

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

VSS International, Inc.

Respondent.

)
)
) DOCKET NO. OPA 09-2018-0002
)
) Complainant's Motion to Supplement and
) Correct the Prehearing Exchange
)

In the course of preparing for hearing, Complainant has learned that a portion of its Prehearing Exchange is incomplete, inaccurate or outdated and as such hereby seeks to supplement and correct its Prehearing Exchange pursuant to 40 C.F.R. § 22.19(f). The specific supplements and corrections are provided below.

CX 20

Complainant's Prehearing Exchange, dated June 1, 2018, sets forth a list of Complainant's Documents and Exhibits. Page 4 of the Prehearing Exchange lists CX 20 as the VSS Int'l Consolidated Plan, May 2017 (SPCC) and CX 21 as the VSS Int'l May 2017 FRP. However, during the prehearing exchange, EPA inadvertently marked the May 2017 FRP as CX 20 and CX 21 and uploaded the same document to the OALJ e-filing system twice. Attached to this motion is the VSS Int'l Consolidated Plan May 2017 (SPCC) marked with the label CX 20R, the R stands for revised. EPA requests that the document previously submitted as CX 20, which is the same document as CX 21 be replaced by CX 20R. There is no prejudice to Respondent because this is Respondent's own document and appears to be the same document as RX 96.

CX 22

EPA periodically compiles estimated costs of compliance with its regulations, and the document provided as CX 22, "Renewal of Information Collection Request for the Implementation of the Oil Pollution Act Facility Response Plan Requirements (40.C.F.R. Part 112)" (ICR), provides the estimated costs for regulated entities to comply with the FRP requirements. The document provided in Complainant's Prehearing Exchange marked as CX 22 is a 2011 document that was applicable at the time of the filing of the Complaint and Complainant's Prehearing Exchange. During most of 2018, EPA was in the process of updating the estimated costs of compliance to issue a new ICR. EPA's initial penalty narrative submitted as part of its Prehearing Exchange relies on cost estimates from the proposed 2018 ICR update of the 2011 ICR for consideration of potential economic benefit. After public comment, EPA finalized the document in December 2018. EPA's proposed and final ICRs are publicly available

at <https://www.regulations.gov>. For clarification and completeness of the record, EPA includes with this motion the 2018 proposed ICR, labeled as CX 22R-A, and the 2018 final ICR, labeled as CX 22R-B. The cost estimates that are included in the 2018 proposed ICR are the lowest values and are therefore the least prejudicial to Respondent. For this action, Complainant will continue to rely on the 2018 proposed ICR providing the lowest costs estimates, rather than the higher costed estimates stated in the 2011 ICR or the 2018 final ICR.

Area Contingency Plan (CX 33)

In Complainant's Prehearing Exchange, Complainant submitted CX 2, which is an excerpt of the Area Contingency Plan for the San Francisco Bay and Delta Area (ACP 2). The excerpt is the section of ACP 2 relating to the Sacramento River Deep Water Ship Channel in the North Delta. In Respondent's Prehearing Exchange, dated June 22, 2018, Respondent submitted RX 83, which is also an excerpt of ACP 2 but is broader than CX 2 because it provides the entire North Delta section of ACP 2. To provide additional context to ACP 2, Complainant requests to supplement the Prehearing Exchange with the document titled "SF Bay & Delta Map, Table of Contents and Introduction," which is available at <https://www.wildlife.ca.gov/OSPR/Preparedness/SF-Spill-Contingency-Plan>. Attached to this motion is the SF Bay & Delta Map, Table of Contents and Introduction," labeled as CX 33. There is no prejudice to Respondent in supplementing the Prehearing Exchange with this document because it is a publicly available document that Respondent is or should already be familiar with since it provided an excerpt of ACP 2 in its Prehearing Exchange.

SPCC Guidance for Regional Inspectors (CX 34)

In Respondent's Prehearing Exchange, Respondent submitted RX 48, which is an excerpt of the SPCC Guidance for Regional Inspectors. The SPCC Guidance for Regional Inspectors can be viewed in its entirety at https://www.epa.gov/sites/production/files/2014-04/documents/spcc_guidance_fulltext_2014.pdf. Attached to this motion is the SPCC Guidance for Regional Inspectors in its entirety, labeled as CX 34. There is no prejudice to Respondent in supplementing the Prehearing Exchange with this document because it is a publicly available document that Respondent is or should already be familiar with since it provided an excerpt of the SPCC Guidance for Regional Inspectors in its Prehearing Exchange.

