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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AGUAKEM CARIBE, INC.,	)	DOCKET NO. RCRA-02-2009-7110
	)	
	)	
	)	
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION IN LIMINE AND MOTION TO STRIKE AND RESPONDENT'S REQUEST FOR DISCOVERY

I. Introduction

This proceeding arises under the authority of Section 3008 of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928. The parties are reminded that 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 ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On September 29, 2009, the United States Environmental Protection Agency, Region 2, Caribbean Environmental Protection Division ("Complainant" or "EPA") initiated the proceeding by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Aguakem Caribe, Inc. ("Respondent" or "Aguakem"). The Complaint alleges that Respondent violated regulations governing the management of hazardous waste and used oil, set forth at 40 C.F.R. parts 260 through 279, as a result of its chemical manufacturing operations at a facility ("Facility") owned by the Port of Ponce Authority ("PPA") in Ponce, Puerto Rico. For the three violations alleged in the Complaint, Complainant proposes the imposition of a civil administrative penalty of $332,963 against Respondent. Complainant also seeks the entry of a compliance order against Respondent.

On October 26, 2009, Respondent filed an Answer to Complaint and Request for Hearing ("Answer"), which contains a section entitled "Factual Response" that sets forth a number of affirmative defenses to liability. As grounds for these defenses, Respondent asserts that it was forced to leave the Facility due to high levels of lead and asbestos caused by PPA's activities on the surrounding property and that it intended to remove the materials remaining at the Facility once the lead and asbestos contamination had been remediated.

By Order dated November 16, 2009, the Honorable William B. Moran, an administrative law judge ("ALJ") in EPA's Office of Administrative Law Judges, was designated as the presiding ALJ for the case. Pursuant to a Prehearing Order issued by Judge Moran on November 25, 2009, the parties subsequently submitted their initial prehearing exchanges.[1/] On February 10, 2010, Complainant submitted Complainant's Motion in Limine ("Motion in Limine") and Motion to Strike ("Motion to Strike"). On February 25, 2010, Respondent submitted Respondent's Opposition to EPA's Motion in Limine and Motion to Strike ("Opposition"), and Request for Discovery and Rescheduling of Hearing ("Request for Discovery").[2/] Complainant

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[1/] Shortly thereafter, Complainant filed a Reply to Respondent's Prehearing Exchange, in which Complainant argued that Respondent acted in bad faith by failing to provide in its initial prehearing exchange all of the documents it intends to present at the hearing and asserting that it would provide the remaining documents within ten days. Complainant further argued that evidence of bad faith is grounds for denying supplements to prehearing exchanges. Pursuant to the Order on Complainant's Reply to Respondent's Prehearing Exchange issued on May 14, 2010, I accepted the supplement to Respondent's initial prehearing exchange upon finding that Respondent was not attempting to unfairly disadvantage Complainant and that Complainant was not denied a meaningful opportunity to review and respond to the information contained in the supplement.

[2/] On February 17, 2010, Judge Moran issued a Notice of Hearing notifying the parties that a hearing in this case would commence on May 4, 2010. In its Request for Discovery, Respondent requests that the hearing be rescheduled in order to afford Respondent the opportunity to obtain certain information identified therein. This request is now moot, as Judge Moran postponed the hearing pursuant to the Notice of Hearing Postponement of March 29, 2010, until rulings had been issued on the matters at hand and the matter raised by Complainant's Reply to Respondent's Prehearing

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submitted a Response to Respondent's Opposition to EPA's Motion in Limine and Motion to Strike ("Response"), and Motion to Deny Respondent's Request for Discovery and Rescheduling of Hearing ("Motion to Deny") on March 11, 2010.

On April 22, 2010, this case was reassigned to the undersigned Judge Barbara A. Gunning because of Judge Moran's departure from EPA's Office of Administrative Law Judges. For the reasons set forth below, Complainant's Motion in Limine, Complainant's Motion to Strike, and Respondent's Request for Discovery are denied.

II. Complainant's Motion in Limine

In its Motion in Limine, Complainant seeks to prevent from being introduced at hearing the email communications, memoranda, audited financial statements, and environmental sampling report that Respondent provided in its initial prehearing exchange. Respondent objects to the Motion in Limine in its entirety.

