

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:

VSS International, Inc.,

Respondent.

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DOCKET NO. OPA 09-2018-0002

**RESPONSE TO RESPONDENT'S  
MOTION TO SUPPLEMENT AND  
CORRECT THE PREHEARING  
EXCHANGE**

Pursuant to 40 C.F.R. § 22.16(b), Complainant objects to Respondent's April 25, 2019 Motion to Supplement and Correct the Prehearing Exchange ("Motion to Supplement") Default as follows:

Complainant is sympathetic to a need for a complete record and understands the limitations of 40 C.F.R. § 22.19(a) on a party's presentation into evidence at hearing. But Complainant has always viewed this matter as straightforward and objects to late efforts that may overly complicate the record in this case, cause unfair prejudice, confusion of issues, waste time or present needlessly cumulative evidence. With less than three weeks before the upcoming hearing<sup>1</sup> and without any clear statement of need or potential use, Respondent's Motion to Supplement seeks to add three categories of documents to the record in this matter. These categories include:

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<sup>1</sup> A non-dispositive motion filed less than 60 days before the scheduled hearing also must be submitted in sufficient time to permit the filing of a response, a reply, and/or the issuance of a ruling. April 20, 2018 Prehearing Order, at 4. A non-moving party has 15 days to respond; the moving party may reply within 10 days. 40 C.F.R. § 22.16(b).

- 1) The Parties' Prehearing Exchanges (Proposed Exhibit Nos.: 98-100, and 108);
- 2) Certain of the Parties' pleadings (Proposed Exhibit Nos.: RX 105-107, 109 and 113); and
- 3) Declarations of identified witnesses (Proposed Exhibit Nos.: RX 101-104, and 110-112).

The Rules of Practice do not provide a standard for granting motions to supplement a prehearing exchange, so such motions should be considered "based on the grounds stated in the motion and the circumstances of the case, including timeliness of the motion and any prejudice to the opposing party." In the matter of Isochem North America, LLC, TSCA-02-2006-9143 (EAB, March 6, 2008). Introducing potential evidence into the record in this matter nonetheless should be considered based on the standard at 40 C.F.R. § 22.22(a), which would exclude all evidence that is irrelevant, immaterial, unduly repetitious, unreliable or of little probative value.

Under the circumstances of this matter, with respect to the first two categories, Complainant objects because these documents are pleadings that already are part of the record and themselves have no inherent probative value. As discussed below, both categories of documents are irrelevant, having no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See FRE § 401. To the extent that any relevance could be speculated, any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or more simply causing an undue delay, waste of time or needlessly cumulative presentation of evidence. See FRE § 403.

The first category, the Parties' Prehearing Exchange documents, include Complainant's and Respondent's Prehearing Exchanges, Complainant's Rebuttal and Complainant's Supplement. Presumably this includes only the narrative supporting submissions and not the individual and respective documents provided with them, which each already have designated exhibit numbers.

These are framing documents drafted by counsel for the Parties in this matter, and are intended to provide notice to the Parties and the Presiding Officer regarding what evidence exists, which witnesses will testify and what issues may arise. That said, Complainant already has designated its initial Prehearing Exchange as Exhibit CX 48, provided for the purpose of supporting its suggested penalty formulation as required pursuant to the April 20, 2018 Prehearing Order. See, April 20, 2018 Prehearing Order, at § 2.C. Regardless, Complainant will provide testimony and more direct evidence to support a penalty recommendation, and will not rely on CX 48. To the extent that CX 48 already is an exhibit, it would be needlessly cumulative and potentially confusing at this stage to designate it again as Exhibit RX 98.

Respondent's Prehearing Exchange, on the other hand and proposed as RX 99, includes argument regarding penalties, but which itself is not potential evidence. Pages 28-42 of Respondent's Prehearing Exchange includes *curricula vitae* for Kari Casey, Lee Delano, John Kastrinos, and Craig Fletcher. Complainant understood from the efforts to meet and confer on this motion that Respondent may seek to identify these as discrete exhibits. Complainant does not object to designating these four *curricula vitae* as RX 99.

