness. Mr. Beedle would be presenting opinion testimony as to the penalty, which would be incompetent, that is, not based upon his personal knowledge of the alleged violations and facts related to penalty issues. EPA could not establish a foundation for his testimony as to the penalty, Respondent asserts, and his testimony "would be of no more value to the Court than testimony from any lay person selected at random." Motion at 7. Therefore it would be unreliable, immaterial and of no probative value. Respondent asserts that EPA can rely on other fact witnesses, documents in the record and legal arguments in support of the penalty.

Respondent also objects to Mr. Beedle's testimony as to "his assessment of the results of the sampling conducted at the site," and his conclusion that "the wastes disposed of at the site were RCRA characteristic waste." Complainant's Rebuttal Prehearing Exchange at 2. Respondent asserts that these issues must be addressed only by a properly qualified expert witness.

In its Response, Complainant states that Mr. Opek is not available for hearing as he suffered further medical complications as a result of the crash. Complainant explains that Mr. Beedle is "the designated representative of Complainant" and that his testimony as to the penalty "will be based on knowledge of the facts of the case that he has acquired since being assigned to the case" in the Spring of 2002. Response at 5. The fact that Mr. Beedle did not inspect the site, Complainant argues, does not mean that he cannot have acquired sufficient personal knowledge of the violations to provide relevant testimony as to the penalty. Not all alleged violations rely on visual observations from the inspection, and most evidence in support of the violations is in written documentation, which Mr. Beedle can review, and he can discuss the penalty with the other witnesses. Complainant asserts that Mr. Beedle will testify as to his knowledge and experience in the RCRA enforcement program, the RCRA Penalty Policy, and its application to sites he has been assigned. Complainant argues that the FRE are more restrictive than C.F.R. Part 22, and that reliance on the FRE and caselaw thereunder is misplaced. Response at 7. Complainant asserts that non-experts may give opinion testimony in administrative adjudications, citing *A.Y. McDonald Industries, Inc.,* 2 E.A.D. 402 (EAB July 23, 1987). Moreover, Complainant asserts, Mr. Beedle calculated the amendments to the proposed penalty "and thus has personal knowledge as to how those changes were calculated." Response n. 2.

Complainant asserts that Mr. Beedle's testimony is needed to explain to the Presiding Judge how it calculated the penalty and its consistency with the RCRA Penalty Policy and statute, and that its other witnesses would not be able to provide such explanation at the hearing, particularly considering the additional testimony Respondent seeks to eliminate.

As to his assessment of the sampling results and of the waste being RCRA characteristic waste, Complainant asserts that there is nothing in administrative law which precludes the

introduction of lay or expert opinion, and that Mr. Beedle does not need expertise to explain the factors EPA considered in determining that the waste was characteristic hazardous waste.

In Reply, Respondent observes that Complainant has apparently reduced the scope of his testimony to merely explaining the factors Complainant considered, rather than his own opinion, on the technical issue of EPA's determination that the waste at issue was characteristic hazardous waste. Reply n. 8. Respondent maintains that his testimony must be excluded because it is not competent as to technical issues.

As to his testimony on the penalty, Respondent cites an opinion from the Court of Veteran Appeals, citing FRE 602 as a guideline for administrative proceedings, and stating that "Personal knowledge is that which comes to the witness through the use of his senses – that which is heard, felt, seen, smelled or tasted. . . . Where this Court has deemed lay testimony competent, the witness has testified to the symptoms or facts that he observed . . . Competent testimony is thus limited to that which the witness has actually observed, and is within the realm of his personal knowledge. *Layno v. Brown,* 6 Vet. App. 465, 469 (1994) (citations omitted). Respondent argues that Mr. Beedle did not have first hand personal knowledge of the alleged violations, and that his testimony of own opinion on the penalty to assess therefore would be incompetent and inadmissible. His explanation of how the proposed penalty was calculated based on the penalty calculation sheet prepared by Mr. Opek would be pure speculation. Respondent argues that Complainant "wants to turn Mr. Opek's unfortunate situation to its advantage by discarding Mr. Opek's penalty calculation and substituting Mr. Beedle's harsher personal opinions." Reply at 9.