A. Standard for adjudicating a motion in limine

Pursuant to Section 22.22(a)(1) of the Rules of Practice, "[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). A motion in limine is the appropriate vehicle for preventing proposed testimony or exhibits from being introduced at hearing on the basis that it does not satisfy the foregoing standard. However, the Rules of Practice do not address the use of motions in limine in administrative proceedings. Accordingly, I may rely on federal court practice, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence as guidance. *See, e.g., In re Euclid of Virginia, Inc.*, 13 E.A.D. ____, 2008 EPA App. LEXIS 13, at *94-95 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges and the [Environmental Appeals Board] to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance...."); *In re Carroll Oil Company*, 10 E.A.D. 635, 649 (EAB 2002)("*Carroll Oil*")("In the absence of administrative rules on [a] subject, it is helpful to consult the Federal Rules of Civil Procedure as they apply in analogous situations.").

[2/] (...continued)
Exchange. Having disposed of these matters in this Order and the Order on Complainant's Reply to Respondent's Prehearing Exchange, I advise the parties that the hearing will be rescheduled shortly for September 2010 or later.

In federal court practice, motions in limine are generally disfavored and should be granted only if the proposed testimony or exhibit sought to be excluded is clearly inadmissible for any purpose. *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 21, at *11 (ALJ, Order on Respondents' Motion in Limine, Apr. 24, 2006). If the proposed testimony or exhibit does not satisfy this high standard, evidentiary rulings must be deferred in order to resolve questions of foundation, relevancy, and prejudice in the context of an evidentiary hearing. *Id.* Thus, denial of a motion in limine means, not that all of the proposed testimony or exhibits contemplated by the motion will be admitted at hearing, but that the presiding ALJ is unable to determine without the context of hearing whether the proposed testimony or exhibits in question should be excluded. *Id.* at 12.

B. Proposed exhibits sought to be excluded

i. Email communications

Complainant seeks to exclude from being introduced at hearing the following emails:

1) An email dated December 29, 2006, which was sent from the email address junuanejr@aol.com;[3/]
2) An email dated February 7, 2007, which was sent by counsel for Respondent; and
3) An email dated March 5, 2007, which was sent by counsel for Respondent.[4/]

Complainant argues that these emails are irrelevant, immaterial, and of little probative value to the allegations set forth in the Complaint. Complainant further contends that Respondent failed to identify in its initial prehearing exchange a proposed witness who could authenticate the emails sent by counsel for Respondent or, in the alternative, to provide a written declaration in its initial prehearing exchange in order to authenticate those emails as business records kept in the ordinary course of business, as

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[3/] I note that part of this email is written in Spanish and that an English translation was not provided in Respondent's initial prehearing exchange.

[4/] Complainant identifies two emails sent by counsel for Respondent on March 5, 2007, that it seeks to exclude from being introduced at hearing. However, a review of the file reveals that Respondent provided in its initial prehearing exchange only one email sent by its counsel on March 5, 2007.

authorized by Federal Rule of Evidence 902(11). Finally, Complainant argues that the emails must be excluded because they "were clearly prepared in response to EPA's enforcement action and/or in preparation for litigation for the instant case." Response at 3.

Respondent counters that Complainant knows the emails sent by counsel for Respondent are authentic as Complainant was the recipient of those emails. Respondent requests that the undersigned permit it to authenticate the emails through either the testimony of Jorge J. Unanue, the only witness proposed by Respondent in its initial prehearing exchange, who, Respondent claims, was a recipient of the emails and retained copies as business records kept in the ordinary course of business;[5/] the testimony of the witnesses proposed by Complainant, who, according to Respondent, were also recipients of the emails; or written testimony from counsel for Respondent.

ii. Memoranda

Complainant seeks to prevent from being introduced at hearing the following memoranda:

1) A memorandum to file, dated October 4, 2007, and prepared by Jorge J. Unanue; and
2) A memorandum to file, dated October 5, 2007, and prepared by Jorge J. Unanue.

