UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
VSS International, Inc.,	)	**Docket No. OPA-09-2018-0002**
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S MOTION IN LIMINE AND RESPONDENT'S MOTION TO COMPEL

I. PROCEDURAL HISTORY

On April 20, 2018, I issued a Prehearing Order in this proceeding in which I directed the parties to file and serve prehearing exchanges, and otherwise established prehearing filing deadlines, including deadlines for dispositive motions and non-dispositive motions. The Prehearing Order provided that non-dispositive motions must be filed no later than 60 days prior to the scheduled hearing.[1] Consistent with the Prehearing Order, Complainant and Respondent submitted their prehearing exchanges, along with Complainant's proposed exhibits ("CX") 1-55 and Respondent's proposed exhibits ("RX") 1-97.[2] Relevant to the motions addressed in this order, Respondent identified Michael Sears, a hazardous materials specialist with the Yolo County Health Department, as a witness in its Prehearing Exchange ("R. PHE").

By order dated February 26, 2019, I scheduled the evidentiary hearing in this matter to commence on May 16, 2019, in San Francisco, California. Therefore, in accordance with the directives of the Prehearing Order, any non-dispositive motions were due no later than March 18, 2019.[3] Consistent with this filing deadline, Complainant filed a Motion in Limine ("Mot. in Lim.") on March 15, 2019. Respondent timely filed an Opposition to Complainant's Motion in Limine ("Opposition" or "Opp.") on April 1, 2019, along with a declaration from Richard McNeil, counsel for Respondent. Thereafter, on April 5, 2019, Complainant filed a Reply to Respondent's Opposition ("Reply").

[1] Notably, the Prehearing Order specifically identified non-dispositive motions as including motions for additional discovery, motions for subpoenas, and motions in limine.

[2] Subsequent to Respondent's Prehearing Exchange, the parties agreed to exclude RX 25, 26, 27, 28, 30, 31, 33-36, and 44 from evidence upon joint stipulation dated March 15, 2019.

[3] Computation of time in this proceeding is governed by 40 C.F.R. § 22.7.

Additionally, following the set deadline for non-dispositive motions, on March 20, 2019, Respondent filed a Motion to Compel Attendance and Testimony of and Production of Documents by Michael Sears at Hearing ("Motion to Compel" or "Mot. to Compel"), including a memorandum of support. Contemporaneous with filing its Motion to Compel, Respondent also filed a declaration from Mr. McNeil, including appended documents ("Second McNeil Decl."),[4] and a proposed subpoena ("Prop. Subpoena"), on March 20, 2019. Complainant timely filed a Response to Respondent's Motion to Compel ("Response" or "Resp.") on March 28, 2019. Both Complainant's Motion in Limine and Respondent's Motion to Compel are addressed in this Order.

II. COMPLAINANT'S MOTION IN LIMINE

a. Applicable Law

The procedural rules governing this proceeding, set forth at 40 C.F.R. Part 22 ("Rules of Practice"), provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible." 40 C.F.R. § 22.22(a)(1). Pertinent to this determination, Rule 408 of the Federal Rules of Evidence ("FRE") establishes that in the context of civil proceedings, conduct or statements made during compromise negotiations about a disputed claim are inadmissible for purposes of proving or disproving the validity or amount of that disputed claim. Fed. R. Evid. 408(a).

Motions in limine are generally disfavored in federal trial practice. *See Acevedo v. NCL Ltd.*, 317 F. Supp. 3d 1188, 1192 (S.D. Fla. 2017). A motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). If evidence is not clearly inadmissible, "evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Thus, denial of a motion in limine does not mean that all evidence challenged by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of trial the tribunal is unable to determine whether the evidence in question should be excluded. *Id.* (citing *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989)).

b. Parties' Arguments

In its Motion in Limine and Reply, Complainant seeks to exclude from admission two categories of material proposed by Respondent in its prehearing exchange: (1) certain proposed documentary evidence from Respondent that Complainant asserts consists of inadmissible evidence regarding compromise offers and negotiations pursuant to Rule 408 of the FRE and 40 C.F.R. § 22.22(a)(1); and (2) certain proposed documentary and testimonial evidence proposed

[4] The declaration of Mr. McNeil is not consecutively paginated with the appended documents included in this filing. For purposes of citation to this document in this Order, the page numbers cited are the natural page numbers of the entire document filed, including the appended documents.

by Respondent pertaining to Mr. Sears, the hazardous materials specialist with the Yolo County Health Department identified by Respondent as a witness in this proceeding. *See* Mot. in Lim. at 1, 4-5; Reply at 3.

