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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF

**VSS INTERNATIONAL, INC.**

3785 Channel Drive  
West Sacramento, CA

Respondent.

DOCKET NO. OPA 09-2018-00002

**RESPONDENT VSS INTERNATIONAL, INC.'S  
MOTION TO COMPEL ATTENDANCE AND  
TESTIMONY OF, AND PRODUCTION OF  
DOCUMENTS BY, MICHAEL SEARS AT  
HEARING; MEMORANDUM IN SUPPORT  
THEREOF**

Proceeding to Assess Class II Civil Penalty Under  
Clean Water Act Section 311

**MOTION FOR SUBPOENA TO COMPEL**

**ATTENDANCE & TESTIMONY OF MICHAEL SEARS**

Comes now Respondent, VSS International, Inc. ("VSSI"), by and through its attorneys of record, pursuant to Rules 22.19 (e)(4) and 22.21(b) of the Consolidated Rules of Practice (40 C.F.R. §§ 22.19(e)(4), 22.21(b)) and respectfully requests that the Chief Administrative Law Judge, Susan Biro, issue a subpoena to compel the attendance and testimony of Michael Sears,

and his production of communications with Complainant Environmental Protection Agency (“EPA”) and VSSI, at the hearing of the above-captioned matter commencing on May 16, 2019, and continuing through May 24, 2019, and as grounds therefore states as follows.

**MEMORANDUM IN SUPPORT OF MOTION FOR TRIAL SUBPOENA**

**I. INTRODUCTION**

VSSI seeks issuance of a subpoena to compel the testimony of Michael Sears, and production of documents, at the hearing of this matter commencing May 16, 2019. Mr. Sears is a Hazardous Materials Specialist with the Yolo County Health Department. Mr. Sears is a percipient witness and took it upon himself to insert himself into, communicate with complainant Environmental Protection Agency (“EPA”) regarding, and opine upon the sufficiency of, VSSI’s Spill Prevention, Control, and Countermeasure (“SPCC”) Plan. EPA will not be calling Mr. Sears as a witness,<sup>1</sup> however, and is seeking to exclude certain of his testimony and communications through a motion in limine. VSSI will be opposing that motion and intends to call Mr. Sears to testify at the hearing. *See* Respondent VSS International, Inc.’s Preliminary Exchange, p. 18. Because VSSI cannot compel Mr. Sears to attend and testify at the hearing regarding his percipient knowledge as to VSSI’s efforts to comply with and correct violations of U.S. environmental regulations, VSSI is filing this motion for subpoena. VSSI requests this tribunal issue a trial subpoena (attached hereto as Exhibit A) to compel Mr. Sears’s testimony and his production of documents, limited to communications he had with the EPA and VSSI.

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<sup>1</sup> Declaration Of Richard McNeil In Support Of Respondent VSS International, Inc’s Motion To Compel Attendance And Testimony Of, And Production Of Documents By, Michael Sears at Hearing (“McNeil Decl.”), ¶ 8, Exh. 7.

EPA has advised VSSI that it does not oppose VSSI's motion for the issuance of a subpoena for Mr. Sears's appearance, provided that EPA otherwise reserves its rights with respect to Mr. Sears's appearance, including those related to relevancy.

## **II. BACKGROUND FACTS**

Michael Sears is a Hazardous Materials Specialist II with the Environmental Health Division of the Yolo County Health Department. (RX 41, p. 2).<sup>2</sup> In or about May 9, 2012, Mr. Sears contacted Randy Tilford, Corporate Environmental Manager for Basic Resources, Inc., the parent company of VSSI (RX 45, p. 1), to schedule a Certified Unified Program Agency ("CUPA") re-inspection of VSSI, as well as a re-inspection of VSSI's Aboveground Petroleum Storage Act ("APSA") and SPCC Plans due to purported outstanding violations. (RX 41, p. 2).

Mr. Tilford disagreed that VSSI had not corrected all violations identified by the Yolo County Environmental Health Division. He asserted that VSSI was in compliance with the pertinent regulations, and that plans like those put forward by VSSI had been accepted in many counties and districts. (RX 41, p. 2). In response, Mr. Sears stated that he would contact a federal inspector regarding their interpretation of the regulations governing CUPA and SPCC Plans, but that it was "common to find such large numbers of discrepancies in a Plan" given that county agencies had just begun to inspect SPCC plans. (RX 41, p. 1). That said, Mr. Sears noted that VSSI's "revised SPCC Plan is much better than the one I original reviewed for this facility." (*Id.*)

Mr. Sears then contacted Peter Reich of the EPA for his interpretation of a certain part of 40 CFR Part 112, specifically a violation purportedly arising out of Part 112.7(b) (General Requirements for Spill Prevention, Control, and Countermeasure Plans):

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<sup>2</sup> Each of the referenced "RX" exhibits herein is attached to the McNeil Declaration. *See* McNeil Decl., ¶¶ 2-7, Exhs. 1-6.

Where experience indicates a reasonable potential of equipment failure (such as loading or unloading equipment, tank overflow, rupture, or leakage, or any other equipment known to be a source of a discharge), include in your Plan a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of each type of major equipment failure.

(RX 42, p. 2). Mr. Sears noted he might be “nit-picking,” but he understood the regulation to require the facility to not only discuss pipe design, but also pipe design support, which VSSI’s SPCC Plan allegedly did not do. (RX 42, p. 3). In response, Mr. Reich agreed that the pipe design “supports” needed to be included in the SPCC Plan. (RX 42, p. 1). Mr. Sears then forwarded Mr. Reich’s response to Mr. Tilford, and advised that “Yolo County Environmental Health is the regulatory agency charged with the responsibility and authority to enforce the APSA regulations.” He also threatened hefty fines for continuing violations. (*Id.*)

On June 4, 2012, Mr. Sears wrote to tell VSSI that all of its pending violations under the APSA had been cleared as of June 1, 2012. (RX 47, p. 1). At that time, Mr. Sears also informed VSSI that its SPCC Plan was purportedly missing the “Management Approval” as stated on Page iii, as it didn’t include the signature, name, and title of the “Authorized Facility Representative.” (*Id.*) Then, on November 27, 2012,<sup>3</sup> Mr. Sears attended the inspection and closing conference between VSSI and the EPA in which it appeared that the EPA also gave VSSI a clean bill of health. During that conference, according to Mr. Tilford, Janice Witul of the EPA told VSSI that it had “no violations that would result in penalties of any kind.” (RX 45, p. 1).

It appears that Mr. Sears did not involve himself with VSSI’s SPCC Plan again until 2015. Apparently, on August 13, 2015, Mr. Sears conducted a SPCC Plan and Site-inspection at VSSI and prepared an APSA Inspection Report that identified six violations and five

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<sup>3</sup> Although Exhibit RX 45 states that the inspection and closing conference at the VSSI facility took place on November 27, 2013, this is a typo. The date RX 45 was written was July 22, 2013, and the meeting took place the prior November. McNeil Decl., ¶ 4.

advisements for correction. (RX 52, p. 2). One of those violations concerned integrity testing. In response, Mr. Tilford confirmed that VSSI had conducted integrity testing on 10 tanks, but the entire schedule for testing was with the EPA for approval. (RX 52, p. 1). Mr. Sears requested documentation for the testing, which Mr. Tilford provided on October 5, 2015. (RX 53, p. 2). That documentation was sufficient for Mr. Sears to find VSSI in compliance with its SPCC Plan. (RX 53, p. 1). That said, Mr. Sears noted that VSSI was not in compliance with the integrity testing requirements of Section 112.8(c)(6) (Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities)), because some tanks had not been tested yet, but because the schedule outlined in the SPCC Plan was “reasonable,” he didn’t see that as a problem so long as the schedule was followed. (RX 53, p. 1).

On March 20, 2019, VSSI’s counsel spoke with EPA’s counsel regarding VSSI’s intent to file a motion for subpoena to compel Michael Sears’s attendance, testimony, and production of documents at the hearing of this matter commencing May 16, 2019. The EPA’s counsel informed VSSI’s counsel that EPA would not oppose VSSI’s motion provided that EPA otherwise reserves its rights with respect to Mr. Sears’s appearance, including those related to relevancy.<sup>4</sup>

### **III. LEGAL STANDARD**

Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“CROP”), a presiding officer “may require the attendance of witnesses . . . by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.” 40 C.F.R. § 22.21(b). EPA has brought its Administrative Complaint

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<sup>4</sup> McNeil Decl., ¶ 9, Exh. 8.

against VSSI under the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990. Admin. Compl., ¶ 1. Under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, subpoenas may be issued to compel the attendance and testimony of witnesses. *See* 33 U.S. Code §§ 1319(g), 1369(a)(1). Accordingly, this tribunal may issue a subpoena compelling Mr. Sears's testimony and production of documents upon a showing by VSSI that his testimony and the limited of category of documents sought is necessary, material, and relevant to VSSI's defense.

#### **IV. A SUBPOENA SHOULD ISSUE TO COMPEL MICHAEL SEARS'S TESTIMONY AND PRODUCTION OF DOCUMENTS AT THE HEARING ON THIS MATTER**

In its Administrative Complaint, Complainant EPA alleges that VSSI's SPCC Plan violated 40 C.F.R. § 112.3 because it failed to include management approval (40 C.F.R. § 112.7(a)) or a facility diagram complying with 40 C.F.R. § 112.7(a)(3). *See* Admin. Compl., ¶¶ 28-38. In addition, EPA asserts that VSSI further violated 40 C.F.R. § 112.3 by failing to have a Professional Engineer review and certify the SPCC Plan. *Id.*, at ¶¶ 39-46. EPA also alleges that VSSI violated 40 C.F.R. § 112.7(e) by failing to keep records of inspections and tests of the VSSI facility for a three year period. *Id.*, at ¶¶ 61-67. As a result, the EPA requests in its Administrative Complaint that this tribunal levy a daily penalty upon VSSI for each day it violated 40 C.F.R. § 112.3 for the period February 13, 2013 to February 12, 2018. *See* Stipulation to Exclude Exhibits and Limit Potential Penalties. *See also* Admin. Compl., ¶¶ 38, 46, 67.