Reference USA for VSS International (CX 35)

Attached to this motion is the Reference USA Report, labeled as CX 35. EPA downloaded this report on January 9, 2019 from the Business database of the Reference USA website that is available through public libraries. There is no harm to Respondent in supplementing Complainant's Prehearing Exchange with this document because it is a publicly available document providing information that Respondent is or should be familiar with. In addition, to the extent there are any inaccuracies in the report, Respondent will be able to present testimony during hearing to address the inaccuracies.

D&B Market Identifiers for VSS International (CX 36)

Attached to this motion is the Dun and Bradstreet Market Identifiers: VSS International, Inc., labeled as CX 36. EPA downloaded this report on January 9, 2019 from Westlaw. There is no harm to Respondent in supplementing Complainant's Prehearing Exchange with this document because it is a publicly available document providing information that Respondent is or should be familiar with. Indeed, Respondent provided its Dun and Bradstreet Identification number its Response to an EPA request for information, suggesting it is familiar with this database. *See* RX 2, Page 3. In addition, to the extent there are any inaccuracies in the report, Respondent will be able to present testimony during hearing to address the inaccuracies.

PE 7

Complainant's Rebuttal Prehearing Exchange, dated July 5, 2018, stated that Complainant was submitting a copy of the email from the Region 9 Regional Hearing Clerk that showed that he received no public comments and marking the email as PE 7. When filing this document, however, the PE number was omitted from the label. In addition, William Michaud's curriculum vitae had previously been filed as PE 7. Attached to this motion is the previously filed Regional Hearing Clerk email now labeled PE 8. EPA requests that the Regional Hearing Clerk email previously filed be replaced with the same email, now labeled PE 8. There is no prejudice to Respondent because this change simply corrects a labeling error and Respondent already saw the previously filed Regional Hearing Clerk email.

RX Exhibits

Complainant also requests that it be allowed to adopt and include in Complainant's Prehearing Exchange any of the RX Exhibits that Respondent included in its Prehearing Exchange. Complainant attempted to jointly stipulate to certain exhibits that Respondent included with Respondent's Prehearing Exchange but was unsuccessful in reaching agreement with Respondent on joint stipulations. There is no prejudice to Respondent because these are documents that Respondent included in its Prehearing Exchange and is therefore familiar with such documents. Complainant reserves its ability to object during hearing to Respondent's offers of evidence from its prehearing exchange that is irrelevant, immaterial, unduly repetitious, unreliable, of little probative value, or would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence.

Complainant recognizes that this motion is being filed outside the time period provided in the Prehearing Order. *See* Prehearing Order dated April 20, 2018 (stating that any motion to supplement the prehearing exchange must be "sought within 60 days of the scheduled hearing"). Complainant urges the Presiding Officer to consider this motion on the merits because the motion seeks to correct or clarify documents already included in the Prehearing Exchange, does not prejudice Respondent because Respondent is or should be familiar with these documents or

the content of these documents (i.e., PE 8, CX 33, CX 34, CX35, and CX36) or the documents are favorable to Respondent (i.e., CX 22R-A and CX 22R-B), or may narrow the focus at hearing because many of these documents are documents that are included in Respondent's Prehearing Exchange (i.e, CX 20R and the RX exhibits listed in the table above).

Complainant provided notice to Respondent's counsel that it planned to file its motion and provided a draft copy of this motion. Respondent's counsel responded that he could not agree to EPA's proposed modifications to the Prehearing Exchange.

Complainant respectfully requests that Complainant's Motion to Supplement and Correct the Prehearing Exchange be granted.

For Complainant United States Environmental Protection Agency:

Dated: January 11, 2019

/s/ Rebekah Reynolds

Rebekah Reynolds
Rebecca Sugerman
U.S. EPA, Region IX
Attorneys for Complainant

CERTIFICATE OF SERVICE

I, Rebekah Reynolds, hereby certify that on January 11, 2019, I caused to be filed electronically the foregoing Complainant's Motion to Supplement and Correct the Prehearing Exchange 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, Rebekah Reynolds, hereby certify that on January 11, 2019, I served a true and correct copy of the foregoing Complainant's Motion to Supplement and Correct the Prehearing Exchange via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: January 11, 2019

Respectfully Submitted,

/s/ Rebekah Reynolds

Rebekah Reynolds
Assistant Regional Counsel,
U.S. EPA, Region IX