UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
United States Department of the Army,	)	**Docket No. CERCLA-08-2020-0001**
	)	
Respondent.	)	

ORDER ON AGENCY'S MOTION IN LIMINE

This action was initiated on June 12, 2020, by Complainant Kenneth C. Schefski, Regional Counsel, United States Environmental Protection Agency, Region 8 ("EPA" or "the Agency"), filing an Administrative Complaint against Respondent, United States Department of the Army. The Complaint alleges that Respondent violated the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), codified as amended at 42 U.S.C. §§ 9601-9675, by failing or refusing to make payments to the Agency as required by the terms and conditions of an agreement entered into under the Act.

Respondent filed an Answer to the Complaint on August 6, 2020, denying the allegations, raising various defenses, and requesting a hearing. After completing the prehearing exchange process and submitting proposed exhibits, the parties filed cross motions for accelerated decision on December 7, 2020. I have ruled on the parties' motions for accelerated decision in a separate Order ("AD Order") issued the same day as this Order.

Now pending is the Agency's Motion in Limine to Exclude from the Record Certain Confidential Settlement Communications ("Motion"), filed January 12, 2021. In the Motion, the Agency seeks to exclude certain statements in Respondent's Answer and prehearing exchange plus two of Respondent's proposed exhibits related to the parties' settlement discussions. Respondent filed a response brief ("Response") in opposition to the Agency's Motion on January 27, 2021, and the Agency submitted a reply brief ("Reply") in support of its Motion on February 4, 2021.

Respondent owns and operates the Rocky Mountain Arsenal, a former chemical warfare agent and pesticide manufacturing facility outside of Denver, Colorado. AD Order at 6. Over several decades, Respondent and other parties contaminated the land with hazardous wastes. AD Order at 7. In 1989, the Agency and Respondent entered into a Federal Facilities Agreement ("FFA") under CERCLA, which requires Respondent to remediate and clean up the Arsenal and to make annual payments to the Agency of "EPA Costs" for the Agency's technical assistance overseeing the cleanup. AD Order at 7-8.

In recent years, Respondent did not pay or only partially paid EPA Costs, which the Agency considered a violation of the terms and conditions of the FFA. AD Order at 9-13. Respondent contended for various reasons that its non-payments or partial payments complied with the terms of the FFA. In contemplation of settling their dispute, the parties engaged in a process mediated by the U.S. Office of Management and Budget ("OMB") in which they sought to obtain a congressional appropriation that would cover EPA Costs the Agency alleges Respondent owes. However, the parties disagreed on the amount that Respondent owed, and the negotiations were unsuccessful. AD Order at 13. Thereafter, the Agency filed the Complaint that initiated this proceeding.

In its Answer and prehearing exchange, Respondent makes various statements about the parties' OMB negotiations. Those statements that are the subject of the Agency's Motion characterize the Agency as "rejecting" Respondent's settlement proposals. *See* Mot. at 5-6; Answer at 12; Respondent's Prehearing Exchange at 11.[1] The Agency also objects to two of Respondent's exhibits: RX 68 and RX 69. Mot. at 7. RX 68 is a series of emails among the parties and OMB that includes detailed discussions of the parties' negotiation positions, settlement offers, and specific dollar amounts. It was submitted by Respondent as Confidential Business Information under 40 C.F.R. 2.201(h). RX 69 is a "pre-decisional internal executive branch draft" of proposed legislation under which Congress would appropriate funds to Respondent for the reimbursement of certain EPA costs at the Arsenal. It too contains specific dollar amounts and was submitted by Respondent as Confidential Business Information.

Under the rules governing this proceeding, I "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 . . . ." 40 C.F.R. § 22.22(a). Rule 408 of the Federal Rules of Evidence provides that evidence is inadmissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction" when it is evidence of the "furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim" or evidence of "conduct or a statement made during compromise negotiations about the claim[.]" Fed. R. Evid. 408(a). However, this evidence may be admitted "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. 408(b). Finally, near the outset of this proceeding, I instructed the parties "*NOT to include, attach, or refer to any terms of settlement offers or agreements in any document*" they submitted. *See* Prehearing Order at 7 (Aug. 24, 2020).

With respect to the statements in Respondent's Answer and prehearing exchange and to RX 68 and RX 69, the Agency contends they are inadmissible because they "characterize certain settlement proposals without full context" and are "self-serving, misleading, and incomplete." Mot. at 5. In response, Respondent argues the statements and exhibits are independently relevant

[1] The Agency also cites certain statements in Respondent's Motion for Accelerated Decision. However, that motion has been ruled upon, rendering consideration of those particular statements moot.

to Respondent's defenses because they "show that Respondent was seeking a legally authorized means of paying EPA Costs" and "how Respondent pursued (and continues to pursue) Congressional authorization to use funds from a Congressional appropriation." Response at 3-4. Respondent further asserts it "does not intend to use any amounts found in the statements or documents to prove or disprove any amount Complainant believes they are owed – or to otherwise refer to the details of exchanges aimed at resolving differences of opinion between the Parties." Response at 5. Rather, "the Army seeks to present only the evidence required to demonstrate that it made efforts to seek an authorized source of funding." Response at 5.

Upon review, I find that the statements and exhibits at issue constitute "evidence relating to settlement" that is inadmissible under 40 C.F.R. § 22.22(a), Rule 408 of the Federal Rules of Evidence, and the Prehearing Order. As Respondent concedes, it intends to use this evidence to demonstrate its efforts to pay EPA Costs, i.e., that it did not violate the terms of the FFA. To that extent, Respondent plans to use the evidence to "disprove the validity . . . of a disputed claim . . . ." Further, the evidence that the Agency has asked to strike is largely "irrelevant, immaterial, unduly repetitious . . . or of little probative value[.]" There is already sufficient evidence in the record that Respondent engaged in an effort to obtain additional funding from Congress to reimburse EPA for its oversight costs at the Arsenal. It is not necessary to also include the specific statements, offers, or monetary amounts discussed during this process for Respondent to establish this fact. Finally, I have previously admonished the parties to not include such information in any document submitted in this proceeding. Yet the statements identified by the Agency and RX 68 and RX 69 contain what amount to "terms of settlement offers or agreements," or references thereto.

Accordingly, the Agency's Motion is **GRANTED**. Respondent's statements that are crossed through on pages 5 and 6 of the Agency's Motion, and which originally appear on page 12 of Respondent's Answer and page 11 of Respondent's prehearing exchange, are stricken. Likewise, RX 68 and RX 69 shall be excluded from the record.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: July 14, 2021
Washington, D.C.

In the Matter of *United States Department of the Army*, Respondent.
Docket No. CERCLA-08-2020-0001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Agency's Motion in Limine**, dated July 14, 2021, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Dated: July 14, 2021
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