UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SAN PEDRO FORKLIFT,	)	**DOCKET NO. CWA-09-2009-0006**
	)	
RESPONDENT	)	

ORDER ON RESPONDENT'S MOTION FOR LEAVE TO FILE A FIRST AMENDED ANSWER TO ADMINISTRATIVE COMPLAINT

The Complaint in this matter was filed on September 29, 2009, pursuant to Complainant's authority under Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1319(g). San Pedro Forklift ("Respondent") filed its initial Answer on November 13, 2009. Following a period of alternative dispute resolution, this case was assigned for litigation on April 13, 2010, to the undersigned.

On July 1, 2010, Respondent submitted a Motion for Leave to File a First Amended Answer to Administrative Complaint ("Motion"), along with a proposed First Amended Answer to Administrative Complaint and Notice of Opportunity for Hearing ("Proposed Amended Answer"). By its Motion, Respondent seeks to add three separate affirmative defenses not pled in the initial Answer. Motion at 1. Respondent states as the reason for its original omission of these defenses that "the *Initial Disclosures* of Complainant have revealed the applicability of three affirmative defenses," which invoke certain provisions of the U.S. Constitution pertaining to equal protection, due process, and the Excessive Fines Clause of the Eighth Amendment. *Id.* (emphasis in original). Respondent states that it seeks no other changes to the Answer. *Id.*

Complainant filed a response on July 19, 2010, entitled Motion in Opposition to Respondent's Motion for Leave to File a First Amended Answer to Administrative Complaint ("Response").[1]

[1] Complainant's Response, although filed as a response to Respondent's original Motion, is titled as an opposition motion and presented in much the same form as a motion to strike. Thus,

In its Response, Complainant argues that despite the liberal standard for amending the pleadings afforded litigants in administrative proceedings, Respondent's proposed amendments must be denied as futile. Response at 2. Respondent did not exercise its right to file a reply to Complainant's Response.

Applicable Standard

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Section 22.15(e) of the Rules of Practice allows the respondent to amend its answer "upon motion granted by the Presiding Officer." 40 C.F.R. § 22.15(e). The Rules of Practice do not, however, illuminate the circumstances when amendment of the answer is or is not appropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the Federal Rules of Civil Procedure ("FRCP")[2] as they apply in analogous situations. *In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n.20 (EAB 1993).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).[3] The Supreme Court has also expressed this liberality in interpreting Rule 15(a), finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be

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to the extent that there is any difference in the relevant evaluative standards for motions to strike and responses to motions to amend, Complainant's Response is construed as both.

[2] The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

[3] FRCP 15(a) provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (internal quotations omitted).

In considering a motion to amend under Rule 15(a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182; *accord Carroll Oil,* 10 E.A.D. at 649-50. Similarly, the EAB has found that administrative pleadings should be easily amended to serve the merits of the action. *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. at 525 n.11; *In re Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992). The burden is on the party opposing the amendment to show prejudice, bad faith, undue delay, or futility. *Isochem North America, LLC,* Docket No. TSCA-02-2006-9143, 2007 EPA ALJ LEXIS 37, at *33 (EPA ALJ Dec. 27, 2007).

In this case, Complainant argues that the amendments proposed by the Respondent are futile. Response at 2. Asserting that an amendment is futile challenges the legal sufficiency of the amendment.[4] *Isochem North America, LLC,* 2007 EPA ALJ LEXIS 37, at *33. Courts have treated the futility of amendment factor to mean that the amendment would not withstand a motion to dismiss. *See, e.g., U.S. v. Keystone Sanitation Co., Inc.*, 903 F. Supp. 803, 814 (M.D. Pa. 1995) (citing *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 519 (3d Cir. 1988)). The standard by which courts evaluate motions to dismiss was recently restated by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007) *abrogating Conley v. Gibson*, 355 U.S. 41 (1957).

Under *Twombly*, to survive a motion to dismiss the non-moving party must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *see also Ashcroft v. Iqbal*, – U.S. –, 129 S.Ct. 1937, 1953 (2009) (applying *Twombly* to all civil cases). This plausibility standard is met when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129

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[4] Practically speaking, this is the same standard used to evaluate motions to strike under Rule 12(f), i.e. whether the answer presents an "insufficient defense." Fed. R. Civ. P. 12(f).