As to the first category of material sought to be excluded, Complainant asserts that RX 7, 10, 11, and 15, consists of communications between counsel for Complainant and counsel for Respondent during 2014 and 2015 regarding the circumstances at issue in this proceeding, and are inadmissible settlement communications pursuant to Rule 408 of the FRE and 40 C.F.R. § 22.22(a)(1). Mot. in Lim. at 2-3; Reply at 1-2. In support of this assertion, Complainant notes that the communications in these proposed exhibits occurred after the date the enforcement action underlying this matter was initiated. Mot. in Lim at 2. Based upon this context, Complainant asserts that these exhibits are "not admissible for the purpose of determining liability or supporting an appropriate penalty," pursuant to Rule 408 of the FRE and 40 C.F.R. § 22.22(a)(1), and should be excluded upon its Motion in Limine on this basis. *Id.* at 2-3. Additionally, in its Reply, Complainant further asserts that admission of these proposed exhibits "puts the parties' counsel in the untenable position of becoming witnesses in this matter." Reply at 2.

Addressing the second category of material that it seeks to exclude upon its Motion in Limine, Complainant asserts that proposed documentary exhibits RX 41, 42, 47, 52, and 53, consisting of communications involving Mr. Sears, as well as the proposed testimony of Mr. Sears outside the scope of his observations during a 2012 EPA inspection of the facility at issue in this matter, are irrelevant, immaterial, and lacking probative value, and should therefore be excluded on this basis. *See* Mot. in Lim. at 3-5; Reply at 2-3. Complainant argues that the communications involving Mr. Sears contained within RX 41, 42, 47, 52, and 53, pertain to state law regarding the facility at issue, rather than the federal law at issue in this proceeding, and that Respondent is attempting to use such communications to conflate state and federal law. *See* Mot. in Lim. at 3-4; Reply at 2-3. With regard to the proposed testimony of Mr. Sears, Complainant acknowledges that Mr. Sears was present at a 2012 EPA inspection of the facility at issue in this matter and could provide testimony regarding his observations during this inspection. Mot. in Lim. at 5. However, Complainant requests that Mr. Sears' testimony be limited to the scope of his observations during this inspection. Mot. in Lim. at 5. More specifically, Complainant notes that Respondent identified Mr. Sears as an expert witness in its prehearing exchange, but did not provide a rationale to support this designation. *Id.* at 4-5. As a result, Complainant "requests that Mr. Sears be excluded as an expert witness, unless Respondent supplements its Prehearing Exchange with his curriculum vitae, area of expertise and other materials to support his utility as an expert witness." Mot. in Lim. at 5.

In its Opposition, Respondent contests the requested exclusion of its proposed documentary and testimonial evidence upon Complainant's Motion in Limine, and requests that this motion be denied in its entirety. *See* Opp. at 1, 14. With regard to the documentary exhibits Complainant seeks to have excluded upon its Motion in Limine, Respondent asserts that these proposed exhibits "are relevant, probative, and admissible." Opp. at 6. Respondent argues that RX 7, 10, 11, and 15, are not, as Complainant asserts, inadmissible evidence of settlement negotiations under the FRE and Rules of Practice, but rather admissible evidence "relevant to the assessment of any penalty." *Id.* at 7. Respondent asserts that the communications in RX 7, 10, 11, and 15, demonstrate Respondent's attempts to cooperate with EPA and comply with the law

at issue in this proceeding, and that such evidence is admissible for penalty assessment purposes. *See* Opp. at 7-11. Respondent further argues that Complainant has not made a showing that the identified documents are settlement communications subject to exclusion under Rule 408 of the FRE, and that these documents do not bear the indicia of such prohibited settlement communications. *Id.* at 9. Likewise, Respondent asserts that the communications involving Mr. Sears objected to by Complainant in its Motion in Limine, contained within RX 41, 42, 47, 52, and 53, are relevant to this proceeding, as they demonstrate Respondent's response to notice of the alleged violations and its efforts to comply with the law at issue. *Id.* at 12-13.

