



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON RESPONDENT’S MOTION FOR DEFAULT

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. The Prehearing Order provided that supplementation of a prehearing exchange requires an accompanying motion to supplement only when such supplementation is sought within 60 days of the scheduled hearing. Additionally, the Prehearing Order set the filing deadline for dispositive motions as 30 days after the due date for Complainant’s Rebuttal Prehearing Exchange on July 6, 2018, and the filing deadline for non-dispositive motions as no later than 60 days prior to the scheduled hearing. Consistent with the prehearing filing deadlines established by the Prehearing Order, Complainant submitted an Initial Prehearing Exchange (“C. PHE”) on May 31, 2018, with Complainant’s proposed exhibits (“CX”) 1-24;¹ Respondent submitted its Prehearing Exchange on June 22, 2018, with Respondent’s proposed exhibits (“RX”) 1-97;² and Complainant filed a Rebuttal Prehearing Exchange (“C. Rebut. PHE”) on July 5, 2018, with CX 25-32 and a document marked as “PE 1.”³

Following the submission of the parties’ prehearing exchanges, I issued a Notice of Hearing Order on July 20, 2018, scheduling the hearing in this matter to commence on January 29, 2019, in San Francisco, California. Complainant timely filed a Motion for Accelerated Decision as to Liability (“Motion for Accelerated Decision”) in advance of the scheduled

¹ In its Initial Prehearing Exchange, Complainant additionally filed documents lacking exhibit numbers, including a curriculum vitae for William Michaud.

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 In its Rebuttal Prehearing Exchange, Complainant referred to this document as “PE 7.” However, the document itself is marked as “PE 1.”

hearing, which was opposed by Respondent. I issued an Order on Complainant's Motion for Accelerated Decision on December 26, 2018, in which I granted accelerated decision as to liability for Count I of the Complaint for the period from February 13, 2013 to May 1, 2017, but otherwise denied the Motion for Accelerated Decision with regard to liability for Counts II-V of the Complaint.

Prior to the scheduled hearing, on December 29, 2018, the U.S. Environmental Protection Agency experienced a lapse in funding causing it to shut down. As a result, the Office of Administrative Law Judges was closed as of December 29, 2018, and did not resume normal operations until January 28, 2019. The parties in this proceeding were provided notice regarding the operational status of the Office of Administrative Law Judges prior to December 29, 2018, and were subsequently informed that the hearing scheduled to commence on January 29, 2019 would be postponed. Prior to the hearing being rescheduled, Complainant filed a Motion to Supplement and Correct its Prehearing Exchange ("Motion to Supplement") on January 11, 2019, seeking to include seven additional proposed exhibits in its Prehearing Exchange. On February 8, 2019, I rescheduled the hearing in this matter to commence on June 18, 2019. Thereafter, on February 15, 2019, I issued an Order on Complainant's Motion to Supplement and Correct the Prehearing Exchange ("Order on Motion to Supplement"), in which I noted that Complainant did not comply with the directives in the Prehearing Order regarding identifying and labeling its proposed exhibits, and granted the Complainant's Motion to Supplement, conditional on Complainant submitting a Supplemental Prehearing Exchange strictly complying with the directives of the Prehearing Order no later than March 15, 2019. After issuing the Order on Motion to Supplement, by order issued on February 26, 2019, I rescheduled the hearing in this matter to commence on May 16, 2019, in San Francisco, California, upon Respondent's request to reschedule the hearing.

On March 14, 2019, Complainant filed its Supplemental Prehearing Exchange, along with CX 37-48,⁴ encompassing previously filed materials, and CX 49-55, additional proposed exhibits that were not previously filed, including a document in CX 55 that is reportedly authored by William Michaud, a proposed expert witness for Complainant, and which discusses a disputed planning distance calculation in this matter.⁵ Additionally, in its Supplemental Prehearing Exchange, Complainant supplemented its witness list to identify two witnesses previously identified as fact witnesses, Janice Witul and Troy Swackhammer, as proposed fact and expert witnesses in this proceeding.

On April 8, 2019, Respondent filed a Motion for Default as to Complainant Environmental Protection Agency's Administrative Complaint ("Motion for Default" or "Def. Mot."), including a memorandum of support, along with declarations from Richard McNeil, counsel for Respondent, and John Kastrinos ("Kastrinos Decl."), Lee Delano ("Delano Decl."), and Craig Fletcher ("Fletcher Decl."), proposed expert witnesses for Respondent. In its Motion

⁴ Complainant's Supplemental Prehearing Exchange also supplemented Complainant's prehearing exchange to include CX 33-36, which were previously filed with Complainant's Motion to Supplement. However, as these documents were already filed in this proceeding, Complainant did not refile them with its Supplemental Prehearing Exchange.