Complainant seeks to exclude these memoranda on the basis that they are irrelevant, immaterial, and of little probative value to the allegations set forth in the Complaint. Complainant further contends that the memoranda "represent a mere characterization of the facts by Respondent"[6/] and are part of a greater effort by Mr. Unanue "to ignore his responsibility with the violations found at

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[5/] Respondent cites Federal Rule of Evidence 803(6) and *Alexian Brothers Health Providers Association, Inc. v. Humana Health Plan, Inc.*, 608 F.Supp.2d 1018 (N.D. Ill. 2009), as support for its request to allow Mr. Unanue to authenticate the emails.

[6/] Complainant repeatedly refers to Jorge J. Unanue as "Respondent" in its filings. However, the named respondent in this case is not Mr. Unanue but Aguakem Caribe, Inc. Complainant is advised to be more precise in future filings.

the facility." Motion in Limine at 3.[7/] Respondent objects to this "attack on Mr. Unanue's character," arguing that it is not a sound basis for excluding proposed exhibits at this stage of the proceedings.

iii. Audited financial statements

Complainant seeks to prevent from being introduced at hearing the audited financial statements of Respondent, dated June 30, 2009. Complainant points out that Respondent failed to identify the individual who prepared the financial statements as a proposed witness in its initial prehearing exchange. Complainant argues, therefore, that Respondent lacks the ability to authenticate the financial statements and that any testimony given by Mr. Unanue at the hearing about the financial statements will be hearsay. Moreover, Complainant asserts that it must have a meaningful opportunity to cross examine the individual who prepared the financial statements.[8/]

[7/] According to Complainant's Response, Respondent asserts in its Opposition that both Mr. Unanue and counsel for Respondent "will authenticate the...memorandums [sic]" and that the memoranda are admissible pursuant to Federal Rule of Evidence 803(6). Response at 2-3. However, Respondent makes no such claims in its Opposition. Accordingly, I do not consider the exclusion of the memoranda on these grounds.

[8/] Complainant also challenges the introduction of these statements on the basis that Respondent alleges for the first time in its initial prehearing exchange that the penalty proposed by Complainant would adversely impact Respondent's ability to remain in business. Section 22.15(b) of the Rules of Practice requires a respondent to set forth in its answer "[t]he circumstances or arguments which are alleged to constitute the grounds for any defense." 40 C.F.R. § 22.15(b). Thus, Respondent's assertion of the ability to pay defense was late. However, "delay by itself is generally an insufficient reason to deny a litigant the opportunity to raise a defense." *In re Lazarus, Inc.*, 7 E.A.D. 318, 332 (EAB 1997). Rather, the Environmental Appeals Board has held that an ALJ may bar untimely defenses where evidence of prejudice to the opposing party also exists. *Id.* at 330. Such prejudice "is usually manifested by a lack of opportunity to respond or need for additional pre-hearing fact-finding and preparation that cannot be readily accommodated." *Id.*

In this case, no apparent prejudice to Complainant exists if

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Respondent counters that the financial statements are admissible as business records kept in the ordinary course of business, citing as support Federal Rule of Evidence 803(6) and *Beale v. Kurtz*, 381 B.R. 727 (S.D. Ind. 2008). Respondent also asserts that, if necessary, Eduardo Guzman, the individual who prepared the financial statements, is available to testify in order to authenticate them.

iv. Environmental sampling report

Finally, Complainant seeks to prevent from being introduced at hearing a report entitled "Environmental Sampling for Contamination in Dust for Asbestos and Lead at Aguakem in Ponce, Puerto Rico," which was prepared by Envirorecycling, Inc., and is dated December 2006. Complainant argues that the sampling report is irrelevant, immaterial, and of little probative value to the allegations of the Complaint and that Respondent failed to identify in its initial prehearing exchange any witness who could authenticate the report. Moreover, Complainant asserts that it must have a meaningful opportunity to cross examine the individual who prepared the sampling report.

Respondent contends that the sampling report is admissible as a business record kept in the ordinary course of business pursuant to Federal Rule of Evidence 803(6). Respondent also asserts that, if necessary, the individual who prepared the sampling report is available to testify in order to authenticate them.