S.Ct. at 1949, citing *Twombly*, 550 U.S. at 556. Whether this restated standard applies to affirmative defenses remains an unsettled question. In construing the scope of *Twombly*, courts have noted that "no Circuit Courts of Appeals have addressed whether this heightened pleading standard applies to affirmative defenses" *Castillo v. Roche Laboratories Inc.*, Slip Copy, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010) (noting that a majority of district courts that rule on this issue do so extend *Twombly*).

Courts that apply the *Twombly* standard to affirmative defenses are primarily concerned with providing plaintiffs with fair notice, weeding out the boilerplate listing of affirmative defenses, and protecting plaintiffs from later surprise. *See, e.g.*, *Holtzman v. B/E Aerospace, Inc.*, 2008 U.S. Dist. LEXIS 42630, at *6 (S.D. Fla. May 28, 2008) (defendants must provide more than bare-bones conclusions); *Barnes v. AT&T Pension Benefit Plan*, 2010 U.S. Dist. LEXIS 62515, at *11 (purpose is to give the opposing party notice and weed out irrelevant, boilerplate defenses); *Francisco v. Verizon South, Inc.*, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010) (same).

Courts that decline to extend *Twombly* to the context of pleading affirmative defenses identify a critical distinction between Rule 8(a), which governs complaints, and Rule 8(c), which governs pleading affirmative defenses. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(c) requires the defendant to "set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c). *See Charleswell v. Chase Manhattan Bank, N.A.*, 2009 U.S. Dist. LEXIS 116358, at *12-13 (D.V.I. Dec. 8, 2009) ("[t]here is no requirement under Rule 8(c) that defendant 'show' any facts at all."); *Ameristar Fence Prods., Inc. v. Phoenix Fence Co.*, 2010 WL 2803907 (D. Ariz., July 15, 2010) (same).

Notably, the motivating concern in these cases is also assuring that the defendant provide the plaintiff fair notice of the grounds for each affirmative defense. *Sembler Family Partnership No. 41, Ltd. v. Brinker Florida, Inc.*, 2008 WL 5341175, at *4 (M.D. Fla., Dec. 19, 2008); *McLemore v. Regions Bank*, 2010 U.S. Dist. LEXIS 25785, at *47 (M.D. Tenn. Mar. 18, 2010) (citing *Lawrence v. Chabot*, 182 Fed. Appx. 442, 456 (6th Cir. 2006) (affirmative defenses sufficiently pled "as long as it gives plaintiff fair notice of the nature of the defense.").

For purposes of this proceeding, it is unnecessary to decide whether *Twombly* does, in fact, govern affirmative defenses. As noted above, *supra* at 2 n.2, the FRCP are not binding on administrative agencies but rather serve as guidelines in applying the Rules of Practice. In this instance, the Rules of Practice are helpful. Section 22.15 addresses answers to the complaint and states that the answer must state "[t]he circumstances *or* arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b) (emphasis supplied). The Rules of Practice, then, do not wade into the linguistic distinctions at issue in *Twombly* or subsequent cases construing the pleading standards in the Federal Rules. Rather, it is enough that the respondent state "arguments" that allegedly constitute the grounds of a defense.

If the federal case law on the narrow issue of *Twombly*'s impact is to provide any guidance in this matter, it is to reemphasize the importance of providing the complainant with fair notice of the affirmative defenses that respondent intends to assert in order to allow the complainant sufficient opportunity to prepare to meet those defenses. With that in mind, I turn to the specific arguments on the instant Motion.

Discussion

Complainant offers two distinct arguments either of which, Complainant argues, would render Respondent's proposed amendments futile. First, Complainant asserts that administrative courts generally "lack the authority to adjudicate constitutional defenses." Response at 3. As such, Complainant argues, any amendment based on a constitutional challenge to the Complaint would be frivolous and would not survive a motion to dismiss. Response at 3. Second, Complainant argues alternatively that:

> even if the Presiding Officer . . . has the authority to rule on constitutional defenses . . . it is clear that each of the affirmative defenses raised . . . should fail on its merits.