2. Discussion and conclusions

A witness testifying on the penalty calculation need not have personally observed the violations as they occurred at the facility. The penalty witness is not testifying as to his observations, which might be used to prove the existence of the violations, or to prove the facts supporting a proposed penalty. Instead, the penalty witness is testifying as to relevant penalty policies and statutory penalty criteria, and how he applied the them to the facts of the case as shown in the record.

In this capacity, he is not a fact witness but is akin to an expert witness, having knowledge of, training on, and experience with the particular penalty policies and their application to various cases and factual situations. *See, Consolidation Coal Company v. Director, Office of Workers Compensation Programs,* 94 F.3d 885, 893 (7th Cir. 2002)("litigants must satisfy the ALJ that their experts are qualified by knowledge, training, or experience to, and have in fact applied recognized and accepted medical principles in a reliable way"). Indeed, the Environmental Appeals Board has referred to witnesses who testify as to the calculation of the proposed penalty as "experts." *Ocean State Asbestos Removal, Inc.,* 7 E.A.D. 522, 1998 EPA App. LEXIS 82 *33 (EAB 1998)("at the hearing, the Region's expert regarding the proposed penalty," who was the Region's Asbestos NESHAP coordinator, testified regarding the application of the statutory penalty criteria, the Asbestos Penalty Policy, and calculation of the

proposed penalty); *Sandoz, Inc.,* 2 E.A.D. 324, 1987 EPA App. LEXIS 7, 1987 EPA App. LEXIS 7 (referring to "the Agency expert who calculated the penalty"). This does not mean that Mr. Beedle must satisfy standards applied in Federal courts for scientific expert testimony, such as that of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). *Consolidation Coal Co, supra.* However, Mr. Beedle must be shown to have expertise as to RCRA penalty assessments. Accordingly, Complainant will be directed to submit a curriculum vitae for Mr. Beedle.

The fact that Mr. Opek originally calculated a penalty based on his application of the RCRA Penalty Policy to the facts of the case as known to him at the time of his calculation, does not preclude testimony of another witness as to his recalculation of the penalty based on his application of the RCRA Penalty Policy to the facts of the case as shown in the case file at the time of his recalculation. The fact that Mr. Opek personally observed some alleged violations does not mean that his testimony as to the penalty calculation is superior to that of Mr. Beedle. *See, Kumho Tire Co. v. Connecticut*, 526 U.S. 137 (1999)(testimony of plaintiff's expert, a tire failure analyst, rejected as being too unreliable; his testimony need not be accepted just because he examined the allegedly defective tire; Court rejected the doctrine that a court must receive the views of any expert who does hands-on work); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468 (2001)("A scientific dispute must be resolved on scientific grounds, rather than by declaring that whoever examines the cadaver dictates the outcome"). At the hearing, or in its post-hearing brief, Respondent may raise an objection with regard to any facts (or lack thereof) upon which the original calculation or recalculation was based, the calculation or recalculation itself, or Mr. Beedle's opinions thereon.

The testimony of Beedle is helpful to the Presiding Judge in understanding the Complainant's application of the RCRA Penalty Policy to the facts of this case and its calculation -- and recalculation -- of the proposed penalty. The Presiding Judge does not rubber stamp the EPA's proposed penalty, but makes an independent assessment of the evidence and the statutory penalty factors, considers the Penalty Policy, and independently calculates a penalty. There is no undue prejudice to Respondent from allowing Mr. Beedle's testimony, as he is available for cross examination. Respondent's arguments are insufficient to exclude Mr. Beedle's testimony, but they may be considered in determining the weight of his testimony. It is not appropriate at this point in the proceeding to preclude Mr. Beedle from testifying as to the calculation of the proposed penalty.

B. Sue Rodenbeck-Brauer's Testimony

1. Arguments of the Parties

Complainant intends to have Sue Rodenbeck-Brauer testify to explain the used oil regulations, State authorization and its impact on the used oil and hazardous waste regulations, and her review of the facts supporting the used oil alleged violations. Complainant states that she may be called upon to discuss the reasonableness of the proposed penalty for used oil

violations. Complainant states further that she is an expert on the RCRA used oil management regulations, she has been the Region 5 Used Oil Expert for almost six years, has interpreted and applied these regulations for almost thirteen years, has conducted, directed or overseen numerous inspections, trained State and Federal personnel, written guidance documents, and participated in the development of used oil regulations and guidance documents.

