UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	)	
	)	
United States Department of the Army,	)	
	)	
Respondent.	)	CERCLA Docket No.
	)	CERCLA-08-2020-0001
Rocky Mountain Arsenal	)	
Commerce City, CO,	)	
	)	
Facility.	)	
	)	

ANSWER FOR THE DEPARTMENT OF THE ARMY

The Department of the Army answers the Administrative Complaint advanced by Regional Counsel Kenneth C. Schefski as follows:

The opening paragraph states legal conclusions and describes the Agency's reasons for commencing the action, and no response is required.

PRELIMINARY STATEMENT

1. The allegations set forth in Paragraph 1 state conclusions of law, and no response is required.

STATUTORY BACKGROUND

2. The allegations set forth in Paragraph 2 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

3. The allegations set forth in Paragraph 3 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

4. The allegations set forth in Paragraph 4 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

5. The allegations set forth in Paragraph 5 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

GENERAL ALLEGATIONS

6. The Department of the Army ("Department") incorporates by reference its answers to the Region's General Allegations into its more specific answers to Count 1.

7. Admitted.

8. The allegations set forth in Paragraph 8 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

9. The allegations set forth in Paragraph 9 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

10. The allegations set forth in Paragraph 10 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law

to which no response is required. Additionally, to the extent that use of the term "Rocky Mountain Arsenal" here includes lands that have been transferred from ownership or management control/jurisdiction of the Department of the Army, the allegation is denied.

11. The Department admits that the current property identified as Rocky Mountain Arsenal by the Department of the Army is owned by the United States and is under the ownership or management control/jurisdiction of the Department of the Army. The remaining allegations set forth in Paragraph 11 state conclusions of law, and no response is required.

12. The allegations set forth in Paragraph 12 state conclusions of law, and no response is required. To the extent a response is required, the Department admits that it had management control/jurisdiction or operated portions of the current Rocky Mountain Arsenal at the time of disposal of certain "hazardous substances" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA).

13. The allegations set forth in Paragraph 13 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

14. Admitted, to the extent that land that previously comprised Rocky Mountain Arsenal was listed on the NPL in August 1987 and March 1989; however denied to the extent that the majority of land that once comprised the Rocky Mountain Arsenal has been deleted from the NPL and transferred from the ownership or management control/jurisdiction of the Department of the Army to a variety of federal, state and local governments.

15. Admitted.

16. Characterize provisions of documents, which speak for themselves and are the best evidence of their content, and no response is required.

17. The Federal Facility Agreement speaks for itself, and no response is required.

18. The Federal Facility Agreement speaks for itself, and no response is required.

19. The Federal Facility Agreement speaks for itself, and no response is required.

20. The Federal Facility Agreement speaks for itself, and no response is required. Additionally, for the conclusion of law, no response is required.

21. The Federal Facility Agreement speaks for itself, and no response is required.

22. The Settlement Agreement speaks for itself, and no response is required.

23. The Consent Decree speaks for itself, and no response is required.

24. The Settlement Agreement speaks for itself, and no response is required.

25. The Settlement Agreement speaks for itself, and no response is required.

26. The Settlement Agreement speaks for itself, and no response is required.

27. The Federal Facility Agreement and the Settlement Agreement speak for themselves, and no response is required.

28. The Federal Facility Agreement and the Settlement Agreement speak for themselves, and no response is required.

29. The Settlement Agreement speaks for itself, and no response is required.

30. The Department admits that it has received correspondence seeking what purport to be costs owed to EPA pursuant to the Settlement Agreement for certain years after 1990, and denies the remaining allegations set forth in Paragraph 30.

31. The Department admits that it did not receive correspondence seeking "EPA Costs" pursuant to the Settlement Agreement for Fiscal Years 2016 and 2017, and that it did receive an email on June 13, 2018 providing cost summaries that indicated that the EPA cost/expenditure summaries generally identified within the documents were "certified" by EPA. The Department denies the remaining allegations set forth in Paragraph 31.

32. The Department admits that it advised EPA on or before June, 2018 that Defense Environmental Restoration Program ("DERP") funds were not legally available to pay "EPA Costs," and that it could not pay costs from DERP appropriations without specific Congressional authorization. The Department denies any remaining allegations set forth in Paragraph 32.

33. The Department admits that EPA initially made a demand in a letter dated September 30, 2014 for $1.2 million to cover their requested costs for fiscal year 2015, and denies any remaining allegations set forth in Paragraph 33.