⁵ Although CX 55 is titled as a declaration, as noted by Respondent and discussed further below, this document is unsigned and lacking a full date. As a result, this document is not identified as a declaration in this Order.

for Default, Respondent seeks entry of an order of default in favor of Respondent on the basis of Complainant's Supplemental Prehearing Exchange. On April 22, 2019, Complainant timely filed a Response to Respondent's Motion for Default ("Response" or "Resp."), opposing Respondent's request for entry of an order of default in favor of Respondent.

II. APPLICABLE LAW

The procedural rules governing this proceeding, set forth at 40 C.F.R. Part 22 ("Rules of Practice"), require the parties to participate in a prehearing exchange of information in accordance with an order issued by the Presiding Officer. 40 C.F.R. § 22.19(a). The Rules of Practice outline the requirements of the prehearing information exchange in 40 C.F.R. § 22.19, and delineate the consequences of a party failing to comply with such requirements, *see* 40 C.F.R. § 22.19(g). Specifically, the Rules of Practice state that in circumstances where a party fails to provide information within its control that is required to be exchanged in the prehearing exchange, the Presiding Officer may (1) infer that the information not provided would be adverse to the party failing to provide it; (2) exclude the information from evidence, or (3) issue a default order pursuant to 40 C.F.R. § 22.17(c). 40 C.F.R. § 22.19(g). Additionally, the Rules of Practice provide that in circumstances where a party has failed to comply with the prehearing exchange requirements by failing to provide any document, exhibit, witness name, or summary of expected testimony to all parties at least 15 days before the hearing date, the Presiding officer shall not admit the corresponding evidence offered, absent a showing of good cause. 40 C.F.R. § 22.22(a).

In addition to requiring parties to participate in the prehearing information exchange, the Rules of Practice additionally set requirements for supplementing or correcting a prehearing exchange following submission. *See* 40 C.F.R. § 22.19(f). Specifically, the Rules of Practice provide that a party that has made a prehearing exchange "shall promptly supplement or correct the exchange when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to [40 C.F.R. § 22.19]." 40 C.F.R. § 22.19(f).

III. PARTIES' ARGUMENTS

a. Respondent's Motion for Default

In its Motion for Default, Respondent requests that I issue a default order in Respondent's favor, in accordance with 40 C.F.R. § 22.17, on the basis Complainant's reported failure to comply with the requirements of the prehearing information exchange in the Rules of Practice and prior orders in this proceeding. *See* Def. Mot. at 1-2, 6-7, 35. Respondent indicates that Complainant did not comply with the requirements in the Rules of Practice regarding supplementing a prehearing exchange, suggesting that Complainant did not promptly supplement its prehearing exchange with the materials provided in the Supplemental Prehearing Exchange that were not previously filed, and the additional designations of Ms. Witul and Mr. Swackhammer as expert witnesses. *See* Def. Mot. at 6, 32.

Respondent further argues that Complainant has repeatedly violated the prior orders issued in this proceeding, and that such conduct warrants entry of an order of default in Respondent's favor. *See* Def. Mot. at 2, 9-10, 27-31, 34. Specifically, Respondent identifies three circumstances in which it asserts that Complainant has violated orders issued in this proceeding. *See* Def. Mot. at 2, 14, 27-30. First, Respondent asserts that Complainant "did not follow the Prehearing Order and its instructions for marking exhibits" in submitting its prehearing exchange. Def. Mot. at 28. Likewise, Respondent notes that Complainant "failed to follow the meet and confer instructions in the Prehearing Order when it filed its Motion [f]or Accelerated Decision in August 2018." Def. Mot. at 28; *see also* Def. Mot. 9-10. Finally, Respondent argues that Complainant violated the Order on Motion to Supplement by including the materials not previously filed and designating two additional expert witnesses, as Respondent concludes that the Order on Motion to Supplement precluded any supplementation aside from the materials it specifically addressed. *See* Def. Mot. at 14, 29-30.

Respondent alleges that Complainant's inclusion of the additional proposed exhibits and its designation of additional expert witnesses in its Supplemental Prehearing Exchange is intentionally motivated to disadvantage Respondent in litigation in this proceeding. *See* Def. Mot. at 3-6, 15-16, 34-35. Additionally, Respondent asserts that it is indeed prejudiced by Complainant's Supplemental Prehearing Exchange. *See* Def. Mot. at 5-6, 17-18, 22-23, 34-35. Respondent argues that Complainant's conduct in submitting its Supplemental Prehearing Exchange with material not previously filed in this matter, is "deliberately deceitful and has prejudiced Respondent to an extraordinary degree as Respondent simply cannot adequately prepare for the hearing, having only recently been inundated with this new information." Def. Mot. at 6. In support of its position that it is unable to adequately prepare for hearing due to Complainant's inclusion of material not previously filed and designation of additional expert witnesses in Complainant's Supplemental Prehearing Exchange, Respondent refers to declarations submitted by Mr. Kastrinos, Mr. Delano, and Mr. Fletcher, proposed expert witnesses for Respondent. *See* Def. Mot. at 5, 22, 35. Notably, Respondent asserts that Mr. Kastrinos and Mr. Delano do not have sufficient time to review the additional information submitted in CX 55 from Mr. Michaud regarding a disputed planning distance calculation in advance of the scheduled hearing.⁶ *See* Def. Mot. at 22-23, 35. Likewise, Respondent alleges that Mr. Fletcher has been "blindsided" by the designation of Ms. Witul as an expert witness, and "cannot timely undertake the necessary analysis in order to prepare a response." Def. Mot. at 5, n.4.

b. Complainant's Response

In its Response, Complainant rebuts Respondent's assertion that it did not comply with the requirements of the prehearing information exchange in the Rules of Practice and prior orders in this proceeding in filing its Supplemental Prehearing Exchange. *See* Resp. at 1-3. Complainant asserts that its Supplemental Prehearing Exchange is a timely supplement, and not

⁶ Notably, Respondent suggests that it objects to the information from Mr. Michaud in CX 55, on the basis that this document is unsigned and undated. Respondent is correct in its assessment that the document in CX 55 is unsigned and lacking a full date. However, nothing in the Rules of Practice, or prior orders from this Tribunal, would preclude admission of such a document to evidence if it is properly authenticated by this proposed witness at the hearing.

accompanied by bad faith. *See* Resp. at 3. Complainant notes that the Prehearing Order required parties to file a motion when supplementing a prehearing exchange only when such supplementation is sought within 60 days of the scheduled hearing, and Complainant indicates that it filed the Supplemental Prehearing Exchange in advance of this filing deadline, given the date the hearing is currently scheduled to commence. *See* Resp. at 2. Complainant asserts that it also complied with the terms of the Order on Motion to Supplement in submitting the Supplemental Prehearing Exchange, and it contests Respondent's claim that this order prohibited further supplementation from the material specifically addressed in this order. *See* Resp. at 3.

Complainant further argues that the Supplemental Prehearing Exchange does not prejudice the Respondent. Complainant acknowledges that the Supplemental Prehearing Exchange includes documents not addressed by the Order on Motion to Supplement, but it asserts that such documents "[do] not add any new facts or provide any consequential substantive information." Resp. at 3. With regard to the additional information provided by Mr. Michaud in CX 55, Complainant asserts that it was not required to provide such detailed information regarding Mr. Michaud's calculations under the requirements of the Rules of Practice for the prehearing information exchange, and it argues that such additional information can only assist Respondent in preparing for hearing. *See* Resp. at 3-4. Likewise, Complainant asserts that the additional designations of Ms. Witul and Mr. Swackhammer as expert witnesses at hearing does not significantly impact the content of their expected testimony, but "merely expands their ability to render such testimony as experts, if deemed necessary." Resp. at 3. Complainant notes that Respondent will have had more than 60 days following filing of the Supplemental Prehearing Exchange to prepare for hearing, and it argues that "Respondent's claim that these supplements have resulted in 'extreme prejudice' let alone any prejudice to Respondent is without merit." Resp. at 3. Alternatively, Complainant requests that if Complainant's Supplemental Prehearing Exchange is found to have prejudiced Respondent, that only the supplemental materials objected to by Respondent be excluded, rather than an order of default issued. *See* Resp. at 3.

Finally, Complainant alleges that in filing the Motion for Default, Respondent failed to comply with both the Rules of Practice and the directives of prior orders in this proceeding. *See* Resp. at 5. In support of this claim, Complainant notes that Respondent filed its Motion for Default less than 60 days in advance of the hearing, and did not seek leave for filing this motion after this filing deadline. *See* Resp. at 5. Additionally, Complainant argues that Respondent did not demonstrate good cause for late filing of the Motion for Default. *See* Resp. at 5.

IV. DISCUSSION

Contrary to Respondent's assertions in its Motion for Default, I do not find that Complainant's Supplemental Prehearing Exchange violated the Rules of Practice or the prior orders issued in this matter. Additionally, I do not find any other circumstances in this matter that warrant issuing an order of default in favor of Respondent pursuant to the Rules of Practice. Furthermore, although I seriously considered Respondent's assertion that it has been disadvantaged by Complainant's Supplemental Prehearing Exchange, I do not find this claim to be supported, and therefore, do not find a basis for providing Respondent any other relief in response to Complainant's Supplemental Prehearing Exchange.

Consistent with the requirements of the prehearing exchange of information in the Rules of Practice at 40 C.F.R. § 22.19, and the Prehearing Order issued in this matter, Complainant filed and served its Initial Prehearing Exchange and Rebuttal Prehearing Exchange. As reflected in the Prehearing Order, the parties in this proceeding only require leave to supplement a prehearing exchange by motion when such supplementation is sought within 60 days of the scheduled hearing. Complainant initially sought leave for supplementation in its Motion to Supplement, as this supplementation was initiated less than 60 days in advance of the date that the hearing was initially scheduled to commence, in January 2019. However, the hearing was subsequently rescheduled, and, therefore, Complainant did not require a motion to supplement its prehearing exchange when it filed the Supplemental Prehearing Exchange on March 14, 2019, more than 60 days in advance of the hearing as it was rescheduled. Contrary to the assertions of Respondent, nothing in the Order on Motion to Supplement precluded the parties from supplementing prehearing exchanges with additional information without leave granted upon motion in advance of 60 days prior to the scheduled hearing. Instead, the Order on Motion to Supplement merely directed Complainant to correct identification and labeling errors in previously exchanged materials by March 15, 2019. Complainant's Supplemental Prehearing Exchange corrected the errors identified in the Order on Motion to Supplement, and permissibly added additional proposed evidence.

Despite Respondent's allegation that Complainant intentionally delayed supplementing its prehearing exchange with the information contained in the Supplemental Prehearing Exchange in an attempt to disadvantage Respondent in this proceeding, there is nothing in the record that reflects that Complainant failed to promptly supplement or correct its prehearing exchange as required by 40 C.F.R. § 22.19(f). With regard to the additional information from Mr. Michaud in CX 55 regarding the disputed planning distance calculation, this document reflects that it was generated in March 2019, *see* CX 55 at 9, within the same month Complainant's Supplemental Prehearing Exchange was filed, and it otherwise indicates that Mr. Michaud did not previously generate a written calculation of the disputed planning distance prior to this document, *see* CX 55 at 2-3. As noted by Complainant in its Response, it previously provided a summary of Mr. Michaud's anticipated testimony in its Initial Prehearing Exchange, *see* C. PHE. at 2, and it was not required, either by the Rules of Practice or the Prehearing Order, to provide a detailed analysis of Mr. Michaud's calculations in the prehearing information exchange.⁷ Likewise, with regard to the additional designations of Ms. Witul and Mr. Swackhammer as expert witnesses in the Supplemental Prehearing Exchange, the record does not reflect that Complainant failed to promptly supplement or correct its prehearing exchange with these designations upon learning that such designations would be necessary. On the contrary, the fact that Complainant identified both of these individuals as proposed witnesses in its Initial Prehearing Exchange and Rebuttal Prehearing Exchange, and provided significant information with regard to their anticipated testimony in these documents, *see* C. PHE at 2; C. Rebut. PHE at 1-2, appears contrary to an intent to obtain an advantage by delaying these expert

⁷ Notably, if Respondent determined that it required more detailed information regarding Mr. Michaud's planning distance calculations to prepare its witnesses further in advance than the date the Supplemental Prehearing Exchange was filed, it had ample opportunity to request production of this material under the Rules of Practice. *See* 40 C.F.R. § 22.19(e) (allowing for other discovery in addition to the prehearing exchange of information, including requests for production). However, Respondent did not do so.

designations. Accordingly, I find no evidence that Complainant failed to promptly supplement or correct its prehearing exchange as required by the Rules of Practice, and find Respondent's speculation that Complainant intentionally delayed the supplementation to its prehearing exchange with the Supplemental Prehearing Exchange to be unsupported.