C. Discussion

Complainant's objections to the foregoing documents focus on 1) the ability of Respondent to establish the necessary foundation

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[8/] (...continued)
I entertain the ability to pay defense raised by Respondent. Respondent asserted this defense in its initial prehearing exchange, which it submitted more than three months prior to the hearing date originally set by Judge Moran. Thus, Complainant has not been denied a sufficient opportunity to respond. Moreover, Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), does not require Complainant to consider Respondent's ability to pay in calculating a proposed penalty for this case. Rather, ability to pay is treated as an affirmative defense under RCRA for which Respondent bears the burden of presentation and persuasion. *See Carroll Oil*, 10 E.A.D. at 663. I find that the audited financial statements are not excluded on the basis that Respondent's assertion of the defense was late.

for authenticating the documents; and 2) the relevancy, materiality, and probative value of the documents to the allegations in the Complaint. I will address each of these arguments in turn.

i. Authentication

Authentication is the act of proving that a proposed exhibit is true and genuine in order for it to be admitted into evidence in a contested proceeding. *Minnesota Metal Finishing, Inc.*, EPA Docket No. RCRA-05-2005-0013, 2007 EPA ALJ LEXIS 14, at *14 (ALJ, Order on Motions to Supplement Prehearing Exchange and Complainant's Motion in Limine, Apr. 23, 2007)("*Minnesota Metal*")(citing Black's Law Dictionary, 127 (7th Ed. 1999) and *U.S. v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997)). Federal Rule of Evidence 901 requires the authentication of exhibits prior to their admission into evidence in federal courts. The only rule of evidence applicable in this administrative proceeding is Section 22.22(a) of the Rules of Practice, quoted above. However, even though this proceeding is not governed by the Federal Rules of Evidence, that fact "does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be, and absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding." *Minnesota Metal*, 2007 EPA ALJ LEXIS 14, at *15 (quoting *Woolsey v. NTSB*, 993 F.2d 516 (5th Cir. 1993) (internal quotation marks omitted)).

In this case, Complainant asserts that Respondent provided as intended exhibits to be introduced at hearing the emails, audited financial statements, and environmental sampling report described above, but failed to identify in its initial prehearing exchange any witness who could authenticate those documents by testifying to their truth and accuracy. Indeed, Respondent has identified only one proposed witness in its initial prehearing exchange, Mr. Unanue, and he did not prepare the emails, the audited financial statements, or the environmental sampling report. Thus, as pointed out by Complainant, Respondent will require witnesses not identified in its initial prehearing exchange to authenticate the documents at issue unless the parties stipulate to the authenticity of the documents.

However, pursuant to the Prehearing Order issued by Judge Moran, the parties may file supplements to their initial prehearing exchanges, without motion, until 30 days before the date scheduled for the hearing. In addition, Section 22.19(f) of the Rules of Practice, 40 C.F.R. § 22.19(f), requires parties to promptly supplement their initial prehearing exchanges when they learn that

the information therein is incomplete, inaccurate, or outdated, and the additional information has not otherwise been disclosed to the opposing party. Thus, Respondent may amend its initial prehearing exchange in accordance with the Prehearing Order and the Rules of Practice in order to identify proposed exhibits or witnesses needed to authenticate the emails, audited financial statements, and environmental sampling report.[9/] Respondent is hereby reminded, however, that Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a) and 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names or testimony summaries have not been exchanged at least 15 days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.[10/]

Respondent is not precluded from calling Complainant's witnesses to authenticate the documents at issue, if such witnesses are properly identified and included in Respondent's prehearing exchange. Furthermore, a party need not use its own witnesses to authenticate proposed exhibits. Respondent possibly could have one of Complainant's witnesses authenticate the documents during cross-examination. Respondent also could request from Complainant

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[9/] That being said, I reject Respondent's proposal to submit written testimony from its counsel in order to authenticate the emails. Section 22.22(c) of the Rules of Practice provides that the presiding ALJ "may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness." 40 C.F.R. § 22.22(c). However, the witness presenting this testimony "shall be subject to appropriate oral cross-examination." *Id.* As argued by Complainant, cross-examination of counsel for Respondent could inevitably lead to a breach of the attorney-client privilege, as well as pose a number of other risks to Respondent and the proceeding. Moreover, Respondent suggests in its Opposition two other manners in which it could seek to authenticate the emails. Thus, Respondent has not demonstrated that its counsel's testimony could not be obtained from another witness. For the foregoing reasons, counsel for either party is not permitted to testify, either orally or in writing, in this proceeding.

