UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
General Motors Automotive - North America	**)**	**Docket No. RCRA-05-2004-0001**
	)	
RESPONDENT	**)**	

ORDER DENYING EPA'S MOTION IN LIMINE TO STRIKE RESPONDENT'S "FAIR NOTICE" AFFIRMATIVE DEFENSE

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a). On October 17, 2003, the United States Environmental Protection Agency, Region 5 ("Complainant" or "the EPA") filed a Complaint and proposed Compliance Order against General Motors Corporation ("Respondent" or "GM"), charging Respondent with violating Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the regulations found at 40 C.F.R. §§ 265.1064(b), 265.1085(c)(4), and 270.1(c), and Michigan Part 111 Administrative Rule 299.9601, for storing hazardous waste without an operating license or interim status by failing to meet the conditions for regulatory exemption and failing to comply with the interim status requirements at three of its facilities located in Pontiac, Michigan, Lake Orion, Michigan, and Moraine, Ohio.

On May 6, 2005, the EPA submitted Complainant's Motion in Limine to Strike Respondent's "Fair Notice" Affirmative Defense ("Motion to Strike"). The EPA contends that Respondent raised a "fair notice" defense by claiming that, at the time of the violations alleged in the Complaint, Respondent did not have "fair notice" of EPA's position on the "point of generation" issue (i.e., the position that the "Purge Mixture" is a "solid waste" and a "hazardous waste" subject to RCRA regulation at the point that the "Purge Mixture" exits the paint applicators). *Id.* at 1. The EPA argues that Respondent cannot raise this particular affirmative defense in the instant proceeding because the D.C. Circuit has already made an explicit finding of fact that Respondent had notice of EPA's position on the regulatory status of the "purge mixture" as it exits the paint applicators as early as September 1998. *Id.* at 1-2 (citing *General Motors Corp. v. EPA*, 363 F.3d 442 (D.C. Cir. 2004)). Furthermore, the EPA contends that the findings and rulings made in the D.C. Circuit's *GM* case are binding precedent upon Respondent, and that Respondent cannot seek to re-litigate in the present forum the factual issue of when Respondent had notice of EPA's position. *Id.* at 2. The EPA points out that March 2001 is the date of the earliest of the alleged violations in the Complaint. *Id.* at 6.

Respondent submitted a response that EPA's Motion to Strike should be denied because it: (1) is an improper motion in limine, and in any event, fails to meet the standards for granting a

motion in limine; (2) fails to meet the standards for striking affirmative defenses, (3) mischaracterizes Respondent's defense, and (4) is moot, as the concerns that prompted EPA's Motion to Strike "are not grounded in anything GM intends to do." General Motor Corporation's Response to Complainant's Motion in Limine to Strike Respondent's "Fair Notice" Affirmative Defense ("Respondent's Response") at 1. Respondent stipulates that it was aware of EPA's position on point of generation expressed in EPA's 1997 "Cotsworth Letter" when the EPA inspected Respondent's facilities in 2001 and 2003. *Id.* at 1-2. Respondent states that it challenges the *correctness* of the position set forth in the Cotsworth Letter rather than its awareness of the Cotsworth Letter. *Id.*

In its response, Respondent clarifies that its argument is designed to address, among other things, the following issues surrounding the rule defining "solid waste": Whether EPA's 1997 position on the underlying rule as articulated in the Cotsworth Letter is correct; whether EPA's historical, purportedly inconsistent interpretations of the same underlying rule indicate that the rule does not provide clear notice of what is a solid waste, and; whether ultimately the rule should apply to Respondent's Purge Mixture at the facilities at issue in this case. *Id.* at 5-6, 8. Moreover, Respondent states that its argument is that the 1997 Cotsworth Letter contradicts other interpretations the EPA had made regarding what is and is not "solid waste" under the same rule both before and after the Cotsworth Letter without any corresponding change in the language of the underlying rule, and argues that therefore EPA's interpretation of the rule is arbitrary, is entitled to no deference, and is wrong. *Id.* at 8-9. In addition, Respondent contends that the D.C. Circuit's decision in *GM* has already decided that GM's fair notice argument is sufficient and presents factual issues that should be determined at a hearing on the merits. *Id.* at 6. Respondent points out the D.C. Circuit's language in *GM*:

> Whether paint purge solvent piping systems are subject to RCRA is partly a factual question dependent on the findings of inspections conducted at individual plants [and] any hardship suffered by GM as a result of postponement of judicial review is ameliorated by its opportunity to challenge EPA's regulatory interpretation administratively . . . at an agency hearing and before the [Environmental Appeals] Board.

Id. (quoting *GM*, 363 F.3d at 452) (citations omitted).