Furthermore, I do not find any other circumstances in this matter that warrant issuing an order of default in favor of Respondent, as requested in Respondent's Motion for Default. As previously discussed, in its Motion for Default, Respondent notes that Complainant did not comply with the Prehearing Order when it failed to consult Respondent prior to filing its Motion for Accelerated Decision. Additionally, in the Motion for Default, Respondent notes that Complainant did not comply with the directives in the Prehearing Order regarding identifying and labeling its proposed exhibits, as discussed in the Order on Motion to Supplement. However, neither of Complainant's actions identified by Respondent warrant entry of an order of default. As I explicitly found in the Order on Complainant's Motion for Accelerated Decision, Complainant's failure to follow the appropriate process for filing a motion as set forth in the Prehearing Order when filing its Motion for Accelerated Decision does not warrant a finding of default in this proceeding. Likewise, Complainant's errors in identifying and labeling proposed exhibits in the prehearing exchange were corrected by Complainant's Supplemental Prehearing Exchange, and otherwise do not support a finding of default in Respondent's favor. As remarked by Complainant in its Response, it is notable that Respondent also failed to comply with the Prehearing Order in filing its Motion for Default, which was filed after the appropriate filing deadline and without motion requesting leave to file out of time. Although the parties are directed to comply with the orders issued in this proceeding, I do not find that any of the aforementioned failures of the parties to comply with orders merit an order of default in this matter.

As noted, in making a determination on Respondent's Motion to Default, I seriously considered Respondent's claim that it has been disadvantaged by Complainant's Supplemental Prehearing Exchange, but I do not find this assertion to be supported. As of the date Complainant submitted its Supplemental Prehearing Exchange, Respondent had a period of over eight weeks to review this information and prepare for hearing. Given the scope and number of additional documents and expert witness designations included in Complainant's Supplemental Prehearing Exchange, I find this to be an adequate amount of time for Respondent to review these materials and prepare accordingly for hearing. This finding is notably not inconsistent with the declarations from Respondent's expert witnesses provided in support of the Motion for Default. Contrary to Respondent's representations, Mr. Fletcher did not state that he would be unable to prepare for the scheduled hearing following the submission of Complainant's Supplemental Prehearing Exchange. On the contrary, he estimated in his declaration that he would require 100 hours to prepare and stated that he would be able to complete this preparation in six weeks in consideration of his other preexisting commitments. Fletcher Decl. at 2. Furthermore, the declarations supplied by Respondent from Mr. Kastrinos and Mr. Delano reflect that although these witnesses report being unavailable to complete further review of the information provided in Complainant's Supplemental Prehearing Exchange, this is due to other competing commitments, rather than an inadequate amount of time between Complainant's

Supplemental Prehearing Exchange and the scheduled hearing.⁸ Accordingly, I do not find that Respondent has been prejudiced by Complainant's Supplemental Prehearing Exchange as it has alleged in its Motion for Default. Therefore, I do not find a basis for providing Respondent any other relief in response to Complainant's Supplemental Prehearing Exchange.

V. **ORDER**

For the reasons stated herein, Respondent's Motion for Default is hereby **DENIED**.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: April 30, 2019
Washington, D.C.

⁸ As noted by Respondent, Mr. Kastrinos reported in his declaration that he would require 80 hours to digest, analyze, and prepare testimony in response to the additional materials included in Complainant's Supplemental Prehearing Exchange, and he stated that he did not have such time to dedicate in advance of the scheduled hearing. *See* Kastrinos Decl. at 2. However, Mr. Kastrinos provided that the reason he was not able to complete a review of the additional materials prior to the scheduled hearing was not because the amount of time was inadequate, but rather, "because of other commitments [he] ha[s] on a number of projects that [he] cannot at this point cancel or reschedule until after the end of May." Kastrinos Decl. at 2. Likewise, in his declaration, Mr. Delano estimates that it would take him approximately 120 hours to review the information from Mr. Michaud in CX 55, and that he is unable to complete such a review prior to the scheduled hearing "given other preexisting commitments." Delano Decl. at 4.

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 Respondent's Motion for Default**, dated April 30, 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
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic Mail to:

Rebecca Sugerman
J. Andrew Helmlinger
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
Email: sugerman.rebecca@epa.gov
Email: helmlinger.andrew@epa.gov
For Complainant

Richard J. McNeil
Jordan L. Ludwig
Crowell & Moring LLP
Email: rmcneil@crowell.com
Email: jludwig@crowell.com
For Respondent

Dated: April 30, 2019
Washington, D.C.