With regard to the testimony of Mr. Sears, Respondent broadly argues that Mr. Sears is a "material, percipient witness" to the violations alleged in this proceeding. Opp. at 13. Respondent states that it will seek testimony from Mr. Sears not only with regard to Respondent's efforts to comply with the law at issue in this proceeding and his observations during inspections with the EPA, but also as to his opinion regarding Respondent's "compliance with environmental regulations," based upon the fact that he reviewed the Spill Prevention, Control, and Countermeasure Plan ("SPCC Plan") for the facility at issue, and further "cleared purported violations associated with [Respondent's] SPCC Plan." *Id.* Respondent, however, does not identify any qualifications Mr. Sears has to offer such opinion testimony at hearing, and further provides no support for its designation of Mr. Sears as an expert witness in its Prehearing Exchange.

c. Discussion

Complainant has not demonstrated that the documentary evidence it seeks to exclude upon its Motion in Limine, consisting of RX 7, 10, 11, 15, 41, 42, 47, 52, and 53, is inadmissible for any purpose, and thereby should be excluded. With regard to RX 7, 10, 11, and 15, Complainant has not established that such documents consist of inadmissible material under Rule 408 of the FRE and 40 C.F.R. § 22.22(a)(1). Notably, Complainant has not clearly established that these documents are compromise offers or negotiations within the purview of Rule 408 of the FRE. Further, Complainant has not established that Respondent is offering such documents for the prohibited uses of compromise offers and negotiations under Rule 408. Likewise, with regard to RX 41, 42, 47, 52, and 53, Complainant has not established that these documents containing communications involving Mr. Sears are, as it has asserted, irrelevant, immaterial, and lacking probative value. Although these documents appear to discuss Respondent's compliance with state law requirements regarding the SPCC Plan for the facility at issue, these communications otherwise more broadly discuss the SPCC Plan for this facility during the period of the alleged violations in this matter, and could, therefore, be relevant to this proceeding. *See generally* RX 41, 42, 47, 52, and 53. As Complainant has not established that proposed documentary exhibits RX 7, 10, 11, 15, 41, 42, 47, 52, and 53 are inadmissible to this proceeding, Complainant's request to exclude these documents upon its Motion in Limine is appropriately denied.

Unlike Complainant's request to exclude documentary exhibits, the record supports limiting the scope of Mr. Sears' testimony upon Complainant's Motion in Limine. It is undisputed that Mr. Sears was present during a 2012 EPA inspection of the facility at issue in this matter, and that he can therefore provide relevant testimony pertaining to his firsthand

personal observations during that inspection. However, Respondent identified Mr. Sears as an expert witness in its Prehearing Exchange, *see* R. PHE at 18, and has proposed offering his opinion testimony on Respondent's compliance with the federal law at issue in this matter, *see* Opp. at 13; R. PHE at 18. Such proposed opinion testimony is patently based upon technical and specialized knowledge within the province of expert opinion testimony under Rule 702 of the FRE. *See* Fed. R. Evid. 702; *see also* Fed. R. Evid. 701 (addressing limitations on opinion testimony by lay witnesses). Despite this, Respondent has not provided a sufficient basis to find that Mr. Sears is qualified as an expert to provide such opinion testimony, based upon his knowledge, skill, experience, training, or education. Furthermore, the Prehearing Order in this matter specifically required the parties to provide a curriculum vitae or resume for each identified expert witness with their prehearing exchanges, and Respondent did not comply with this requirement to propose Mr. Sears as an expert witness. Accordingly, it is appropriate to exclude the proposed expert opinion testimony from Mr. Sears and limit his opinion testimony to that permitted for lay witnesses pursuant to Rule 701 of the FRE, absent subsequent qualification of this individual as an expert witness in this proceeding.[5] Contrary to Complainant's broader arguments, however, I do not find a basis for further limiting Mr. Sears' lay testimony solely to his observations during the 2012 EPA inspection of the facility at issue in this matter.

III. RESPONDENT'S MOTION TO COMPEL

a. Applicable Law

The Rules of Practice provide that the Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena "upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced," provided that the statute applicable to the proceeding authorizes such action. 40 C.F.R. § 22.21(b); *see also* 40 C.F.R. § 22.19(e). Pertinent to this matter, the Clean Water Act,[6] the relevant statute at issue in this proceeding, provides authority for the issuance of "subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents," in administrative enforcement proceedings. 33 U.S.C. § 1319(g)(10).

b. Parties' Arguments

In its Motion to Compel, Respondent requests that I issue a subpoena to (1) compel the attendance and testimony of Mr. Sears for the entire duration of the scheduled evidentiary hearing, and (2) compel Mr. Sears to produce all communications between himself and any and all persons employed by the EPA, as well as any and all persons employed by Respondent, from January 1, 2010 to the present. *See* Mot. to Compel at 1-2, 9; Prop. Subpoena at 1-2. Notably, Respondent neither acknowledges the untimeliness of its Motion to Compel nor does it provide any justification for such late filing in making these requests.