Respondent objects to Ms. Rodenbeck-Brauer's testimony about the regulations because courts do not accept "expert" testimony as to what statutes mean, citing, *inter alia, Specht v. Jensen*, 853 F.2d 805, 810 (10th Cir. 1988)("In no instance can a witness be permitted to define [for the jury] the law of the case"); *Burkhart v. Washington Metro Area Transit Authority*, 112 F.3d 1207, 1212-14 (D.C. Cir. 1997); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997). Respondent posits that this rationale should apply equally to regulations.

Respondent further objects to Ms. Rodenbeck-Brauer's testimony as to the penalty because her qualifications on her resume (Complainant's Prehearing Exhibit ("C's Ex." 24), *viz.,* her degree and licensing in geology, being an "environmental scientist/used oil expert," and having written articles on technical issues, do not qualify her as an expert on the issue of what penalties to assess in administrative proceedings. Respondent argues that she is no more qualified to provide "expert" testimony as to penalty issues than any lay person. Respondent argues further that she cannot qualify to provide opinion testimony as a lay witness because she has no personal knowledge of the facts upon which it would be based.

Complainant points out that the cases cited by Respondent are not administrative proceedings, but are mostly jury trials in which the judge is the ultimate arbiter of the law, and cites to several cases, including *United States v. Bucahanan*, 787 F.2d 477, 483 (10th Cir. 1986), which allowed experts to testify in jury trials as to the interpretation of the law. Complainant asserts that the question of whether expert testimony is proper under the FRE is determined principally upon the basis of whether the testimony will assist the trier of fact, citing an ALJ opinion, *General Electric Co.*, at *3 and citation therein, *Northern Heel Corp. v. Compo Industries, Inc.,* 851 F.2d 456 (1st Cir. 1988). Complainant asserts that Ms. Rodenbeck-Brauer's may testify to the risk of exposure from mismanaging used oil and extent of deviation from the requirements, and that even if she is not qualified as an expert, she should testify as to her opinion on the appropriateness of the penalty as to used oil violations, given her experience.

2. Discussion and Conclusions

In administrative enforcement proceedings, each party may submit its interpretation of EPA's regulations, and the Presiding Judge in the decision will independently interpret the relevant regulations and apply them to the findings of fact. The interpretation starts with the plain language of the regulation, and any ambiguities are resolved under principles of statutory (and regulatory) construction and interpretations set forth in applicable case precedent. Testimony, however, by a witness as to what EPA intended or expected the regulation to mean, but did not express so as to provide fair notice, may not be considered by courts or administrative tribunals in interpreting a regulation. Therefore such testimony is not admissible.

However, testimony which states the *witness'* own understanding of what the regulation means may assist the Presiding Judge in understanding the witness' factual or expert testimony, and may be admissible. Testimony which simply explains, as a matter of background, the regulatory scheme, or any relevant changes in the regulations, may assist the Presiding Judge at the hearing in understanding the factual testimony, and is admissible.

As to discussing the reasonableness of the proposed penalty for used oil violations, the witness must show either expertise as to the Penalty Policy and its application, or expertise as to a particular element of the penalty. For example, economists frequently testify as experts as to ability to pay a penalty and economic benefit to the violator. Ms. Rodenbeck-Brauer, as a used oil expert and geologist may be able to testify as to seriousness of the violations in terms of risk of harm to health or the environment from the alleged violations. Therefore she may testify as to any aspects of the penalty for which she is shown to be qualified.

