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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF **VSS INTERNATIONAL, INC.** 3785 Channel Drive West Sacramento, CA Respondent.	DOCKET NO. OPA 09-2018-00002 **RESPONDENT VSS INTERNATIONAL, INC.'S OPPOSITION TO COMPLAINANT'S MOTION IN LIMINE** Proceeding to Assess Class II Civil Penalty Under Clean Water Act Section 311

OPPOSITION TO MOTION IN LIMINE

Respondent, VSS International, Inc. ("VSSI"), by and through its attorneys of record, files this Opposition to Complainant's Motion in Limine. VSSI requests that this Court deny Complainant's motion in its entirety

I. BACKGROUND FACTS

As part of its Prehearing Exchange, VSSI submitted the following exhibits on June 22, 2018:

EXHIBIT NO.	BRIEF DESCRIPTION
RX 7	Email from Richard McNeil to Andrew Helmlinger August 29, 2014 RE: VSS Emultech
RX 10	Email from Andrew Helmlinger to Richard McNeil April 1, 2015 RE: VSS Facility Response Plan
RX 11	Email from Andrew Helmlinger to Richard McNeil April 1, 2015 RE: VSS Facility Response Plan
RX 15	Email from Richard McNeil to Andrew Helmlinger June 9, 2015 RE: Second 2.5 MM Gallon Tank at VSS Emultech (Not in Service)
RX 25	Email from Andrew Helmlinger to Richard McNeil May 5, 2017 RE: VSS Emultech
RX 26	Email from Andrew Helmlinger to Richard McNeil May 5, 2017 RE: VSS Emultech
RX 27	Email from Andrew Helmlinger to Richard McNeil May11, 2017 RE: VSS Emultech
RX 28	Email from Andrew Helmlinger to Richard McNeil May11, 2017 RE: VSS Emultech
RX 30	Email from Richard McNeil to Andrew Helmlinger June 27, 2017 RE: VSSI Meeting at EPA - SF
RX 31	Email from Richard McNeil to Andrew Helmlinger July 18, 2017 RE: VSSI Meeting at EPA - SF
RX 33	Email from Andrew Helmlinger to Richard McNeil September 15, 2017 RE: September 25 - VSS International
RX 34	Email from Richard McNeil to Richard McNeil, forwarding email from Andrew Helmlinger September 18, 2017 Fwd: VSSI Emultech, meeting in July and information
RX 35	Email from Richard McNeil to Andrew Helmlinger September 21, 2017 Re: Sept. 25 – VSS International

EXHIBIT NO.	BRIEF DESCRIPTION
RX 36	Email from Richard McNeil to Richard McNeil, forwarding email from Andrew Helmlinger October 9, 2017 Fwd: VSS Emultech
RX 41	Emails between Michael Sears (Yolo County) and Randy Tilford, Roger Liston, Jeff Nowlin and Pat McNairy (VSS) May 8 – May 9, 2012 RE: CUPA and SPCC Plan INspection
RX 42	Email from Michael Sears (Yolo County) forwarding an email from Pete Reich (EPA) to Randy Tilford (VSS) May 30, 2012 FW: 40 CFR Part 112 Questions
RX 44	Draft meeting notes, Office of the State Fire Marshall
RX 47	Email from Randy Tilford (VSS) to Rick McNeil and Wes Greenwood (Condor Earth) forwarding an email from Michael Sears July 30, 2013 FW: VSS Emultech SPCC Plan Changes
RX 52	Email from Michael Sears (Yolo County) to Randy Tilford (VSS) August 14, 2015 REL VSS Emultech (4801) APSA Inspection Report
RX 53	Email from Michael Sears (Yolo County) to Randy Tilford (VSS) October 6, 2015 RE: Letter regarding API 653 Inspection at VSS Emultech Sacramento

On March 14, 2015, Complainant met and conferred with VSSI regarding a proposed motion in limine Complainant intended to file. Declaration Of Richard J. McNeil In Support Of Opposition To Motion In Limine ("McNeil Decl."), ¶ 2. Specifically, Complainant informed VSSI that it intended to seek exclusion of the above-listed exhibits on the grounds that (1) a number of them constituted settlement communications between Complainant's and VSSI's attorney; or (2) comprised irrelevant written communications and anticipated opinion testimony by Michael Sears, a percipient witness designated by VSSI. McNeil Decl., ¶¶ 2-4, ¶ 5, Exh. 1.

Although VSSI agreed that, generally, settlement communications should be excluded from evidence, it nevertheless noted that a number of the communications Complainant sought to exclude were relevant to VSSI's compliance efforts and calculation of any potential penalty.