[5] Notably, any such subsequent qualification would require supplementation of Respondent's Prehearing Exchange to include a curriculum vitae or resume for Mr. Sears, in compliance with the requirements set forth in the Prehearing Order.

[6] The Clean Water Act is the common name of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

In support of its request that I issue a subpoena to compel the attendance and testimony of Mr. Sears at hearing, Respondent avers that Mr. Sears' testimony is material to Respondent's defense. Mot. to Compel at 7. Respondent specifically identifies several purposes for presenting the testimony of Mr. Sears, including his knowledge of Respondent's efforts to comply with the relevant statutory and regulatory provisions at issue in this matter, as well as the extent of Respondent's cooperation with the EPA. *Id.* at 7-8. Further, Respondent notes that Complainant has not proposed calling Mr. Sears as a witness at the hearing, and that Respondent has no authority to compel Mr. Sears' attendance at hearing in the absence of a subpoena. Mot. to Compel at 2. In further support of its request to compel the appearance and testimony of Mr. Sears at hearing, Respondent provided, attached to the declaration of Respondent's counsel, Mr. McNeil, communications between Mr. McNeil and counsel for Complainant from January 2019, reflecting that Complainant is unable to produce Mr. Sears as a witness. *See* Second McNeil Decl. at 43.

With regard to its request for compel Mr. Sears to produce all communications between himself and any and all persons employed by the EPA, as well as any and all persons employed by Respondent, from January 1, 2010 to the present, Respondent argues that this represents a request for "a limited number of documents." Mot. to Compel at 8. Respondent further argues that such documents would demonstrate Respondent's attempts to comply with the statutory and regulatory provisions at issue, and further "would likely" support Respondent's position that Mr. Sears was acting as an agent of the EPA in providing certain assurances to Respondent about its SPCC Plan for the facility at issue in this proceeding. *Id.* 8-9. As a result, Respondent concludes that the sought communications are material and relevant to the proceeding. *Id.* at 9. Notably, Respondent does not elaborate on how the sought communications are would satisfy its identified purposes, why it would be necessary to subpoena such documents, or whether Mr. Sears is an appropriate source to produce such communications. In support for Respondent's request to compel production of the identified communications from Mr. Sears at hearing, Mr. McNeil, in his declaration in support of the Motion to Compel, broadly references, and includes copies of, communications between Mr. Sears and agents or employees for Respondent, each of which has been proposed as an exhibit by Respondent in its Prehearing Exchange. *See* Second McNeil Decl. at 1-2.

In its Response, Complainant asserts that it "does not oppose Respondent's request to subpoena Mr. Sears." Resp. at 1. However, Complainant states its position that "Mr. Sears' testimony should be limited to relevant and material percipient testimony and evidence." *Id.* at 2. Consistent with the arguments asserted by Complainant in its Motion in Limine, Complainant argues that Respondent misstates the role of Mr. Sears in this action, and conflates Mr. Sears' role in enforcing state law with the federal law at issue in this proceeding. *See id.* at 2. Notably, aside from noting that it broadly does not object to Respondent's subpoena request, Complainant does not more specifically address Respondent's request to compel Mr. Sears to produce the communications identified by Respondent in the Motion to Compel.

c. Discussion

i. Request for Subpoena to Compel Attendance and Testimony of Mr. Sears at Hearing

Respondent has adequately supported its position that Mr. Sears has relevant, material lay testimony to contribute at the hearing in this proceeding. Further, Respondent demonstrated the necessity to subpoena Mr. Sears to appear and testify at the hearing in this proceeding as a proposed non-party witness in this matter. As a result, Respondent has satisfied the requirements for its request to subpoena this witness to appear and testify at the hearing in pursuant to the Rules of Practice. *See* 40 C.F.R. § 22.21(b). As previously noted, Respondent's Motion to Compel is untimely, and Respondent has provided no justification for such late filing in supporting this motion. Nevertheless, Complainant has not objected to Respondent's request for a subpoena to compel the attendance and testimony of Mr. Sears at hearing, and the record does not otherwise reflect that Complainant would be prejudiced by the untimeliness of this request. As a result, I find it appropriate to grant Respondent's request for a subpoena to compel Mr. Sears' attendance and testimony at the hearing under the conditions provided for further below.[7]