There is no assertion by Respondent that there is any other unique information stated in this first category of documents that is not provided in the individual and respective exhibits transmitted with the prehearing exchanges or in the anticipated testimony of the identified witnesses. Although lacking probative value, there is a significant risk of undue prejudice in the matter, as relying on these documents as potential evidence is akin to allowing the Parties' counsel to testify without the benefit of cross-examination. Accordingly, these documents should not be added to the Prehearing Exchange as potential evidence because they cannot pass the standard of relevance and efficiency at 40 C.F.R. § 22.22(a).

With regard to the second category, Pleadings, these include Complainant's Motion for, Memorandum in Support of, and Reply regarding its Motion for Accelerated Decision, as well as the March 15, 2019, and April 12, 2019 Joint Stipulations in this matter. These documents already exist in the record and bear no independent probative value, and there is no assertion by Respondent regarding the benefit of admitting these documents into the record for this matter. To the best of its ability, Complainant has been forthright with Respondent and the Presiding Officer in this matter, and Complainant stands by its submissions in their proper context. Short of to impugn the integrity Complainant's assertions in these pleadings, Complainant cannot speculate on and Respondent has not suggested any particular use or allegation that is benefitted by introducing these documents into the formal record. At best any relevance is clearly outweighed by the potential for confusion in the record, undue delay, wasted time and needlessly cumulative evidence. Accordingly, these documents also cannot pass the standard of relevance and efficiency at 40 C.F.R. § 22.22(a).

Regarding the third category, Declarations, Complainant does not object to supplementing the Prehearing Exchange with these documents if limit to use as impeachment material, although Complainant does not understand that having the declarations in the Prehearing Exchange is required for their use in this manner. In fact, Complainant would stipulate that any documents ostensibly authored by any witness could be used for impeachment regardless of whether the document is included in the Prehearing Exchange. However, where this matter is ripe for hearing and the parties have been preparing for hearing to include live testimony from the identified witnesses, Complainant does object to any use of a declaration in lieu of any witness or to supplement testimony that is not elicited directly from a witness with an opportunity for cross-examination. Use of the declarations in this manner bears a substantial potential to create an

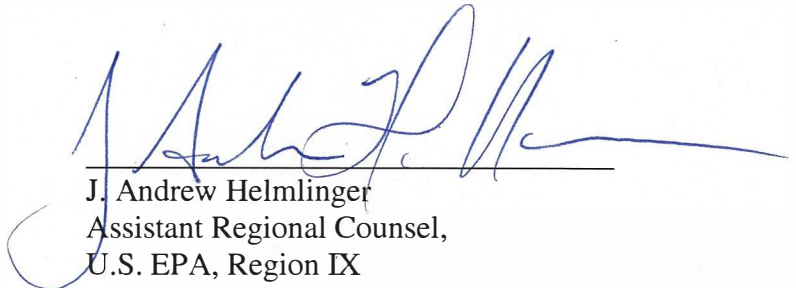
unfair prejudice by creating a record of unproven reliability, in contravention of the fair standards of adjudication as exemplified at FRE 403 and required by 40 C.F.R. § 22.22(a).

**CONCLUSION**

Based on the foregoing reasons, Complainant requests that Respondent's Motion to Supplement be Denied as to the Prehearing Documents and Pleadings (proposed Exhibit numbers: RX 98-100, 105-109, and 113), and allowed solely for potential use as impeachment material for the Declarations (proposed Exhibit numbers: RX 101-104, 110-112).

Respectfully submitted,

May 1 2019  
Date

  
J. Andrew Helmlinger  
Assistant Regional Counsel,  
U.S. EPA, Region IX

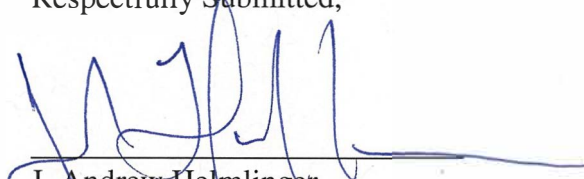
**CERTIFICATE OF SERVICE**

I, J. Andrew Helmlinger, hereby certify that on May 1, 2019, I caused to be filed electronically the foregoing RESPONSE TO RESPONDENT'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, J. Andrew Helmlinger, hereby certify that on May 1, 2019, I served a true and correct copy of the foregoing RESPONSE TO RESPONDENT'S MOTION TO SUPPLEMENT AND CORRECT THE PREHEARING EXCHANGE via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: May 1, 2019

Respectfully Submitted,



J. Andrew Helmlinger  
Assistant Regional Counsel,  
U.S. EPA, Region IX