McNeil Decl., ¶ 5, Exh. 1. Likewise, VSSI disagreed that Mr. Sears's testimony was irrelevant, especially given that Mr. Sears accompanied EPA officials on one of their inspections of the VSSI facility and, thus, was part of the enforcement chronology. *Id*.

Subsequently, the parties met and conferred by telephone. As a result, the parties filed a Stipulation To Exclude Exhibits And Limit Potential Penalties (the "Stipulation") on March 15, 2019. McNeil Decl., ¶ 6, Exh. 2. In that Stipulation, the parties agreed to exclude the following exhibits submitted by VSSI (and listed above) in its Prehearing Exchange: RX 25, RX 26, RX 27, RX 28, RX 30, RX 31, RX 33, RX 34, RX 35, RX 36, and RX 44. *See id*. The parties, however, could not reach an agreement on the following exhibits, which constitute communications between VSSI's and Complainant's counsel that Complainant characterizes as "settlement communications":

EXHIBIT NO.	BRIEF DESCRIPTION
RX 7	Email from Richard McNeil to Andrew Helmlinger August 29, 2014 RE: VSS Emultech
RX 10	Email from Andrew Helmlinger to Richard McNeil April 1, 2015 RE: VSS Facility Response Plan
RX 11	Email from Andrew Helmlinger to Richard McNeil April 1, 2015 RE: VSS Facility Response Plan
RX 15	Email from Richard McNeil to Andrew Helmlinger June 9, 2015 RE: Second 2.5 MM Gallon Tank at VSS Emultech (Not in Service)

(hereinafter, the "Counsel Communication Exhibits") (McNeil Decl., ¶ 7) or the following exhibits, which Complainant asserts are "irrelevant" communications by Michael Sears:

EXHIBIT NO.	BRIEF DESCRIPTION
RX 41	Emails between Michael Sears (Yolo County) and Randy Tilford, Roger Liston, Jeff Nowlin and Pat McNairy (VSS) May 8 – May 9, 2012 RE: CUPA and SPCC Plan Inspection

EXHIBIT NO.	BRIEF DESCRIPTION
RX 42	Email from Michael Sears (Yolo County) forwarding an email from Pete Reich (EPA) to Randy Tilford (VSS) May 30, 2012 FW: 40 CFR Part 112 Questions
RX 47	Email from Randy Tilford (VSS) to Rick McNeil and Wes Greenwood (Condor Earth) forwarding an email from Michael Sears July 30, 2013 FW: VSS Emultech SPCC Plan Changes
RX 52	Email from Michael Sears (Yolo County) to Randy Tilford (VSS) August 14, 2015 REL VSS Emultech (4801) APSA Inspection Report
RX 53	Email from Michael Sears (Yolo County) to Randy Tilford (VSS) October 6, 2015 RE: Letter regarding API 653 Inspection at VSS Emultech Sacramento

(hereinafter, the "Sears Exhibits") (McNeil Decl., ¶ 8).

II. LEGAL STANDARD RELEVANT TO MOTIONS IN LIMINE

Under the Consolidated Rules of Practice (the "Rules of Practice"), the "Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22 (a)(1). Where a party contends that evidence lacks relevancy and probative value, a "motion in limine is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing[.]" *In the Matter of: Carbon Injection Systems LLC, et al*., 2012 WL 3068489, *2 (E.P.A. May 30, 2012). A motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Id*. (quoting *Noble v. Sheahan*, 116 F.Supp.2d 966, 969 (N.D. Ill. 2000)).

Generally, motions in limine are disfavored. *In the Matter of: Carbon Injection Systems LLC,* 2012 WL 3068489 at *2 (citing *Hawthorne Partners v. AT&T Technologies, Inc*., 831 F.Supp. 1398, 1400 (N.D. Ill. 1993)); *see also In re Minnesota Metal Finishing, Inc*., 2007 WL 1934722, *5 (E.P.A. Apr. 23, 2007) ("[m]otions in limine are generally disfavored"). "If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context." *In re Minnesota Metal*

Finishing, Inc., 2007 WL 1934722 at *5 (citing *Hawthorne Partners*, 831 F.Supp. at 1401). Accordingly, denial of a motion in limine "does not mean that all evidence contemplated by the motion will be admitted at trial." *In the Matter of: Carbon Injection Systems, LLC*, 2012 WL 3068489 at *2. Instead, it merely means that "without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Id*. (citing *U.S. v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989); *see also In re Minnesota Metal Finishing, Inc*., 2007 WL 1934722 at *5.