Given the limited scope of Mr. Sears' proposed testimony, as previously addressed in the discussion of Complainant's Motion in Limine, I do not find Respondent's request to compel his attendance for the entire duration of the evidentiary hearing supported. Respondent has not provided an estimate of the time that it expects it will require for Mr. Sears' testimony at the hearing in its request. However, based upon the scope of the proposed testimony, it is reasonable to require the attendance of this witness for one day of the scheduled seven-day hearing. Considering the scheduling for this hearing, it would be appropriate for Mr. Sears to appear at the hearing on Monday, May 20, 2019. Accordingly, I grant Respondent's request for a subpoena to compel the attendance and testimony of Mr. Sears at hearing on May 20, 2019, or another single day of the hearing otherwise agreed to in advance, in writing, by Mr. Sears.[8]

ii. Request for Subpoena to Compel Production of Documents

Contrary to Respondent's representations in its Motion to Compel, its request for a subpoena to compel Mr. Sears to produce the documents identified in the Motion to Compel is not limited in scope, but exceptionally broad, both temporally and in the breadth of documents sought.[9] Respondent has failed to demonstrate that the numerous communications sought are relevant and material to this proceeding, consistent with the requirements of the Clean Water Act, at 33 U.S.C. §1319(g)(10), and the Rules of Practice, at 40 C.F.R. § 22.21(b), for seeking

[7] The parties in this matter are on notice, however, that untimely requests made at this late stage in this proceeding may not be granted, even in circumstances when they are agreed upon by the parties. Further, it may well be that upon receipt of the subpoena the witness may move to have it quashed due, for example, to unavailability based upon untimely notice. All witnesses are entitled to such fees and costs as provided for by federal law. See e.g., 28 U.S.C. § 1821; 5 U.S.C. § 5704.

[8] This Tribunal will generally accept the offer of testimony of non-party witnesses out of order to accommodate the schedule of such witnesses.

[9] Notably this request encompasses more than nine years of communications between Mr. Sears and multiple entities.

such document production by subpoena. Notably, Respondent's exceptionally broad request encompasses communications which do not even pertain to Respondent and have no relevance to this proceeding. Furthermore, Respondent has not shown that its request for the production of the sought documents by subpoena is necessary. Notably, it is unclear from Respondent's Motion to Compel why Respondent would be unable to acquire the requested communications between its employees and Mr. Sears, and Respondent's submission of proposed exhibits consisting of communications between Mr. Sears and agents or employees for Respondent, such as those referenced by Mr. McNeil, suggests that Respondent has access to such communications. As Respondent's request for a subpoena to compel Mr. Sears to produce the documents identified in the Motion to Compel does not satisfy the requirements for such a request pursuant to the Clean Water Act, at 33 U.S.C. §1319(g)(10), and the Rules of Practice, at 40 C.F.R. § 22.21(b), this request is appropriately denied.

IV. ORDER

1. Complainant's Motion in Limine is hereby **GRANTED IN PART**, and **DENIED IN PART**, as follows:

A. Complainant's request to exclude RX 7, 10, 11, 15, 41, 42, 47, 52, and 53 is **DENIED**, for the reasons stated above.

B. Complainant's request to exclude expert opinion testimony from Michael Sears is **GRANTED**. Any opinion testimony provided by this witness must conform with Rule 701 of the FRE, as discussed above.

2. Respondent's Motion to Compel is hereby **GRANTED IN PART**, and **DENIED IN PART**, as follows:

A. Respondent's request for a subpoena to the compel the attendance and testimony of Michael Sears at the evidentiary hearing is **GRANTED** for the date of May 20, 2019, or another single day of the hearing otherwise agreed to in advance, in writing, by Michael Sears. The relevant subpoena for this witness will be issued contemporaneously with this Order to designated counsel for Respondent for service on Michael Sears.

B. Respondent's Motion to Compel is **DENIED** with regard requiring Michael Sears to produce documents at hearing and to require his attendance for the entire duration of the scheduled evidentiary hearing in this matter.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: April 12, 2019
Washington, D.C.

In the Matter of *VSS International, Inc.*, Respondent.
Docket No. OPA-09-2018-0002

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion in Limine and Respondent's Motion to Compel**, dated April 12, 2019, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Andrea Priest
Attorney Advisor

Original and One Copy by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
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Copy by Electronic Mail to:

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For Complainant

Copy by Electronic Mail with Attached Subpoena:

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For Respondent

Dated: April 12, 2019
Washington, D.C.