Discussion

"Motions to strike . . . are the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and are the primary procedure for objecting to an insufficient defense." *In re Dearborn Refining Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *6 (ALJ, Jan. 3, 2003). Moreover, "motions to strike are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Id.* at *6-7 (internal quotation marks omitted). "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." *Id.* at *7 (quoting *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill. 1991)). "As a general matter, pleadings should be treated liberally and a party should have the opportunity to support its contentions at trial," and "defenses are not appropriate subjects of a motion to strike, if there is any possibility that the defenses could be made out at trial." *Id.* at *7. "Furthermore, even if the arguments raised by Respondent do not constitute complete defenses to liability, they may raise issues that are relevant to the determination of any penalty." *Id.* at *8.

Regarding motions in limine, as I explained in a previous order denying a motion in limine in the instant matter, the Consolidated Rules of Practice provide that the Administrative Law Judge ("ALJ") "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." *In re General Motors Auto. – North America*, Docket No. RCRA-05-2004-0001, at 3-4 (ALJ, May 19, 2005) (quoting 40 C.F.R. § 22.22(a)(1)). Furthermore, "a motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Id.* at 4 (internal quotation marks omitted).

I reject EPA's argument that Respondent is barred from raising the affirmative defense of "fair notice" with regard to EPA's position on the "point of generation" issue because the D.C. Circuit has already made an explicit finding of fact that as early as September 1998 GM had notice of EPA's position on the regulatory status of "purge mixture" as it exits the paint applicators. *GM*, 363 F.3d at 449. First, I observe that the D.C. Circuit's decision is limited in its reach as it was a jurisdictional determination as opposed to a decision on the merits, and the D.C. Circuit ultimately concluded that it lacked jurisdiction.[1] Nevertheless, the D.C. Circuit, in dicta, noted:

> Contrary to GM's theory, the Shimberg letters cannot accurately be characterized as the culmination of EPA's position on the applicability of Subparts J, BB, and CC to purge solvent piping systems. The Shimberg letters reflect neither a new interpretation nor a new policy. *See General Electric*, 290 F.3d at 382-83. EPA's general regulatory interpretation was stated as early as 1997 in the Cotsworth letter. That interpretation was published to the regulated community by September 1998 in the RCRA

[1] The D.C. Circuit observed that its jurisdiction under Section 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), was limited to review of an action of the EPA Administrator in promulgating any regulation or requirement, or denying any petition for the promulgation, amendment, or repeal of any regulation." *GM*, 363 F.3d at 448. In denying GM's petition for review, the D.C. Circuit concluded that the so-called EPA "Shimberg letters," dated May 7, 2002, are not reviewable as final agency action under Section 7006(a) of RCRA, that GM's challenge to the regulatory interpretation in the Shimberg Letters was untimely, and that GM's challenge to the application of EPA's regulatory interpretation to GM plants was unripe. *Id.*

> Policy Compendium, *see Appalachian Power*, 208 F.3d at 1020, and was applied to GM plants in 1998 and again in 2001. In response to industry inquiries, EPA repeated its regulatory interpretation without change in the Schaeffer letter of August 31, 2001, and again in the Shimberg letters of May 7, 2002. Nothing in the record indicates that the paint purge solvent issue was "unresolved"; rather, EPA's position was settled long before the Shimberg letters.[2]

Id.

Second, the EPA does not address Respondent's assertions that the rule itself does not provide "fair notice," and that the Cotsworth Letter contradicts other interpretations the EPA had made regarding what is and is not "solid waste" under the same rule both before and after the Cotsworth Letter without any corresponding change in the language of the underlying rule.[3] Although Respondent does not specify the purported EPA and state "pronouncements" on the "continued use of solvent doctrine," such was not raised or addressed in the D.C. Circuit decision in *GM*. "Appropriate consideration will be given to the arguments raised by Respondent at the hearing on this matter, if such evidence is found to be relevant and material to liability or the determination of any penalty." *Dearborn*, 2003 EPA ALJ LEXIS 10, at *8-9.

Finally, I observe that the D.C. Circuit's decision in *GM* does not preclude Respondent from arguing that its paint purge solvent piping systems are not subject to RCRA. Indeed, in *GM* the D.C. Circuit found that EPA's regulatory interpretation that paint purge solvent piping systems can be subject to RCRA is "[p]artly a factual question" appropriately addressed in an administrative agency hearing. *GM*, 363 F.3d at 452. Such question is to be addressed at the upcoming evidentiary hearing.

---

[2] This language in the *GM* decision contradicts Respondent's assertion that the D.C. Circuit has already decided that Respondent's "fair notice" argument is sufficient. Additionally, the language Respondent cites in its Response, at 6, does not support its argument.

[3] Respondent states that it is not arguing that it did not know about EPA's 1997 Cotsworth Letter in 2001 and 2003. In fact, Respondent stipulates that it was aware of EPA's position on point of generation expressed in EPA's 1997 "Cotsworth Letter" when the EPA inspected Respondent's facilities in 2001 and 2003. Respondent's Response at 1-2.

Accordingly, EPA's Motion to Strike is DENIED.

Dated: June 8, 2005
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge