

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF: )  
 )  
 ) DOCKET NO. OPA 09-2018-0002  
VSS International, Inc., )  
 ) Complainant's Motion in Limine  
 )  
 )  
Respondent. )  

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Pursuant to 40 C.F.R. § 22.16(a), Complainant files this Motion in Limine, in which it seeks to exclude correspondence exchanged between the parties in the context of settlement negotiations and the correspondence and testimony of Yolo County Health Department inspector, Michael Sears.

While a motion in limine is the appropriate mechanism for excluding proposed exhibits and testimony from being introduced at hearing, the Consolidated Rules of Practice at 40 C.F.R. Part 22 do not specifically address such motions. In the absence of a specific reference in Part 22, however, Presiding Officers have repeatedly consulted the Federal Rules of Civil Procedure as well as the Federal Rules of Evidence for guidance. See, *In re: Euclid of Virginia, Inc.*, 13 E.A.D. 616 (EAB 2008); *In re: Carroll Oil Company*, 10 E.A.D. 635 (EAB 2002); *In the Matter of Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110 (June 2, 2010). According to federal court practice, motions in limine are generally disfavored and should be granted only if the proposed testimony or exhibit sought to be excluded is clearly inadmissible for any purpose. See, *In the Matter of USA Remediation Servs., Inc.*, Docket No. CAA-03-2002-0159 (February

10, 2003); *In re: Zaclon, Inc.*, Docket No. RCRA-05-2004-0019 (April 24, 2006). Typically, this type of motion is evaluated in light of the standard for admissible evidence under Part 22.

The Consolidated Rules of Practice at 40 C.F.R. § 22.22(a)(1), state, in pertinent, part:

The 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 (28 U.S.C.) is not admissible.

Rule 408 of the Federal Rules of Evidence further provides that “[e]vidence of conduct or statements made in compromise negotiations” is not admissible to prove liability for or invalidity of a disputed claim or its amount.

In the present case, Respondent’s Prehearing Exchange (“Resp. PHE”) includes correspondence between counsel for Respondent and counsel for Complainant generated and exchanged in the context of settlement negotiations. As noted in its Prehearing Exchange, Respondent offers these documents as evidence that no penalty is warranted because Respondent was “seek[ing] guidance” from EPA. Resp. PHE at 10. Similarly, in its Prehearing Exchange, Respondent characterizes the correspondence as showing that Respondent “received dispensation from [SPCC] requirements from the appropriate state and federal officials.” Resp. PHE at 7. Every one of these documents is subsequent to EPA initiating and seeking to resolve an enforcement action, as evidenced by Complainant’s May 22, 2014 “Show Cause” letter to Respondent. RX 6. It is irrelevant to dispute both this characterization and any probative value here because, most simply, these documents 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. Since these

documents are inadmissible under Rule 408, they are also inadmissible under 40 C.F.R.

§ 22.22(a)(1). Accordingly, the following documents should be excluded:

| <b>Exhibit No.</b> | <b>Brief Description</b>   |
|--------------------|--|
| RX 7               | Email from Richard McNeil to Andrew Helmlinger<br>August 29, 2014<br>RE: VSS Emultech  |
| RX 10              | Email from Andrew Helmlinger to Richard McNeil<br>April 1, 2015<br>RE: VSS Facility Response Plan                                |
| RX 11              | Email from Andrew Helmlinger to Richard McNeil<br>April 1, 2015<br>RE: VSS Facility Response Plan                                |
| RX 15              | Email from Richard McNeil to Andrew Helmlinger<br>June 9, 2015<br>RE: Second 2.5 MM Gallon Tank at VSS Emultech (Not In Service) |

Additionally, Complainant requests that Respondent's correspondence with Michael Sears, an inspector from the Yolo County Health Department ("Yolo County") be excluded as exhibits because they are irrelevant, immaterial and offer no probative value.