[10/] In its Response, Complainant correctly points out that it must have an opportunity to cross-examine the authors of the audited financial statements and the environmental sampling report.

a stipulation as to the admissibility of the documents prior to or during the hearing.[11/]

Thus, Respondent may be able to authenticate the documents in question through any additional witness named in a supplement to its initial prehearing exchange, the witnesses identified in Complainant's initial prehearing exchange, or stipulations. Accordingly, I cannot determine with certainty at this stage of the proceeding that the emails, audited financial statements, and environmental sampling report cannot be authenticated and therefore are "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value."

ii. Relevancy, materiality, and probative value

As noted above, Section 22.22(a)(1) of the Rules of Practice requires an ALJ to admit "all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value...." 40 C.F.R. § 22.22(a)(1). Complainant seeks to preclude Respondent from introducing into evidence at the hearing the emails, memoranda, and environmental sampling report described above on the basis that these documents are irrelevant, immaterial, and of little probative value to the violations alleged in the Complaint. In its Opposition, Respondent puts forth only its conclusory argument that the relevance of these documents is "patent." Opposition at 2.

I decline to make any evidentiary rulings until the hearing in this case. Granting a motion in limine at this stage of the proceeding is unnecessary and may result in further delay. Respondent should be given the opportunity at the hearing to demonstrate the relevance and materiality of the documents at issue to liability or the determination of any penalty. Complainant is free to renew its objections at that time. In accordance with this and the foregoing discussion regarding authentication, Complainant's Motion in Limine is denied.

III. Complainant's Motion to Strike

As noted above, Respondent raises several defenses to liability in its Answer, which derive from Respondent's claims that

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[11/] Indeed, the parties are encouraged, to the greatest extent possible, to stipulate to the authenticity and admissibility of each others' proposed exhibits and witnesses prior to the hearing, thus allowing the limited time allotted for the hearing to be utilized for acquiring evidence of substantive matters in dispute.

it was forced to leave the facility in question due to high levels of lead and asbestos caused by PPA's activities on the surrounding property and that it intended to remove the materials remaining at the Facility once the lead and asbestos contamination had been remediated. Specifically, Respondent contends that Complainant is barred from pursuing the present action against Respondent because of "the legal release granted to Aguakem by the EPA in [an Administrative Order on Consent entered into by Complainant, Respondent, and the PPA], mitigation, failure to join necessary parties, the defense of illegality (federal OSHA laws and Puerto Rico law precluded Aguakem to act in the ways desired by the EPA), the equitable defense of laches, and failure to state a claim." Answer at 6. In its initial prehearing exchange, Respondent states that Mr. Unanue intends to testify with respect to these defenses.

Complainant moves to strike from the record the defenses raised by Respondent on the basis that Respondent failed to provide legal or factual support for the defenses in its prehearing exchange. In its Opposition, Respondent argues that Complainant's Motion to Strike is premature and that it is entitled to present the foregoing defenses at the hearing.

Because the Rules of Practice do not address the use of motions to strike in administrative proceedings, I may consult the Federal Rules of Civil Procedure and federal court practice for guidance. Rule 12(f) of the Federal Rules of Civil Procedure, which governs the filing of motions to strike in federal courts, provides that a "[a] court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Pro. 12(f). A motion to strike is typically viewed with disfavor by courts, however, because striking a portion of a pleading is a drastic measure and because it is often sought by the moving party as a dilatory tactic. *Morell v. U.S.*, 185 F.R.D. 116, 117 (D.P.R. 1999). *See also Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill. 1991) ("Indeed, motions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored.").

This remedy also is contrary to the general principle that pleadings should be treated liberally and that a party should have the opportunity to present its arguments at trial. *See Dearborn Refining Co.*, EPA Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *6-8 (ALJ, Order on Complainant's Motion to Strike Defenses, Jan. 3, 2003) ("*Dearborn Refining*"). Thus, a motion to strike a defense is granted only if the insufficiency of the defense is clearly apparent. *Id.* at 8.

Complainant acknowledges that motions to strike are rarely granted.[12/] Nevertheless, Complainant maintains that Respondent "failed to provide a detailed narrative statement that fully elaborates the exact factual and legal basis of its affirmative defenses" and that "Respondent's mere recital of affirmative defenses is not sufficient." Motion to Strike at 13. Complainant argues, therefore, that the defenses should be struck from the record.