34. The Department admits that it made payments for "EPA Costs" totaling $470,000 for fiscal year 2015 and admits that among other amounts demanded by EPA for fiscal year 2015 costs, this includes an EPA demand for the sum of $1,050,038.71. The Department further alleges that the unsupported sum demanded was more than twice the maximum figure that the Assistant Regional Administrator for the Office of Ecosystems Protection and Remediation had suggested should be billable as maximum "out-year oversight costs" in correspondence dated September 26, 2011 and is among four different amounts identified by EPA for fiscal year 2015.

35. The Department admits that EPA made an additional demand for payment alleged to have been incurred during fiscal year 2015 in a letter dated August 21, 2018, and that the Department advised EPA, as noted in response to Paragraph 32, that DERP funds were not available to pay "EPA Costs" under the Settlement Agreement. The Department is without knowledge of information sufficient to form a belief about EPA's calculations pertaining to the August, 2018 demand. The remaining allegations set forth in Paragraph 35 state conclusions of law and no response is required.

36. The Department admits that it has made no further payments earmarked to cover "EPA Costs" for fiscal year 2015, and denies the remaining allegations set forth in Paragraph 36.

37. The Department admits that EPA made a demand for certain costs alleged to have been incurred during fiscal year 2016 in the amount of $1,050,038.71 in a letter dated August 21, 2018, and the Department further alleges that any such demand would necessarily be untimely even pursuant to the course of dealing alleged in Paragraph 30 of the Administrative Complaint. The remaining allegations of Paragraph 37 state conclusions of law, and no response is required.

38. The Department admits that it has not made a payment to EPA relating to costs alleged to have been incurred in fiscal year 2016, and further alleges that any demand made for such costs in June, 2018 was untimely and that the sum demanded, $1,050,038.71, was again more than twice the maximum figure that the Assistant Regional Administrator for the Office of Ecosystems Protection and Remediation had suggested should be billable as maximum "out-year oversight costs" in correspondence dated September 26, 2011. To the extent that the allegations of Paragraph 38 state conclusions of law, no response is required.

39. The Department admits that EPA demanded reimbursement of $1,087,225.81 in costs in a letter to the Army, dated August 21, 2018. The Department further alleges that the demand made for such costs in August, 2018 was untimely and that the unsupported sum demanded, $1,087,225.81 was again more than twice the maximum figure that the Assistant Regional Administrator for the Office of Ecosystems Protection and Remediation had suggested should be billable as maximum "out-year oversight costs" in correspondence dated September 26, 2011. The remaining allegations set forth in Paragraph 39 state conclusions of law, and no response is required.

40. The Department admits that it has not made a payment to EPA relating to costs alleged to have been incurred in fiscal year 2017, and is without knowledge or information sufficient to form a belief regarding the remaining allegations set forth in Paragraph 40. Again, the Department further alleges that any demand made for such costs in August, 2018 was untimely and that the sum demanded, $1,087,225.81, was more than twice the maximum figure that the Assistant Regional Administrator for the Office of Ecosystems Protection and Remediation had suggested should be billable as maximum "out-year oversight costs" in correspondence dated September 26, 2011. To the extent that the allegations of Paragraph 40 state conclusions of law, no response is required.

41. The Department admits that EPA initially demanded $1.1 million in costs in a letter dated January 25, 2018, and denies that the Department paid $482,131.84 on April 5, 2018, but instead paid $485,000.00 representing the maximum amount predicted in the Assistant Regional Administrator's 2011 letter for the period from Fiscal Years 2014-2017, inflated from the maximum fiscal year 2017 amount to include interest at the rate specified for investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal

Revenue Code. The Department further admits that EPA made a subsequent demand for $605,093.97 in August, 2018, and is without knowledge or information sufficient to form a belief regarding the remaining allegations set forth in Paragraph 41. To the extent that the allegations of Paragraph 41 state conclusions of law, no response is required.

42. The Department admits that it has made no further payments earmarked to cover any additional "EPA Costs" for fiscal year 2018, and denies the remaining allegations set forth in Paragraph 42. To the extent that the allegations of Paragraph 42 state conclusions of law, no response is required.

43. Admitted.

44. The Department admits that it has made no payments earmarked for fiscal year 2019 "EPA Costs," and denies the remaining allegations set forth in Paragraph 44. To the extent that the allegations of Paragraph 44 state conclusions of law, no response is required.

45. Denied.

VIOLATIONS

46. The Department incorporates by reference Paragraphs 1 through 45 of this Answer, inclusive, as if fully set forth herein.

47. Denied.

48. The allegations set forth in Paragraph 48 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

49. The allegations set forth in Paragraph 49 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

CIVIL PENALTY ASSESSMENT

50. The Department incorporates by reference Paragraphs 1 through 49 of this Answer, inclusive, as if fully set forth herein.

51. The allegations set forth in Paragraph 51 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

52. The allegations set forth in Paragraph 52 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

53. Paragraph 53 characterizes the perceived "severity" of the Region's allegations and provides conclusions of law, and no response is required. The Department specifically disputes the suggestion that EPA's obligation to perform oversight at NPL sites is contingent upon payment of either oversight costs demanded by EPA or "EPA Costs" under the Settlement agreement, and denies any remaining allegation set forth in the same Paragraph.

54. Paragraph 54 provides a statement of the Region's intentions in connection with the litigation commenced by the Complaint, and no answer is required.

55. Paragraph 55 provides a statement of the Region's intentions in connection with the litigation commenced by the Complaint, and no answer is required.

56. The allegations set forth in Paragraph characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

57. Paragraph 57 summarizes the requirements of an answer as contained in §22.15 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, which speak for themselves and are the best evidence of their content. On July 8, 2020, the Regional Judicial Officer granted the Department's motion for an extension, extending the Department's deadline to file its answer to EPA's complaint to August 6, 2020. The Department hereby requests a hearing on the allegations set forth in the Complaint, as the Department disputes, as indicated in this Answer, the Complainants allegations that the Department owes costs pursuant to the FFA and Consent Decree and Settlement Agreement as characterized by EPA and states the grounds for its defenses below.

58. Paragraph 58 summarizes the requirements of an answer as contained in §22.15 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, which speak for themselves and are the best evidence of their content. The allegations set forth in Paragraph 58 also state conclusions of law, and no response is required.

59. The Department acknowledges the notice provided in Paragraph 59. Any remaining allegations set forth in that paragraph state conclusions of law, and no response is required.

60. The Department acknowledges being informed that Mr. Lindsey will represent the Regional Counsel, and will serve this answer and other case documents on him at the email address identified by him, at Lindsey.William@EPA.gov, pursuant to a mutual agreement for electronic service. Any remaining allegations set forth in that paragraph refer to administrative matters, and no response is required.

SETTLEMENT CONFERENCE

61. The Department acknowledges notice that an informal conference was made available, and the Army has contacted EPA counsel to engage in such informal settlement discussions. Any remaining allegations set forth in that paragraph refer to administrative matters, and no response is required.

62. The allegations set forth in Paragraph 62 characterize provisions of law, which speak for themselves and are the best evidence of their content, and constitute conclusions of law to which no response is required.

63. The allegations set forth in Paragraph 63 state the Regional Counsel's position or conclusions of law, to which no response is required. However, pursuant to section 22.18(d), the Army requests the ALJ refer this matter to mediation or alternative dispute resolution (ADR) to facilitate settlement.

SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

64. The allegations set forth in Paragraph 64 state conclusions of law, and no response is required.

The Department denies each and every allegation not specifically addressed in the preceding paragraphs.

** ** **

FIRST AFFIRMATIVE DEFENSE

The Army has not refused or failed to provide for payment of EPA's "oversight" costs. The Department of Defense, on behalf of the Department of the Army, submitted several fiscal year 2021 legislative proposals to the Office of Management and Budget (OMB) seeking Congressional authorization to pay EPA costs from Army cleanup funds, including costs sought by EPA in the Complaint, but each of these proposals was rejected by EPA. After rejection of the proposals during the last legislative cycle, at its first opportunity, the Department of Defense submitted a fiscal year 2022 legislative proposal to OMB seeking Congressional authorization to pay EPA costs from Army cleanup funds. Pending OMB approval, the proposal will again go through interagency coordination and approval, prior to submission to Congress, which if passed, would permit Army payment of authorized amounts.

SECOND AFFIRMATIVE DEFENSE

To the extent that the Complainant alleges that the FFA requires the Army to pay for EPA Costs or "oversight costs," the 1989 Federal Facility Agreement (FFA) between the Complainant and the Department does not provide for payment of EPA Costs or "oversight costs."

THIRD AFFIRMATIVE DEFENSE

Even if there was a provision of in the FFA for "oversight" costs, the Complainant is not entitled to penalties pursuant to the express terms of the FFA. Section XXVIII., titled Enforceability, of the FFA provides the conditions for when EPA can obtain civil penalties for violation of the FFA under section 109 of CERCLA. EPA can obtain penalties through a CERCLA 109 complaint only where the Department failed to meet a deadline that has been incorporated into the FFA, for violations of terms or conditions which relate to remedial actions or work associated with remedial actions, or for violation of terms, conditions, or deadlines associated with a final resolution of dispute. The FFA does not allow for penalties to be assessed for the reasons alleged by the Complainant. Therefore, penalties are not authorized here.

FOURTH AFFIRMATIVE DEFENSE

This tribunal lacks jurisdiction over the subject matter of the Complaint. While cloaked in terms of an action for penalties for violation of a CERCLA FFA and terms of a CERCLA consent decree, the subject of costs is not a requirement under the FFA or CERCLA. While the Environmental Protection Agency has authority and jurisdiction to address issues related to violations of CERCLA that are further defined or specified within FFAs or consent decrees, neither section 120 of CERCLA, which defines the relationship and obligations of the parties for Federal Facilities on the National Priorities List, nor the FFA contain provisions related to the subject matter of the Complaint.

FIFTH AFFIRMATIVE DEFENSE

In accordance with the 1992 Consent Decree, whereby the Court expressly retains jurisdiction to enforce the terms of the Consent Decree, including any dispute with respect to compliance with the Consent Decree, the Complainant has chosen an improper forum and must enforce the settlement agreement through the district court. While EPA alleges that the FFA contains a requirement for payment of EPA costs or "oversight costs," it is the Consent Decree, incorporating the settlement agreement, which contains provisions regarding EPA costs and the process for payment.

SIXTH AFFIRMATIVE DEFENSE

As the Complaint explicitly acknowledges, the procedure defined in Paragraph 12.3 of the Settlement Agreement as a prerequisite for payments after October 1, 1990 have not been followed. Accordingly, payments made to date were improper, and no further payments are due.

SEVENTH AFFIRMATIVE DEFENSE

Assuming, *arguendo*, that the Parties somehow adopted a compulsory process that required annual billing and payment for "oversight" costs, the Complaint affirmatively alleges that EPA did not submit timely demands for payment for fiscal years 2016, 2017, 2018, and 2019, and no payments for those years are due.

EIGHTH AFFIRMATIVE DEFENSE

The Settlement Agreement provides for payments only with regard to "technical assistance," which EPA does not allege it has rendered. Accordingly, payments made to date were improper, and no further payments are due absent the provision of such assistance.

NINTH AFFIRMATIVE DEFENSE

On information and belief, EPA's method of determining oversight costs was altered unilaterally sometime after September 26, 2011. EPA was not empowered by the Settlement Agreement to make such unilateral changes, and therefore at least portions of any sum demanded thereafter were improperly billed. Again assuming, *arguendo*, an obligation tied to an annual billing cycle for "oversight" costs, the Agency has waived costs for years in which demands were improperly inflated.

** ** **

WHEREFORE, the Department asks the Presiding Officer:

(1) To find in favor of the Department and issue an order dismissing the Administrative Complaint, including Count I thereof, with prejudice;

(2) To issue an order finding and concluding that:

(a) No sums for "oversight costs" or EPA Costs are due and owing for the years 2015 to 2019;

(b) Civil penalties are not justified;

(c) The terms of the Federal Facility Agreement do not allow for penalties as requested by the Complainant;

(d) This administrative tribunal and the EPA do not have jurisdiction over the subject matter of the Complaint;

(e) The express terms of the Settlement Agreement preclude amendment absent unanimous agreement of the parties prior to entry of incorporation into a Consent Decree,

and thereafter only in accordance with the terms of the Consent Decree; and that the Decree requires written agreement by all parties and entry by the Court;

(f) No further demands may be made in the absence of the provision of "technical assistance" to the Army in accordance with the Settlement Agreement;

(g) "Oversight costs" do not constitute "technical assistance;"

(h) The submission of further demands for payment pursuant to the Settlement Agreement violate the Settlement Agreement unless and until EPA convenes a proper conference to discuss the costs associated with "technical assistance" and provides an accounting that would allow the parties to consider EPA's "actual expenditures" on "technical assistance" in accordance with the agreement;

(3) To dismiss this proceeding as the District Court for the District of Colorado expressly retained jurisdiction for the purpose of enforcing the terms of the Consent Decree and adjudicating any dispute subject to judicial review and any dispute with respect to compliance with the Consent Decree, and therefore, this tribunal does not have jurisdiction the matters raised by the Complainant; and

(4) To grant what other relief the Presiding Officer finds necessary.

Dated this 6th day of August 2020.

KROHN.RYAN.DARYL.1290345975
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Respectfully submitted,

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