Id. Complainant then goes on to address the alleged futility of each asserted defense. First, I consider Complainant's assertion that administrative courts lack jurisdiction to adjudicate constitutional issues. Finding that I have jurisdiction to hear challenges as to whether the statute or regulation is being applied in a manner that satisfies constitutional requirements, I then address each proposed affirmative defense in turn.

A. Jurisdiction

Complainant argues that, as a general rule, this tribunal lacks authority to adjudicate constitutional defenses. Response at 3, citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("adjudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"); *In re Tillamook County Creamery Assn.*, Order on Motion to Strike, Docket No. EPCRA-1094-03-01-325 (EPA ALJ June 1, 1995) ("[c]onstitutional challenges, whether statutory or regulatory, are beyond the jurisdiction of this tribunal."). Respondent does not offer any legal argument to the contrary.

Initially, I note that the case law relied upon by Complainant is, by its own terms, concerned with, and therefore limited to, challenges to the constitutionality of the underlying statute or regulation and not the applicability of constitutional protections available to all citizens. In addition, the EAB has on many occasions entertained arguments by a respondent that a statute or regulation is being *applied* in a manner that does not satisfy constitutional requirements. *See, e.g., In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 557-58 (EAB 1998); *In re City of Irving Texas*, 10 E.A.D. 111, 124 (EAB 2001) (recognizing the distinction between non-reviewable challenges to the constitutional validity of the regulations themselves and reviewable questions of whether a statute or regulation is being applied in a manner which passes constitutional muster).

Moreover, administrative law judges routinely consider and decide the validity of various affirmative defenses, including those grounded in constitutional protections such as the "fair notice" (due process) and "selective enforcement" (equal protection) defenses raised by the instant Motion. *See, e.g., Univ. of Kansas Med. Ctr.* (Order Granting Motions to Amend Complaint and Answer), Docket No. RCRA-07-2006-0261, 2007 WL 1933131 (EPA ALJ Apr. 20, 2007) (finding that respondent stated a colorable good faith basis for raising the fair notice defense); *Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2007 WL 3138354 (EPA ALJ Aug. 3, 2007) (dispatching respondent's fair notice claim); *Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301, 2007 WL 1219961 (EPA ALJ Jan. 19, 2007) (same); *Virgin Petroleum-Princess, Inc.*, Docket No. RCRA-02-2002-7501, 2003 WL 22245382 (EPA ALJ Sept. 10, 2003) (discussing the standard for establishing a selective enforcement affirmative defense and ruling on same); *Goodman Oil Co.*, Docket No. RCRA-10-2000-0113, 2003 WL 733882 (EPA ALJ Jan. 30, 2003) (reviewing the record to determine whether respondents established the elements of a

selective enforcement defense); *In re Envtl. Prot. Servs., Inc.*, TSCA Appeal No. 06-01, 2008 WL 464834 (EAB Feb. 15, 2008) (affirming the ALJ's determination that respondent failed to sustain its burden of proving selective enforcement claim). The weight of this case law strongly militates against Complainant's position that administrative tribunals lack jurisdiction to hear the affirmative defenses raised by Respondent in this case. Besides case law, procedural logic also dictates that ALJs retain authority to hear evidence related to constitutional defenses.

The Administrative Procedure Act ("APA") clearly provides that federal judicial courts have the authority to consider the effect of agency enforcement on the constitutional rights, powers, privileges, and immunities of respondents. *See* 5 U.S.C. § 706(2)(B). At the same time, jurisdiction to hold administrative hearings is statutorily vested in administrative law judges. *See* 33 U.S.C. § 1319(g)(2)(B) (providing respondent in CWA cases the opportunity for a hearing on the record in accordance with 5 U.S.C. § 554 of the APA). Whenever a court reviews a final agency action under the APA, the court is restricted to reviewing "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The reviewing court cannot open the record on appeal and expand the evidence before it. Were administrative law judges prohibited from receiving evidence on claims or defenses merely because of their relationship to protective constitutional provisions a curious paradox would result: federal judicial courts would be called upon to review a constitutional defense based on a record wholly devoid of any evidence related to that defense.[5] Such a result cannot be what Congress intended when it established administrative courts. Accordingly, although mindful of Complainant's jurisdictional argument, I deem it appropriate to address Respondent's constitutional concerns.