Section 22.15(b) of the Rules of Practice requires an answer to "clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge," as well as state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense...." 40 C.F.R. § 22.15(b). As this provision suggests, "an important purpose of the answer is to identify the points in dispute through [the respondent's] statement of factual challenges and the circumstances and arguments that constitute the grounds of any defense." *Dearborn Refining*, 2003 EPA ALJ LEXIS 10, at *4. As already noted, Respondent's Answer contains a section entitled "Factual Response," in which Respondent not only enumerates the defenses listed above but also sets forth the factual circumstances that allegedly underlie those defenses. However, Complainant correctly points out that Respondent does not provide any legal arguments to support the enumerated defenses.

For affirmative defenses properly raised, Respondent bears the burdens of presentation and persuasion once Complainant has established its prima facie case. *See* 40 C.F.R. § 22.24(a). At this stage of the proceeding, however, evaluating the merit of the defenses asserted by Respondent would be premature. As noted above, the hearing in this case is going to be rescheduled for September 2010 or later, meaning that the possibility still exists that Respondent will further develop its arguments. *See Sheffield Steel Corp.*, EPA Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100, at *8 (ALJ, Order Denying Motions to Strike Answers and to Dismiss, Nov. 21, 1997) ("[D]efenses are not appropriate subjects of a motion to strike, if there is any possibility that the defenses

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[12/] Complainant quotes an order issued by my former colleague, the Honorable Stephen J. McGuire, in order to describe how motions to strike are generally disfavored. Motion to Strike at 12-13 (quoting *County of Bergen* and *Betal Environmental Corp., Inc.*, EPA Docket Nos. RCRA-02-2001-7110 and -7108, 2002 EPA ALJ LEXIS 13, at *7-8 (ALJ, Order Denying Complainant's Motion to Strike, Mar. 7, 2002).

could be made out at trial."). Furthermore, even if the arguments raised by Respondent do not constitute complete defenses to liability, the issues underlying those arguments may be relevant to the determination of any penalty.

For these reasons, I find it more appropriate to rule on the validity of the defenses raised by Respondent in the context of an evidentiary hearing. Accordingly, Complainant's Motion to Strike is denied. As long as the evidence is found to be relevant and material to liability or the determination of any penalty, I will give appropriate consideration to the arguments raised by Respondent at the hearing for this case. Complainant is free to renew its objections at that time.

IV. Respondent's Request for Discovery

Respondent has submitted a Request for Discovery seeking (1) "all communication received by the EPA transmitted to it by Aguakem"; (2) "all communications received and transmitted by the EPA to the Muncipio of Ponce and the Ponce Port Authority regarding the3 [sic] Site at issue in this proceeding"; and (3) "the depositions of Eduardo Gonzales, Angel Rodriguez, Lourdes Rodriguez and Raymond Basso," who, according to Respondent, were "the recipients of communications from Aguakem regarding the Site as issue n [sic] in this proceeding." Request for Discovery at 3. Respondent asserts that this discovery request became necessary because Complainant has challenged "the admissibility and authenticity of the electronic communications sent to it by Aguakem that Aguakem seeks to admit as evidence." *Id.* Complainant subsequently submitted a Motion to Deny, in which Complainant challenges Respondent's Request for Discovery on the grounds that Respondent failed to satisfy the criteria set forth in Section 22.19(e) of the Rules of Practice, 40 C.F.R. § 22.19(e), for "other discovery."

In an administrative proceeding governed by the Rules of Practice, discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs through a prehearing exchange of information in accordance with Section 22.19(a), 40 C.F.R. § 22.19(a). Subsequent to the prehearing exchange, a party may move for "additional discovery" pursuant to Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1). Such a motion must "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted)." 40 C.F.R. § 22.19(e)(1). The presiding ALJ may order the requested discovery only if he or she finds that it:

> (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 which the non-moving party has refused to provide voluntarily; 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).