Here, the exhibits that Complainant seeks to exclude – RX 7, RX 10, RX 11, RX 15, RX 41, RX 42, RX 47, RX 52, RX 53 – are relevant, probative, and admissible. Contrary to Complainant's contentions, the Counsel Communication Exhibits are not inadmissible settlement communications, but relevant admissible evidence that goes to VSSI's level of cooperation with the EPA to prepare a compliant Spill Prevention, Control, and Countermeasure plan (the "SPCC Plan") and Facility Response Plan ("FRP"). Likewise, as shown below, the Sears Exhibits, and Mr. Sears's percipient testimony, is relevant and necessary to VSSI's defense against EPA's Administrative Complaint and the counts therein based on VSSI's purported violations arising from its SPCC Plan. At the very least, these exhibits, and Mr. Sears's testimony, are not "clearly inadmissible" based on the showing made by Complainant in its motion in limine. Accordingly, this Court should deny Complainant's motion in limine in its entirety and, to the extent the relevancy and probative value of the Counsel Communication Exhibits, the Sears Exhibits, or Mr. Sears's testimony is in question, this Court should reserve its ruling until trial in this matter.

III. DISCUSSION AND ANALYSIS

A. The Counsel Communication Exhibits Are Not Inadmissible Settlement Communications; Rather, They Are Admissible And Relevant To The Penalty Assessment In This Matter

In its motion in limine, Complainant seeks to exclude the Counsel Communication Exhibits on the grounds that they constitute inadmissible settlement communications under the Rules. VSSI disagrees with Complainant's characterization. VSSI contends the Counsel Communication Exhibits are relevant to the assessment of any penalty that this Court may potentially levy against VSSI. In particular, as set forth in Complainant's Explanation of the Proposed Penalty Assessment, attached to Complainant's Prehearing Exchange filed June 1, 2018, the "gravity component" of the penalty assessment turns on a "number of case-specific considerations, including the violator's degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, and any other unique factors." Complainant's Explanation of the Proposed Penalty Assessment, Section III, Statutory Penalty Factors and Guidance. Here, each of the Counsel Communication Exhibits demonstrates VSSI's attempts to cooperate with the EPA in drafting an FRP that complied with the relevant laws and regulations of the United States. Indeed, two of the exhibits include emails in which VSSI transmitted its FRP to EPA in furtherance of compliance with those laws and regulations. *See* RX 10 & RX 11.

The Rules of Practice provide that this Court "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 (28 U.S.C.) is not admissible." 40 C.F.R. § 22.22 (a)(1). Federal Rule of Evidence, Rule 408 ("Rule 408") provides as follows:

> (a) Prohibited Uses. Evidence of the following is not admissible - - on behalf of any party - - either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a construction:

> (1) furnishing, promising, or offering - - or accepting, promising to accept, or offering to accept - - a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim - - except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid., R. 408.

Based on the Rules and Rule 408, Complainant argues that the Counsel Communication Exhibits "clearly fall within the scope of 'evidence of conduct or statements made in compromise negotiations' and, as such, under Rule 408, are not admissible for the purpose of determining liability or supporting an appropriate penalty." Complainant's Motion In Limine, p. 2. Indeed, Complainant is so sure of its position, it doesn't even address the relevancy of these exhibits to the assessment of a penalty or provide any case or administrative law that supports its position. *See id*., at pp. 2-3. Unfortunately for Complainant, however, Rule of Practice 22.22(a)(1) and Rule 408 do not go so far.

Rule 408 specifically provides that a court may admit evidence of "conduct or a statement made during compromise negotiations about the claim" for "another purpose." Fed. R. Evid., R. 408(a)(2), (b). To be sure, EPA Administrative Law Judges have found that Rule 408 "does not preclude the introduction of evidence . . . which is offered for another purpose merely because the evidence was presented in settlement negotiations." *In the Matter of StanChem, Inc*., 1998 WL 100009, *2 (E.P.A. Feb. 9, 1998); *In the Matter of Crown Central Petroleum*, 2002 WL 56519, *20 (E.P.A. Jan. 8, 2002) ("Rule 408 does not require exclusion of evidence of 'other matters' such as those in support of an equitable estoppel defense or rebuttal evidence"). *See*

also Matter of U.S. Air Force, 2000 WL 1207284, *3 (E.P.A. Aug. 18, 2000) (finding documents admissible because proffered to rebut factual basis for violations alleged in complaint and were not excluded under Rule 408 even though presented during settlement negotiations).

Initially, Complainant makes no factual showing that the Counsel Communication Exhibits submitted by VSSI are, indeed, settlement communications subject to exclusion under Rule 408. To begin, Complainant does not offer a declaration from its recipient and/or author of the Counsel Communication Exhibits testifying that the emails constituting the exhibits were, in fact, "made during compromise negotiations about the claim."