Respondent states incorrectly and without support that "the CUPA [Certified Unified Program Agency] has regulatory oversight authority of the VSS Emultech SPCC Plan" (CX 16 Page 7 of 45) and that Yolo County's inspection of Respondent's SPCC plan was "under a program administered by [EPA]." Resp. PHE at 2. In fact, neither implementation nor enforcement of EPA's SPCC program is delegated to state, local or tribal representatives. CX 34 at 50. Mr. Sears and the CUPA only implement and enforce the California Aboveground Petroleum Storage Act. While California law may have analogues that requires certain entities to maintain SPCC plans, Mr. Sears and the CUPA play no role in compliance with or enforcement of the federal Oil Pollution Prevention regulations or SPCC program. RX 42 at 1,

RX 44 at 3. Consequently, the following correspondence with Mr. Sears is irrelevant, immaterial and offers no probative value and should be excluded as exhibits:

| <b>Exhibit No.</b> | <b>Brief Description</b>  |
|--------------------|---|
| RX 41              | Emails between Michael Sears (Yolo County) and Randy Tilford, Roger Liston, Jeff Nowlin and Pat McNairy (VSS)<br>May 8– May 9, 2012<br>RE: CUPA and SPCC Plan Inspections     |
| RX 42              | Email from Michael Sears (Yolo County) forwarding an email from Pete Reich (EPA) to Randy Tilford (VSS)<br>May 30, 2012<br>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,<br>July 30, 2013<br>FW: VSS Emultech SPCC Plan Changes |
| RX 52              | Email from Michael Sears (Yolo County) to Randy Tilford (VSS),<br>August 14, 2015<br>RE: VSS Emultech (4801) APSA Inspection Report   |
| RX 53              | Email from Michael Sears (Yolo County) to Randy Tilford (VSS)<br>October 6, 2015<br>RE: Letter regarding API 653 Inspection at VSS Emultech Sacramento                        |

It should be noted that the facts here contrast with those in *In the Matter of: Service Oil, Inc.*, Docket No. CWA-08-2005-0010 (March 7, 2006), where the Presiding Officer allowed testimony of a State witness in a Clean Water Act matter. In that case, the State had issued a permit that was relevant to the federal enforcement action, was involved in the inspection that prompted the case, and was involved in the permitting process and Respondent's subsequent compliance efforts. Here, Mr. Sears independently communicated with Respondent about violations of the state's requirements and has no role in the federal inspection or enforcement action.

Respondent also lists Mr. Sears as a fact and expert witness who will "testify regarding the compliance of VSSI with the matters alleged in the complaint and VSSI's interactions with

Yolo County Environmental Health Department and the USEPA.” Resp. PHE at 16.

Complainant acknowledges that Mr. Sears was present at the 2012 inspection with EPA and could testify regarding his observations at that time. Accordingly, Complainant requests that Mr. Sears’ testimony be limited to factual testimony based on his observations at the 2012 inspection. With respect to his role as an expert witness, however, the prehearing exchange does not include a resume for Mr. Sears, specify his area of expertise, or provide other foundational material to demonstrate the value of his opinions in this matter. Therefore, 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.

Based on the foregoing reasons, having established good cause, Complainant requests that its Motion in Limine be granted. Complainant and Respondent conferred on this motion and agreed that certain documents should not be subject to this motion, and to stipulate that other documents will be excluded from this adjudication. The parties will separately file a stipulation in this regard.

Respectfully submitted,

3/15/19

Date

R.A. Suger

Rebecca Suger  
Assistant Regional Counsel,  
U.S. EPA, Region IX

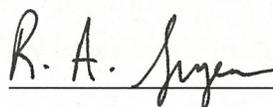
**CERTIFICATE OF SERVICE**

I, Rebecca Sugerman, hereby certify that on March 15, 2019, I caused to be filed electronically the foregoing Complainant's Motion in Limine with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Rebecca Sugerman, hereby certify that on March 15, 2019, I served a true and correct copy of the foregoing Complainant's Motion in Limine via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: March 15, 2019

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "R. A. Sugerman", is written over a horizontal line.

Rebecca Sugerman  
Assistant Regional Counsel,  
U.S. EPA, Region IX