C. Testimony as to Citizen Complaints and Local Concerns

Complainant's summary of Mr. Powers' proposed testimony includes testimony that during his detail with the City of Detroit and in environmental fora with the City and State of Michigan he "has learned of the problems the City [of Detroit] had with citizen complaints regarding explosions at the facility" and that "inspectors and staff at the City and State [of Michigan] indicated that federal attention and action was needed since Respondent was not responsive to them." C's Prehearing Exchange at 3. Complainant also states that Reginald Arkell, an EPA investigator, who has "reviewed documents and interviewed individuals related to operation of the site, may testify related to "citizen complaints and local concerns related to the site." Complainant's Rebuttal Prehearing Exchange at 3. Complainant's summary of Jeffrey Gahris' proposed testimony includes testimony that scrap yards and junk yards are a priority environmental concern for the City and that the City had identified Respondent's scrap yard as one of significant environmental concern.

Respondent asserts that such testimony is irrelevant and immaterial to the alleged violations and has no probative value as to liability or penalty. Respondent points out that such testimony is not within the scope of the penalty factor "history of violations." Respondent asserts that it is second-hand and third-hand hearsay which is not reliable, probative or fair, and would violate Respondent's right to cross-examine. Respondent argues that Complainant has not identified names, dates or nature of alleged "complaints," which hinders Respondent's opportunity to present rebuttal evidence. Therefore, in the alternative, Respondent requests that Complainant provide the names and other identifying information as to each individual who allegedly complained about the facility, so Respondent can interview and possibly subpoena such individuals.

Complainant asserts that as shown in Mr. Powers' May 21, 2002 Declaration and in the inspection reports the citizen complaints concerned explosions, puddles of gasoline on the ground, and odors. Response, Exhibit 2; C's Ex. 4, 73. The explosions, gasoline and odors are

relevant to both liability and the penalty, Complainant asserts, in terms of seriousness of the violations, good faith and willfulness, which would include considerations such as Respondent's awareness of the gasoline and its risks. The citizen complaints and local concerns also may be useful in rebuttal, and in support of the contention that the violations occurred on more than one day. Complainant adds. Though hearsay, they fit within the FRE hearsay exception (FRE 803(8)) of government records: the citizen complaints are reliable because they were recorded by Government witnesses in documents they were required by law to keep.

Complainant argues that in administrative proceedings there is no right to cross examine witnesses. The citizen complaints and local concerns were documented in Complainant's Prehearing Exchange, and Respondent has submitted a FOIA request, and could have also requested discovery, as to these items. Complainant asserts that it is not aware of the names and addresses of the persons who made the citizen complaints. Response n. 16.

References in government records and testimony as to citizen complaints and local concerns cannot at this point in the proceeding be deemed irrelevant, immaterial, or not probative as to any issue of liability or the penalty. At the hearing, Respondent may cross examine any witnesses who refer to such complaints or local concerns. Any testimony or evidence concerning citizen complaints and local concerns will be given such weight, if any, as appropriate.

D. Testimony as to Nature and Importance of Multi-Media Inspections

Complainant proposes to present Mr. Gahris as a fact witness to testify, *inter alia*, as to "the purpose, scope and importance of the multi-media inspection conducted at Respondent's facility and as to "what is a multi-media inspection and its importance to the Complainant's compliance and enforcement program." Complainant's Prehearing Exchange at 7-8.

Respondent asserts that such testimony is irrelevant and of no probative value as to this case which now addresses only RCRA issues and is no longer a multi-media case.

Complainant asserts that the testimony as to the multi-media investigation "will be short" and that it is particularly relevant to the issue of the penalty. Complainant explains that a witness need not have observed the conditions at the facility to testify as to multi-media inspections in general, the reasons for selecting Respondent for a multi-media inspection, and local concerns with the site or industrial sector.

It is not clear that testimony as to the Clean Air Act aspects of the multi-media inspection is relevant or material as to the alleged RCRA violations at issue. However, facts related to the purpose, importance and initiation of the multi-media enforcement action against Respondent may be relevant as to the penalty assessment. Therefore it cannot be determined that Mr. Gahris' testimony is irrelevant or of no probative value.

E. Order on Respondent's Motion in Limine

1. Respondent's Motion in Limine is **DENIED**.

2. Complainant shall submit a curriculum vitae for Mr. Beedle **on or before November 7, 2003.**

Susan L. Biro
Chief Administrative Law Judge

Dated: October 27, 2003
Washington, D.C.