What's more, the exhibits, on their face, make no such showing. None of them are marked as "settlement communications" or protected communications under Rule 408. Nor does the body of any of these exhibits bear the indicia of settlement communications. Nowhere in any of the Counsel Communication Exhibits does either VSSI or EPA use the word "settlement." Nor do any of the exhibits bear the traditional indicia of settlement communications, such as transmitting a settlement offer or acceptance, a proposed penalty amount, settlement terms, or a draft settlement agreement. *See*, *e.g.*, *In the Matter of: The Clorox Co*., 2007 WL 4202938, *6 (E.P.A. Nov. 20, 2007) (finding that Rule 408 excludes settlement offers, settlement terms, or draft settlement agreements, which should never be presented to the presiding officer); *In re Gypsum North Corp., Inc*., 2002 WL 31744922, *8 (E.P.A. Nov. 1, 2002) (finding Rule 408 excludes information "regarding the penalty amounts reached in settlement agreements"). Where exhibits lack such indicia of settlement, courts have refused to exclude evidence pursuant to Rule 408. *See In the Matter of: Hanson's Window and Construction, Inc*., 2010 WL 5093890, *10 (E.P.A. Dec. 1, 2010) ("[b]ecause there are no terms, monetary or otherwise, of settlement offered, accepted or discussed within the September letter, it cannot meet the

definition of what FRE 408 would exclude and the parties are not prejudiced by the letter's inclusion").

Even if the Counsel Communication Exhibits were made during compromise negotiations, they still would not automatically be excluded under Rule 408. Despite Rule 408, there is no "settlement privilege" under federal common law. *Graves v. U.S.*, 2014 WL 11899874, *2 (S.D. Fla. Oct. 30, 2014) ("[n]either the Supreme Court nor this Circuit has recognized a settlement privilege as a matter of federal common law"); *Two-Way Media LLC v. AT&T Inc.*, 2011 WL 13113724, *2 (W.D. Tex. Mar. 7, 2011) ("[n]either the Supreme Court nor any other circuit court has recognized the [settlement] privilege"). Thus, settlement communications are not protected simply because they were made during settlement negotiations. Rather, the key is admissibility, *i.e.*, how the evidence is to be used. *See In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 n. 20 (7th Cir. 1979) ("[i]nquiry into the conduct of [settlement] negotiations is . . . consistent with the letter and the spirit of Rule 408 of the Federal Rules of Evidence. That Rule only governs admissibility"). Where settlement communications are used for "another purpose" other than proving or disproving the validity or amount of a disputed claim, they may be admitted for that purpose if relevant. *See id.* at 1124 (finding that evidence into how settlement negotiations were conducted was relevant to fairness of settlement and reversing court's refusal to permit such evidence and its order approving settlement).

Here, Complainant is seeking penalties from VSSI due to its alleged failure to timely submit SPCC Plans and an FRP compliant with federal regulations. To that end, Complainant has explained that assessment of a penalty against VSSI will turn on a number of factors. *See* Complainant's Explanation of the Proposed Penalty Assessment, Section III, Statutory Penalty

Factors and Guidance. One of these factors is the gravity, or seriousness, of VSSI's alleged violation. To assess that factor, Complainant must consider "whether (and to what extent) the activity of [VSSI] actually resulted or was likely to result in an unpermitted discharge or exposure," as well as a number of case-specific considerations such as VSSI's "degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, and any other unique factors." *Id*. VSSI contends – and the exhibits show – that each of the Counsel Communication Exhibits is relevant to that assessment. To the extent there is an argument otherwise, which Complainant has failed to make in its motion, that argument and the Court's ruling on it is best left to the hearing. *In re Minnesota Metal Finishing, Inc*., 2007 WL 1934722 at *5 ("[i]f evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context")(citing *Hawthorne Partners*, 831 F.Supp. at 1401).

B. The Sears Exhibits Are Relevant Because Michael Sears Is A Percipient Witness Who Inserted Himself Into The Sufficiency Of VSSI's SPCC Plan

Complainant asserts that the testimony and email communications of Michael Sears, who is a Hazardous Materials Specialist with the Yolo County Health Department, are irrelevant and should be excluded because he and California's Certified Unified Program Agency ("CUPA") had no role in VSSI's compliance with or EPA's enforcement of the Oil Pollution Prevention regulations of the SPCC program. Not so.

