UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
BP Chemicals, Inc.	)	**Docket No. CAA-5-99-027**
	)	
Respondent	)	

ORDER DENYING MOTION TO STRIKE ANSWER

The Region 5 Office of the U.S. Environmental Protection Agency (the "Complainant" or "Region") filed a motion, dated December 15, 1999, to strike the Answer of BP Chemicals, Inc., the Respondent (or "BP" or "BP Chemicals") in this administrative enforcement proceeding. The Respondent filed a response in opposition to that motion on December 27, 1999.

The Complaint in this proceeding alleges that the Respondent began construction of a new chemical processing unit, a stationary source of air pollutant emissions under the Clean Air Act ("CAA"), without having obtained a construction permit in accordance with the CAA's regulations governing the prevention of significant deterioration of air quality, known as "PSD." The Complaint alleges two counts of violations of the PSD regulations at 40 CFR §52.21(i), and the CAA §165(a)(1). The Region seeks assessment of a civil penalty of $92,800 against Respondent for these alleged violations.

In its Answer, BP Chemicals responded to each numbered paragraph in the Complaint, as described in greater detail below. The Respondent also raised several affirmative defenses. The defenses deny the Respondent's liability on the bases that its activities did not constitute "construction" of the PSD unit, and that BP Chemicals had a valid PSD permit before beginning these activities. The Answer also objects to the proposed penalty assessment as excessive and inconsistent with EPA's penalty policy.

- Respondent's Use of "Boilerplate" Responses

The Region's main objection to BP Chemicals' Answer is the Respondent's use of "boilerplate" responses to certain allegations of the Complaint. In its response paragraphs numbered 3 to 18, BP Chemicals provided the identical response, as follows:

"To the extent Paragraph [3 to 18] of the complaint

> purports to set forth a legal position, no response is necessary. BP Chemicals otherwise denies the allegation."

In response to paragraphs 30, 31, 35, and 36, BP similarly responded: "to the extent Paragraph [30, 31, 35, and 36] of the complaint purports to assert a legal interpretation, no response is necessary." In response to paragraphs 39 to 47 of the Complaint, which address the Region's proposed assessment of a civil penalty of $92,800, BP provided the following identical response: "Respondent contests EPA's proposed civil penalty as being excessive and inconsistent with EPA's penalty policy."

Paragraphs 3 to 18, and paragraphs 30, 31, 35, and 36, of the Complaint consist almost entirely of quotations or paraphrases of the statutes and regulations that the Region asserts are applicable to this matter.[1] In response to other allegations of the Complaint -- those that allege facts (paragraphs 19 to 28, 32, 33, 37, and 38) –- BP Chemicals provided clear and detailed factual responses. For example, BP stated its "boilerplate" response to allegations such as that in paragraph 9 of the Complaint, which quotes the definition of "construction" from 40 CFR §52.21(b)(8). On the other hand, in response to paragraph 24 of the Complaint, BP admits it installed a mud mat at the plant, as alleged, but denies that such work constitutes "construction on a PSD unit" as defined in the regulations. Paragraph 23 of the Complaint describes a meeting between the Region and BP that took place on November 28, 1999, concerning possible construction activities projected at the unit. BP's response to that allegation provides greater detail and a somewhat different interpretation of the import of the meeting than does the Region's description.

The EPA's Consolidated Rules of Practice set forth the requirements for the contents of an answer, at 40 CFR §22.15(b) as follows:

> "The answer shall clearly and directly admit, deny or

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[1] One of those paragraphs does contain a factual allegation, and another contains an arguably factual allegation, combined with a legal conclusion. In ¶15, after quoting a regulation on the issuance of a draft permit, the Complaint states that the Ohio EPA issued a final permit decision on November 10, 1998. In ¶16, after quoting another part of the regulation on the effective date of a permit, the Complaint states that pursuant to that regulation, BP's permit was effective on December 11, 1998. Although BP provided the same "boilerplate" responses to these two paragraphs, it did substantively answer these factual allegations later in its Answer, primarily in ¶22. Hence, there is no need to require an amended answer with regard to these two allegations and responses.

> explain each of the *factual* allegations contained in the complaint with regard to which the respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: the circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested." (italics added).

The Respondent's Answer interposed its "boilerplate" responses only in response to non-factual allegations of the Complaint. As the Respondent points out, the procedural rules expressly require the answer to substantively address only *factual* allegations. BP Chemicals did so in its Answer here.