VSSI believes that penalties are unwarranted. Specifically, in its defense, VSSI contends that it has complied with all applicable regulations and at all times cooperated and worked with

the EPA to ensure its SPCC Plan satisfied the EPA's expectations. *See* Respondent VSS International, Inc.'s Prehearing Exchange, pp. 1-4.

Mr. Sears's testimony is material to VSSI's defense. VSSI received notice of alleged violations at its facility in May, 2012 through Mr. Sears acting on behalf of the Yolo County Environmental Health Division, the CUPA. (RX 41, p. 2). Mr. Sears initially inspected VSSI's SPCC Plan under a program administered by the EPA, and opined on VSSI's compliance with the EPA's program. (*Id.*) Within a week of receiving notice of the SPCC alleged violations, VSSI sought to clarify with Mr. Sears CUPA's expectations (RX 41, p. 2), which resulted in guidance being sought by Mr. Sears from the EPA, to the extent a question of regulatory ambiguity was presented. (RX 42, p. 1). Based on this guidance, VSSI voluntarily agreed to modify its SPCC Plan and all violations were cleared by Mr. Sears as of June 1, 2012. (RX 47, p. 1) Since that time, VSSI has continuously and diligently worked to seek guidance from the CUPA, through Mr. Sears, and from the EPA on how to enhance its SPCC program so that it satisfies the Complainant's expectations.

Approximately six months later, in November 2012, VSSI's facility was inspected again by the CUPA (RX 45, p.1); however, this time Mr. Sears brought Janice Witul of EPA with him. In attendance for VSSI were Mr. Tilford and Pat McNairy (Plant Manager). (*Id.*) The VSSI representatives were advised that no penalty would be forthcoming based on the November 27, 2012 inspection, that the EPA would possibly be offering further guidance respecting VSSI's SPCC and Facility Response Plans, and that EPA would respond to VSSI within three to four months. (*Id.*)

Based on this, VSSI asserts it timely responded to the EPA's notices of alleged violations at its facility regarding its SPCC Plan, and also maintained constant contact with EPA, through

its employees and agents, such as Mr. Sears, over the past five years through phone calls, written communications, and in person meetings that provided updates on VSSI's efforts to respond to additional clarification and information requests from EPA and CUPA and satisfy their expectations for VSSI's SPCC Plan. (*See, e.g.*, RX 41, RX 42, RX 45, RX 47, RX 52, RX 53). Mr. Sears's testimony goes to these efforts, and VSSI's compliance with environmental regulations, because he reviewed, commented upon, and found purported violations arising from VSSI's SPCC Plan (RX 41, 42); cleared purported violations associated with VSSI's SPCC Plan (RX 47, RX 53); and attended inspections within which the EPA determined VSSI owed no penalties for any violations based on its SPCC Plan (RX 45).

Because of this, Mr. Sears is a material, percipient witness to EPA's claims that VSSI violated 40 C.F.R. § 112.3 by failing to provide appropriate management approval, diagrams, and certifications in its SPCC Plan. He is also a material witness as to VSSI's efforts to document tests and inspections at the facility, as well as address and correct any alleged violations regarding proper documentation of those tests and inspections pursuant to 40 C.F.R. § 112.7(e). (*See, e.g.*, RX 53, RX 53). He is also a material, percipient witness to VSSI's defense that it cooperated and worked diligently to correct purported violations and comply with 40 C.F.R. § 112.3 and 40 C.F.R. § 112.7(e) in defense to the penalties EPA seeks in Counts I, II, and IV of its Administrative Complaint.

In addition, VSSI seeks to compel Mr. Sears to bring a limited number of documents with him to the hearing. Specifically, VSSI seeks to compel Mr. Sears to produce documents evidencing his communications with EPA and VSSI. These documents would likely further support VSSI's contention that Mr. Sears was working as an agent of EPA when he commented on VSSI's SPCC Plan, as well as demonstrate VSSI's continued commitment to cure violations

and develop an SPCC Plan consistent with EPA expectations. As such, this limited production of documents would be material and relevant to VSSI's defense of the EPA's Administrative Complaint.

Accordingly, Mr. Sears's testimony is material, relevant, and necessary to VSSI's defense against EPA's Administrative Complaint and the counts therein based on purported violations arising from its SPCC Plan. Thus, this tribunal should issue the Subpoena attached hereto as Exhibit A, compelling Mr. Sears's testimony at the hearing commencing on May 16, 2019.

**V. CONCLUSION**

For all of the foregoing reasons, including that the EPA does not oppose VSSI's motion for issuance of a subpoena to compel Mr. Sears's appearance (provided that EPA otherwise reserves its fights with respect to Mr. Sears's appearance), respondent VSSI respectfully requests that this tribunal issue the Subpoena attached hereto as Exhibit A, compelling Mr. Sears's testimony at the hearing commencing on May 16, 2019 given his testimony is material, relevant, and necessary to VSSI's defense against the counts set forth in Complainant EPA's Administrative Complaint.

Dated: March 20, 2019

CROWELL & MORING LLP



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Attorneys for Respondent  
VSS INTERNATIONAL, INC.