The presiding ALJ may also order depositions upon oral questions, subject to the same criteria set forth at Section 22.19(e)(1), as well as the additional criteria that:

> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

In support of its Request for Discovery, Respondent asserts that the requested discovery "will not unreasonably delay the proceeding nor unduly burden the EPA, as it will merely require the EPA to produce documents in its possession and provide witnesses for deposition in San Juan, Puerto Rico."[13/] Request for Discovery at 3. Complainant opposes the Request for Discovery, arguing that Respondent fails to address the second or third criteria of Section 22.19(e)(1) for additional discovery. Complainant further asserts that "Respondent does not specify what information is allegedly in Complainant's possession" and that "[i]t appears that Respondent is attempting to engage in a fishing expedition." Motion to Deny at

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[13/] While contending that the additional discovery will not "unreasonably delay the proceeding," Respondent also requests that the hearing originally set to commence on May 4, 2010, be rescheduled "in order to provide Aguakem an opportunity to garner [the information it seeks]." Request for Discovery at 3. Complainant argues that, by requesting to reschedule the hearing for the foregoing reason, Respondent acknowledges that the additional discovery will unreasonably delay the proceeding, contrary to Respondent's claim. As noted above, the hearing was postponed and has yet to be rescheduled. Therefore, I find that the discovery request would not unreasonably delay the proceeding.

9. Finally, Complainant objects to the depositions requested by Respondent, arguing that Mr. Gonzales and Mr. Rodriguez are identified as witnesses in Complainant's prehearing exchange; Mr. Basso is not involved in the present proceeding; and Respondent fails to demonstrate any legal or factual basis for deposing Ms. Rodriguez, counsel for Complainant.

Complainant persuasively argues against Respondent's Request for Discovery. As Complainant correctly points out, Respondent fails to describe with any specificity the type of information it expects to obtain from the documents and depositions it requests. Respondent simply seeks "all communication" sent from Respondent to Complainant, without setting any date or subject restrictions. In addition, Respondent seeks "all communications" between Complainant, the Municipio of Ponce, and the PPA regarding the "Site at issue in this proceeding." This request also fails to set any date restrictions. Furthermore, the reference to the "Site" lacks specificity, as the "Site" could consist of either the Facility itself or the surrounding property on which PPA allegedly conducted activities causing lead and asbestos contamination of the Facility.

The Request for Discovery, therefore, fails to satisfy the requirement set forth by Section 22.19(e) of the Rules of Practice that it contain a detailed description of the nature of the information or documents sought. This lack of specificity, moreover, precludes me from determining whether Respondent's requests will produce any information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought, as required by Section 22.15(e)(1)(iii) of the Rules of Practice, 40 C.F.R. § 22.15(e)(1)(iii).

Respondent's request for depositions suffers from similar deficiencies. Respondent fails even to identify the individuals named in its request, let alone show that the request satisfies all of the requirements set forth by Section 22.15(e). For example, Respondent fails to show that the information sought is not obtainable through other methods. Two of the individuals named by Respondent are also listed as proposed witnesses for Complainant in Complainant's prehearing exchange. Respondent may call these witnesses as its own witnesses, if they are properly included in its prehearing exchange, or cross-examine these witnesses if their testimony is presented by Complainant. Respondent provides no reason why depositions of those individuals before the hearing would yield otherwise unobtainable information with significant probative value.

For the foregoing reasons, Respondent's Request for Discovery is denied. Respondent has presented its requests in such a manner that precludes me from determining whether the Request for Discovery satisfies the applicable requirements for "other discovery" under the Rules of Practice. A motion should stand on its own and not require the presiding ALJ to refer to outside sources to make this determination. Respondent is free to renew its Request for Discovery later in this proceeding in accordance with this ruling.[14/]

V. Order

In accordance with the foregoing discussions, Complainant's Motion in Limine, Complainant's Motion to Strike, and Respondent's Request for Discovery are DENIED.

Barbara A. Gunning
Administrative Law Judge

Dated: June 2, 2010
Washington, DC

[14/] I note, however, that the denial of Complainant's Motion in Limine, in which Complainant sought to exclude certain emails sent by Respondent to Complainant, eliminates the reason Respondent advances as justification for its Request for Discovery.

In the Matter of *Aguakem Caribe, Inc.*, Respondent.
Docket No. RCRA-02-2009-7110

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order on **Complainant's Motion *In Limine* and Motion to Strike and Respondent's Request for Discovery**, dated June 2, 2010, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
US EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Pouch Mail to:

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Assistant Regional Counsel
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Copy by Regular Mail to:

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Dated: June 2, 2010
Washington, D.C.