UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
StanChem, Inc.,	)	Docket No. CWA-2-I-95-1040
	)	
	)	
RESPONDENT	)	

ORDER GRANTING MOTION TO STRIKE

By contemporaneous orders, dated September 26, 1997, the parties' cross-motions for accelerated decision were denied, StanChem's motion for discovery was granted in part and the parties were ordered to exchange prehearing information on or before November 14, 1997. Each party made a prehearing submission by the mentioned date.

On November 24, 1997, Complainant filed an objection to StanChem's prehearing exchange upon the ground that StanChem failed to comply with the prehearing order insofar as it required a summary of the testimony of prospective witnesses. Complainant moved for an order compelling StanChem to provide a summary of the expected testimony of its witnesses and a list of specific cites to the Federal Register upon which it expected to rely or refer.

On November 26, 1997, Complainant filed a motion for an order of discovery. The motion recites that it seeks discovery in three principal areas: the economic benefit derived by StanChem from its violations of the OCPSF rule at issue here, the applicability of the rule to StanChem's facility, and the timing of StanChem's knowledge that it was subject to the rule. Discovery in these areas is allegedly necessary to enable Complainant to present to the ALJ all information necessary for an informed decision on issues determined to be factual in the order of September 26, 1997, which denied the parties' cross-motions for accelerated decision. Discovery was also allegedly necessary in order to demonstrate that Complainant had proposed an appropriate penalty.

Under date of December 12, 1997, StanChem filed an objection to Complainant's motion for an order of discovery, a motion to bifurcate the hearing and to compel discovery, a response to Complainant's objection to prehearing exchange, an objection to Complainant's motion to compel, a motion to compel and a first amended prehearing exchange. Attached to StanChem's objection to Complainant's motion for

an order of discovery was a copy of a letter, dated October 25, 1995, from counsel for Complainant to counsel for StanChem referring to settlement negotiations and which stated, inter alia, that Complainant was withdrawing its previous offer to settle this matter for a stated sum. The letter referred to a methodology for determining economic benefit with which the Agency thought StanChem had agreed. However, the methodology was not described.

On December 30, 1997, Complainant filed a motion to strike the mentioned letter upon the ground that it referred to settlement negotiations and was inadmissible in accordance with Rule 22.22 (40 CFR Part 22). The cited rule provides that evidence relating to settlement which would be excluded in federal court under Federal Evidence Rule 408 is not admissible. In an accompanying letter, Complainant opines that attaching the letter to StanChem's objection to the motion for discovery is a breach of expected professional conduct and asks that among the pending motions, its motion to strike be decided first. Additionally, Complainant asks the ALJ to consider whether the letter creates a bias [as to the penalty amount].

On January 14, 1998, StanChem filed an objection to Complainant's motion to strike. StanChem pointed out that the letter contained only two types of information: (1) the failure of the parties to reach a settlement and Complainant's plans to proceed with litigation; and (2) the settlement amounts offered by StanChem and Complainant, including the amount of the proposed settlement which was based on Complainant's calculation of alleged economic benefit [resulting from the violations]. StanChem emphasized that Complainant had previously disclosed the former type of information in a letter to the Chief Judge, dated February 16, 1996, which stated the nature and result of the parties' prior efforts to reach a settlement, and Complainant's intent to establish liability by a motion for partial accelerated decision. In this respect, StanChem says that the letter provides no new information.

StanChem asserts that the letter was not offered as evidence of compromise by either party, but rather was attached to its objection to support its contention that Complainant does not need further discovery at this time to comply with the ALJ's prehearing exchange order requiring Complainant to furnish certain documents and information "explaining the reasoning behind the proposed penalty". StanChem points out that Complainant initially, and after settlement negotiations [reached an impasse], continues to propose a penalty of $125,000, presumably based upon its estimate of economic benefit and other factors. StanChem maintains, however, that the relevant reasoning [for the purpose of the ALJ's order] is that which occurred at the time the penalty was calculated and that new information sought by Complainant is not relevant to that issue.

Moreover, StanChem emphasizes that Federal Evidence Rule 408, which is in effect incorporated into Consolidated Rule 22.22 by reference, does not require the exclusion of evidence otherwise discoverable, merely because it is presented in the course of compromise negotiations. While StanChem says that it is willing to refile the letter, redacting any and all figures offered in compromise negotiations, it objects to any other exclusion of the letter or the striking of any other information in its pleadings related to calculation of economic benefit and formal proposal of penalties. According to StanChem, these matters are directly relevant to its equitable estoppel and other defenses.

Complainant, without having moved for permission to do so, has filed a reply to StanChem's objection to its motion to strike (Reply, dated January 27, 1998). The Rules of Practice do not provide for replies to responses to motions, and, although this rule has not previously been invoked here because of the complexity of the issues, Complainant's reply will not be considered.[(1)]

Discussion

The rule that offers of settlement or compromise are not admissible to prove liability or to prove invalidity of a claim or its amount is based on public policy and is well established. Federal Evidence Rule 408. The rule, however, does not preclude the introduction of evidence "otherwise discoverable" or which is offered

for another purpose merely because the evidence was presented in settlement negotiations.[2]

Here, StanChem asserts that the letter, dated October 25, 1995, was offered merely to show that Complainant did not need the discovery requested in its motion, dated November 26, 1997, in order to comply with the ALJ's prehearing order for documents and information "explaining the reasoning behind the proposed penalty".

There can be little doubt that the letter supports StanChem's position in this respect, because it contains Complainant's "bottom line" figure for settling this matter which presumably includes its computation at the time of the economic benefit of noncompliance. That being said, it does not follow that the letter was properly offered or is admissible for the purpose alleged by StanChem. StanChem's assertion that the letter was offered for purposes other than to show the amount for which the Agency was formerly willing to settle this matter would be more persuasive if the letter had described the methodology for determining economic benefit. Moreover, it is not clear how the letter supports StanChem's contention that Complainant should be estopped from pursuing this action.

In view of the foregoing, the letter at issue will be struck. StanChem may, however, file a motion to refile the letter with all references to settlement amounts redacted.[3]

ORDER

The letter, from counsel for Complainant to Counsel for StanChem, dated October 25, 1995, is struck. StanChem may, however, file a motion to refile the letter with all references to settlement amounts redacted.[4]

Dated this 9th day of February 1998.

original signed by undersigned

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Spencer T. Nissen

Administrative Law Judge

1. See, e.g., Hardin County, RCRA (3008) Appeal No. 92-1, Order Denying Reconsideration (EAB, February 4, 1993) (in the absence of a properly supported motion filed in advance, replies to motions will normally be struck as not authorized by the rules).

2. See, e.g., Catalina Yachts, Inc., Docket No. EPCRA-09-0015 (Initial Decision, February 2, 1998) (slip opinion, note 2), (statements of Agency representatives in settlement negotiations, offered to show Agency personnel regarded the ERP (penalty policy) as binding, were considered to be "otherwise discoverable" within the meaning of Federal Evidence Rule 408 and thus motion to strike was denied).

3. It was obviously necessary to read the letter in order to determine the validity of the motion to strike. I reject out of hand, however, any suggestion that exposure to the letter biases in any manner my ultimate decision in this matter.

4. Rulings on the other pending motions will be forthcoming.

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