There is no basis for the Region's assertion that the Respondent's use of "boilerplate" responses leaves the Complainant unable to determine the issues in dispute in this matter. While such language may not be the ideal response to allegations of legal authority, the failure to substantively respond to such allegations is not improper under the EPA Rules of Practice. The Rules only require specific responses to factual allegations. It would have no effect on the course of this proceeding if the Respondent were to admit that the Region had correctly quoted and paraphrased the applicable statutes and regulations. It may be assumed that Respondent is not raising any issue concerning the correctness or application of the cited legal authorities through its "boilerplate" responses.

The answer quite adequately identifies the main issue in this proceeding, which is recognized by both parties. That is whether BP Chemical's activities constituted prohibited construction under the CAA and PSD regulations. (See Answer, ¶¶23, 24, 32, 33, and 38, and First Affirmative Defense). I agree with Judge Nissen in *In re Sheffield Steel Corporation*, (Docket No. EPCRA-V-96-017, ALJ, November 21, 1997) that allegations stating legal conclusions do not require answers, and that requiring an amended answer "would simply delay the proceeding for no sound reason." (p. 14-15).

Similarly, the Complaint's allegations in ¶¶39-47 are not factual, but generally recite the applicable civil penalty factors derived from the CAA and the EPA's CAA Stationary Source Penalty Policy. These paragraphs also generally outline the Region's consideration of these factors in arriving at the proposed penalty, but do not provide the actual penalty calculation. Similarly, the EPA rules do not require a specific response to these non-factual allegations. The Respondent has denied liability in any event.

Alternatively, BP Chemicals has sufficiently responded to the proposed penalty, in the same general terms as in the Complaint, in its Fourth Affirmative Defense. It is entirely appropriate to address the specifics of the Region's penalty calculation and the Respondent's specific objections to it in the subsequent discovery and litigation stages of this proceeding.

- Respondent's Affirmative Defenses

The Region has included in its motion a request to strike four of the Respondent's five defenses. Concerning this aspect of the answer, the Rules, at 40 CFR §22.15(b), further provide as follows:

> "The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested."

It is inappropriate to strike defenses if there is any possibility the defenses could be made out at trial. *Sheffield Steel* at 8.

BP Chemicals' Second Defense states that it had obtained a PSD permit prior to undertaking the subject activities. The Region argues that, under the regulations, the permit is not effective until the 30-day appeal period expires after issuance, during which period the Respondent began its construction activities. BP Chemicals asserts that its activities during the permit appeal period did not constitute prohibited construction. Since the factual nature of the activities is at issue, it is premature to rule on this by striking this defense. The timing of the activities in relation to permit issuance may also turn out to be relevant to any penalty calculation as well, as potentially bearing on the Respondent's culpability and seriousness of the violation. It is quite appropriate for defenses in EPA proceedings to address the proposed penalty assessment, if they provide a "basis for opposing any proposed relief." 40 CFR §22.15(b). Therefore, the Respondent's Second Defense will not be stricken.

BP Chemicals' Third Defense alleges that the EPA failed to advise the Respondent of the requirements and did not provide fair notice of those requirements. Again, even if this does not provide a complete defense to liability, the issue of fair notice could be relevant to any penalty assessment. Hence, the Answer's Third Defense will not be stricken.

The Respondent's Fourth Defense directly expresses several bases for opposing the proposed penalty. BP Chemicals asserts that

any violation did not cause any threat of environmental harm, did not impair the PSD program, and did not result in any economic benefit to the company. As stated above, it is entirely appropriate for a defense to address these penalty factors under 40 CFR §22.15(b). Hence, the Answer's Fourth Affirmative Defense will not be stricken.

The Respondent's Answer's Fifth Defense states: "BP Chemicals relies on all other matters which constitute or may constitute an avoidance or affirmative defense." This vague assertion does not allege any meaningful circumstance or argument that could constitute a defense to the charges or the basis for opposing the proposed relief. If it is intended to reserve the Respondent's right to interpose additional defenses as this proceeding progresses, it is unnecessary. That can always be done later by filing an appropriate motion or making the appropriate argument in a post-hearing brief. Hence, although it will have no substantive effect on this proceeding, the Respondent's Fifth Defense will be stricken.

Order

Complainant's motion to strike Respondent's Answer, including its affirmative defenses is **denied**, with the exception of the Answer's Fifth Defense, which is stricken.

This proceeding will continue according to the schedule set forth in the Prehearing Order of October 13, 1999.

Dated: January 21, 2000
Washington, D.C.

Andrew S. Pearlstein
Administrative Law Judge