In its Administrative Complaint, Complainant EPA alleges that VSSI's SPCC Plan violated 40 C.F.R. § 112.3 because it failed to include management approval (40 C.F.R. § 112.7(a)) or a facility diagram complying with 40 C.F.R. § 112.7(a)(3). *See* Admin. Compl., ¶¶ 28-38. In addition, Complainant asserts that VSSI further violated 40 C.F.R. § 112.3 by failing to have a Professional Engineer review and certify the SPCC Plan. *Id*., at ¶¶ 39-46. As a

result, the EPA seeks requests in its Administrative Complaint that this tribunal levy a daily penalty upon VSSI for each day it violated 40 C.F.R. § 112.3 for the period February 13, 2013 to February 12, 2018. *See* Stipulation to Exclude Exhibits and Limit Potential Penalties.

VSSI believes that penalties are unwarranted. Specifically, in its defense, VSSI contends that it has complied with all applicable regulations and at all times cooperated and worked with the EPA to ensure its SPCC Plan satisfied the EPA's expectations.

Mr. Sears's testimony and the Sears Exhibits are material to VSSI's defense. As evidenced by RX 41, VSSI received notice of alleged violations at its facility in May, 2012 through Mr. Sears acting on behalf of the Yolo County Environmental Health Division, the CUPA. RX 41 also shows that Mr. Sears initially inspected VSSI's SPCC Plan under a program administered by the United States Environmental Protection Agency ("USEPA"), and opined on VSSI's compliance with the EPA's program. This exhibit, along with RX 42, demonstrates that within a week of receiving notice of the SPCC alleged violations, VSSI sought to clarify with Mr. Sears CUPA's expectations, which resulted in guidance being sought by Mr. Sears from the EPA, to the extent a question of regulatory ambiguity was presented. Based on this guidance, RX 47 shows that VSSI voluntarily agreed to modify its SPCC Plan and, as a result, all violations were cleared by Mr. Sears as of June 1, 2012. Since that time, VSSI has continuously and diligently worked to seek guidance from the CUPA, through Mr. Sears, and from the EPA on how to enhance its SPCC program so that it satisfies the Complainant's expectations.

Continuing the timeline, RX 45 (not subject to Complainant's motion in limine) shows that Approximately six months later, in November 2012, VSSI's facility was inspected again by the CUPA; however, this time Mr. Sears brought Janice Witul of EPA with him. In attendance for VSSI were Mr. Tilford and Pat McNairy (Plant Manager). The VSSI representatives were

advised that no penalty would be forthcoming based on the November 27, 2012 inspection, that the EPA would possibly be offering further guidance respecting VSSI's SPCC and Facility Response Plans, and that EPA would respond to VSSI within three to four months.

Based on this, VSSI asserts it timely responded to the EPA's notices of alleged violations at its facility regarding its SPCC Plan, and also maintained constant contact with EPA, through its employees and agents, such as Mr. Sears, over the past five years through phone calls, written communications, and in person meetings that provided updates on VSSI's efforts to respond to additional clarification and information requests from EPA and CUPA and satisfy their expectations for VSSI's SPCC Plan. As proof, VSSI seeks to rely upon the Sears Exhibits at RX 41, RX 42, RX 47, RX 52, RX 53. Further, VSSI will seek testimony from Mr. Sears that goes to these efforts, and VSSI's compliance with environmental regulations, because he reviewed, commented upon, and found purported violations arising from VSSI's SPPC Plan (as evidenced by RX 41 and 42); cleared purported violations associated with VSSI's SPCC Plan (as evidenced by RX 47 and RX 53); and attended inspections within which the EPA determined VSSI owed no penalties for any violations based on its SPCC Plan (RX 45). Because of this, Mr. Sears is a material, percipient witness to EPA's claims that VSSI violated 40 C.F.R. § 112.3 by failing to provide appropriate management approval, diagrams, and certifications in its SPCC Plan. He is also a material, percipient witness to VSSI's claims that it cooperated and worked diligently to correct purported violations and comply with 40 C.F.R. § 112.3. His testimony, and the Sears Exhibits, therefore, should not be excluded as irrelevant or of little probative value.

Accordingly, Mr. Sears's testimony and the Sears Exhibits are relevant and necessary to VSSI's defense against EPA's Administrative Complaint and the counts therein based on

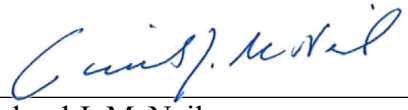
purported violations arising from its SPCC Plan. Thus, this tribunal should deny Complainant's motion in limine.

IV. CONCLUSION

Based on the foregoing reasons, having established good cause, Respondent requests that Complainant's Motion in Limine be denied.

Dated: April 1, 2019

CROWELL & MORING LLP



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