UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	DOCKET NO. OPA 09-2018-0002
	)	
VSS International, Inc.,	)	
	)	
	)	
Respondent.	)	

Complainant's Reply to Respondent's Opposition to Complainant's Motion in Limine

Complainant submits the following Reply to Respondent VSS International, Inc.'s Opposition to Complainant's Motion in Limine:

I. The Counsel Communication Exhibits Are Inadmissible Settlement Communications

The first set of exhibits that Respondent seeks to include – RX 7, RX 10, RX 11, RX 15 - are correspondence between counsel for Complainant and counsel for Respondent in the context of settlement negotiations for the basis of penalty mitigation. As stated in our Motion, to admit these exhibits goes against the intent and plain meaning of Federal Rules of Evidence ("FRE") 408 which states, "[e]vidence of the following is not admissible on behalf of any party either to prove or disprove the *validity* or *amount* of a disputed claim … conduct or a statement made during compromise negotiations about the claim…." FRE 408(a) (emphasis added). To the extent that Respondent intends to present evidence regarding its purported compliance efforts, it can address these efforts directly through testimony and/or documentary evidence other than

correspondence between the parties' counsel. Moreover, including this correspondence into evidence for Respondent's stated purpose puts the parties' counsel in the untenable position of becoming witnesses in this matter.

II. The Communications Between the Certified Unified Program Agency and VSSI Are Irrelevant and Conflate State Law and Federal Law

Respondent claims that communications with Mr. Sears, a representative of the Yolo County Health Department, a California Certified Unified Program Agency ("CUPA"), are relevant to show that VSSI's Spill Prevention Control and Countermeasures ("SPCC") Plan complied with EPA requirements. They are not. The CUPA administers the California Aboveground Petroleum Storage Act ("APSA"). This action is brought under the federal Clean Water Act ("CWA"), a program that is not delegated to the state.

None of Mr. Sears' communications imply or indicate that he is opining on compliance with the federal program. The CUPA is not confused about its role, and Mr. Sears does not put himself forward as a representative of EPA. Mr. Sears provides guidance regarding compliance with the APSA, as is appropriate; this guidance has no bearing on VSSI's compliance with standards written, assessed, and enforced by the federal EPA pursuant to the federal CWA. EPA seeks to limit these communications in the record to avoid confusing the standards at issue in this case.

Respondent suggests in RX 41 that Mr. Sears "initially inspected VSSI's SPPC Plan under a program administered by the United States Environmental Protection Agency." Opposition to Motion p. 12. In fact, Mr. Sears writes in RX 41, "I will contact your office … to

schedule a re-inspection of both the CUPA and the APSA/SPCC Plan Inspections." [1] RX 41. Respondent next claims that RX 42 shows that Mr. Sears sought guidance from the EPA regarding regulatory ambiguity for SPCC Plans. RX 42 is a communication between Michael Sears and Peter Reich, an EPA inspector. Mr. Sears asked Mr. Reich to opine generally about one section of the Code of Federal Regulations, without context to this case. The communication does not mention VSSI nor does Mr. Reich's response draw any conclusion regarding VSSI's compliance with the CWA. As such, this exhibit is also irrelevant to this action. The other exhibits are similarly irrelevant as they continue to demonstrate VSSI's potential compliance under state law, but not federal law. At no point do the communications discuss compliance under the CWA or the adequacy of Respondent's SPCC Plan under the CWA.

Based on the foregoing reasons, the exhibits in question should be removed from the record as described above and in Complainant's Motion in Limine.

Respectfully Submitted,

R A Sugerman

Rebecca Sugerman
Assistant Regional Counsel
U.S. EPA, Region IX

[1] APSA requires that a regulated facility maintain an SPCC Plan pursuant to 40 CFR Part 112. While both programs require an SPCC Plan, the programs have different requirements. For example, APSA does not regulate asphaltic cement, the material stored in the two 2.4 million-gallon tanks at issue in this case. An SPCC Plan that does not address asphaltic cement stored onsite could be compliant with APSA while also noncompliant with CWA.

CERTIFICATE OF SERVICE

I, Rebecca Sugerman, hereby certify that on April 5, 2019, I caused to be filed electronically the foregoing Reply to Respondent VSS International, Inc.'s Opposition to Complainant's Motion in Limine 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, Rebecca Sugerman, herby certify that on April 5, 2019, I served a true and correct copy of the foregoing Reply to Respondent VSS International, Inc.'s Opposition to Complainant's Motion in Limine via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: April 5, 2019

Respectfully Submitted,

R A Sugerman

Rebecca Sugerman
Assistant Regional Counsel
U.S. EPA, Region IX
Attorney for Complainant