

Richard J. McNeil (SBN 116438)
CROWELL & MORING LLP
3 Park Plaza, Suite 2000
Irvine, CA 92614
Telephone: 949-263-8400
Facsimile 949-263-8414
rmcneil@crowell.com
Attorneys for VSS INTERNATIONAL, INC.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF

VSS INTERNATIONAL, INC.
3785 Channel Drive
West Sacramento, CA

Respondent.

DOCKET NO. OPA 09-2018-0002

**RESPONDENT VSS INTERNATIONAL, INC.'S
NOTICE OF ERRATA RE INITIAL POST-
HEARING BRIEF**

NOTICE OF ERRATA

PLEASE TAKE NOTICE that Respondent VSS INTERNATIONAL, INC. hereby respectfully submits **RESPONDENT VSS INTERNATIONAL, INC.'S NOTICE OF ERRATA RE INITIAL POST-HEARING BRIEF**, page 34. Page 34 of the brief filed Friday contained an unintentionally included handwritten note on page 34, which is removed in the clean copy attached to this Notice of Errata as Exhibit A. No other change to the document was made.

Dated: September 16, 2019

CROWELL & MORING LLP



Richard J. McNeil
Attorneys for Respondent
VSS INTERNATIONAL, INC.

EXHIBIT A

resulting from a discharge.” EPA did not, either in its expert reports or at the hearing, satisfy its burden of presentation and persuasion regarding this element of its prima facie case either.²⁹

Thus, in addition to the other reasons set forth above, EPA as a matter of law cannot prevail on its Count V.

III. VSS’S ANALYSIS THAT A FRP WAS NOT REQUIRED WAS ROBUST, DETAILED, AND APPLIED IN ACCORDANCE WITH A MODEL ENDORSED BY EPA’S EXPERT

Although not required to carry this burden at the hearing, VSS, through both its June 23, 2015 Substantial Harm Criteria report (RX 88) and the testimony of Kari Casey and Lee Delano, presented a compelling case that a FRP was not required. That case applied specific and scientifically sound site data that had been gathered by WHF to the FRP regulations. (As noted

²⁹ The words describing the finding that must be made in this regard do not appear in the record. To be sure, there was some general testimony to the effect that asphalt cement can create an oil sheen (“like the rainbow you might see in a parking lot on a rainy morning”), see Tr. 55:2-14 as well as a general observation that was made that asphalt cement contains lighter and denser molecules (*i.e.*, “floaters” and “sinkers”) -- but no witness testified that a discharge from the VSS facility would result in anything that was described by a competent expert as “a measurable adverse change, either long-term or short-term, in the chemical or physical quality or the viability of [the SRDWSC] resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions resulting from a discharge. EPA also relies in Complainant’s Initial Post-Hearing Brief, page 30, on the (again, unsupported but -- more to the point, insufficient --for the purpose of this particular regulation) assumption that “it is generally accepted that one gallon of oil can contaminate a million gallons of water”). Rather than proving this element of its prima facie case, EPA seems rather to have simply assumed that a FRP was required if it established that any amount of oil reached the channel (which VSS disputes but acknowledges seems to have been EPA’s assumption). See Tr. 306:19-307:2 (Testimony of William Michaud) (“I concluded that as soon as that material reaches that, that resource, it will cause injury to that, it will impact that environment, so my conclusion in, in my report was that D3 is some value greater than zero because it will – it will move into that, that body of water. I established that through my calculation, if it moves into that body of water by *one inch*, it will – it will have impact to that body of water, according to the regulations”) (emphasis supplied). With due respect to Mr. Michaud, his opinion in this regard is not just an oversimplification, it is a distortion – there is a world of difference between “one inch” of oil in the water (assuming, *arguendo*, that that was established, which it was not) and “a measurable adverse change, either long-term or short-term, in the chemical or physical quality or the viability of [the SRDWSC].”

CERTIFICATE OF SERVICE

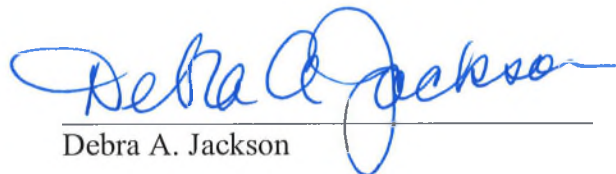
I, Debra A. Jackson, hereby certify that on September 16, 2019, I caused to be filed electronically, the foregoing **RESPONDENT VSS INTERNATIONAL, INC.'S NOTICE OF ERRATA RE INITIAL POST-HEARING BRIEF** in the Matter of VSS International, Inc., Docket No. OPA 09-2018-0002, with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Debra A. Jackson, hereby certify that on September 16, 2019, I served a true and correct copy of the foregoing **RESPONDENT VSS INTERNATIONAL, INC.'S NOTICE OF ERRATA RE INITIAL POST-HEARING BRIEF** in the Matter of VSS International, Inc via electronic mail to the following attorneys for the EPA:

Rebecca Sugerman at Sugerman.rebecca@epa.gov
Rebekah Reynolds at Reynolds.rebekah@epa.gov
Andrew Hemlinger at Helmlinger.andrew@epa.gov

Dated: September 16, 2019

Respectfully Submitted,



Debra A. Jackson