B. Equal Protection Argument

Respondent's first proposed amendment claims that Complainant's enforcement action violates equal protection because:

> Complainant has engaged in unreasonable and selective enforcement of the [CWA], targeting Respondent, a tenant on the subject premises, for alleged violations

[5] Indeed, an ALJ is charged with conducting a fair and impartial proceeding, assuring that the facts are fully elicited, and adjudicating all issues. 40 C.F.R. § 22.4(c).

> which were caused or created by others and which pre-date Respondent's tenancy on the subject premises.

Proposed Amended Answer at 5.

Complainant argues in its Response that Respondent has not sufficiently alleged the elements of a selective enforcement defense, nor could Respondent prove the necessary elements even if they had been properly pled. Response at 4. Complainant states that Respondent was one of 55 individual port tenants inspected for storm water compliance (and one of 20 that were issued administrative orders) and as such was not singled out for prosecution. *Id.* Complainant also asserts that Respondent has not pointed to any evidence of bad faith on the part of EPA in seeking a penalty and thus fails to meet its burden to plead all necessary elements of the defense. *Id.*

As an initial matter I note that Complainant has relied solely on legal arguments and has not produced any sworn affidavits to support the factual assertions made in the Response. More importantly, Respondent is not required under the Rules of Practice to allege discrete elements of an affirmative defense. All that is required is a statement of the "circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). Respondent has in this instance met the bare minimum. As an affirmative defense, Respondent will bear the burden of establishing this defense on the record at hearing, which will necessarily include the submission of evidence that addresses each prong of the selective enforcement standard. However, that burden cannot be placed on the Respondent at the pleading stage. The selective enforcement claim presents a mixed question of fact and law best suited for resolution at hearing. *See U.S. v. Kramer*, 757 F. Supp. 397, 410 (D.N.J. 1991) ("a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits.").

It is also apparent from the depth of detail in Complainant's Response that Respondent has laid out sufficient statements to provide notice to Complainant of the basis for the first proposed amendment and Complainant does not dispute that it is a recognized affirmative defense. There is no record evidence indicating Respondent unduly delayed, acted in bad faith, or had a dilatory motive. Therefore, Respondent's request to amend its Answer to add a "selective enforcement" defense is **GRANTED.**

C. Due Process Argument

Respondent's second proposed amendment claims that Complainant's enforcement action violates due process because:

> Complainant failed to provide reasonable notice of the permitting requirements alleged in the Complaint with sufficient clarity and conspicuousness sufficient to place a reasonable person on notice of said requirements.

Proposed Amended Answer at 5.

As Complainant notes in its Response, Respondent does not specify the particular requirements it claims are insufficiently clear. Response at 5. Complainant identifies two possible meanings and offers counterarguments to both. According to Complainant, if Respondent's fair notice defense is based on an alleged inadequate publication of the statutory requirement to *obtain* a permit in compliance with the CWA, such an "argument is meritless on its face." Response at 5. Complainant goes on to cite case law to support the propositions that ignorance of the law is no defense and EPA is not obligated to notify each entity of general mandates of the CWA. *Id.* Such a defense, Complainant implies, should fail as a matter of law.

Alternatively, Complainant continues, Respondent may instead seek to attack the clarity of the permitting regulations and requirements found at 40 C.F.R. parts 122-24. Response at 6. Complainant then offers a lengthy, factual roadmap to establish that the permitting regulations are, in its view, clear and provide fair notice. Notably, Complainant's argument against this alternative necessarily includes several factual assertions and arguments.[6] Unlike the first alternative, an attack on the clarity of the underlying permitting regulations is a recognized affirmative defense, which (again given Complainant's detailed response) has clearly put Complainant on notice of the basis for the second proposed affirmative defense.

Respondent's failure to plead its "sufficient clarity" (fair notice) defense with anything but sufficient clarity is not, by itself, a sufficient basis to deny the Motion. As the Chief ALJ noted in *Univ. of Kansas Med. Ctr.*, "[s]uch assertions, while non-specific, conclusionary and unsupported, at least provide arguably a colorable good faith basis for raising a 'fair notice'

[6] As with the selective enforcement claim, fair notice arguments can also present a mixed question of fact and law best suited for resolution at hearing.

defense and meet the standard of [Rule 22.15(b)]." 2007 WL 1933131, at *4. As in *Kansas Med. Ctr.*, the proposed "fair notice" claim here has been sufficiently pled, under the Rules of Practice, to overcome Complainant's futility argument. There is no record evidence indicating Respondent unduly delayed, acted in bad faith, or had a dilatory motive. Therefore, Respondent's request to amend its Answer to add a "fair notice" defense is **GRANTED.**

D. Excessive Fines Argument

Finding that the Respondent has sufficiently articulated certain affirmative defenses does not eliminate the requirement that any affirmative defense must allege some recognized claim that may fairly be said to offer some possibility of success. *See* Fed. R. Civ. P. 12(f) (permitting the court to strike "any insufficient defense"); *Cf. California Dept. of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1032 (C.D. Cal. 2002) ("the moving party must demonstrate that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed.").

Respondent's third proposed amendment asserts that the fines and penalties sought by Complainant in this matter "are grossly disproportionate to the alleged regulatory violations and are thus [c]onstitutionally excessive and violate the Excessive Fines Clause of the Eighth Amendment." Proposed Amended Answer at 5. Complainant notes in its Response that "at the time Respondent filed its Motion to Amend, Complainant had not yet sought a specific penalty in this matter." Response at 9. Rather, the Complaint proposed a penalty "not to exceed" the statutory maximum, as adjusted for inflation. Compl. at ¶ 53.[7]

Complainant argues that even if it did seek the statutory maximum, such a penalty would not violate the Eighth Amendment. Response at 9, citing *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000). Respondent offers no authority to support its position.

As an initial matter, I note that the Excessive Fines Clause

[7] It is of no moment that the Complainant subsequently specified a proposed penalty of $128,627 in its Rebuttal Prehearing Exchange filed July 16, 2010, because even the maximum statutory penalty would not raise the spectre of excessive fines.

of the Eighth Amendment is only invoked when the penalty is both "excessive" and a "fine." *See Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 420 (3d Cir. 2000). The term "fine" more commonly refers to punishment for a criminal offense. *See Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). Administrative penalties assessed pursuant to federal environmental laws are not usually considered "punishment" for some offense, but tend to be considered remedial in nature. *See, e.g., Sunbeam Water Co., Inc.*, Docket No. 10-97-0066-SDWA, 1999 WL 1013077, at n.1 (EPA ALJ Oct. 28, 1999) (finding that compliance enforcement and civil penalties under the Safe Drinking Water Act are remedial and not penal); *but see Austin v. U.S.*, 509 U.S. 602 (1993) (civil proceedings may advance punitive as well as remedial goals and thus may be subject to the limitations of the Excessive Fines Clause).

Even assuming, *arguendo*, that the Excessive Fines Clause may be a valid defense to civil penalties generally, Respondent's third proposed amendment must still fail. It is a well-established proposition that a civil penalty that falls within the statutory maximum does not offend the Constitution. *See, e.g., Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) ("[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment."); *Ghaith R. Pharaon v. Bd. of Gov. of Fed. Reserve Sys.*, 135 F.3d 148, 156 (D.C. Cir. 1998); *U.S. v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997); *U.S. v. Eqhbal*, 475 F. Supp. 2d 1008, 1017 (C.D. Cal. 2007). In this case, Complainant has proposed a civil penalty that falls within the statutory maximum established by the CWA. Therefore, the third proposed defense is insufficient on its face as a matter of law and can be dispatched at this time. Accordingly, Respondent's request to amend its Answer to add an "excessive fines" defense is **DENIED.**

Respondent's Motion is hereby **GRANTED** as to the first and second proposed affirmative defenses, but **DENIED** as to the third proposed affirmative defense.

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Barbara A. Gunning
Administrative Law Judge

Dated: August 11, 2010
Washington, DC