

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
) DOCKET NO. OPA 09-2018-0002
)
VSS International, Inc.,) **RESPONSE TO RESPONDENT'S**
) **MOTION FOR DEFAULT**
)
Respondent.)

Pursuant to 40 C.F.R. § 22.16(b), Complainant responds to Respondent's April 8, 2019 Motion for Default as follows:

I. Complainant complied with the Consolidated Rules of Practice and the Presiding Officer's Orders, acted in a timely manner and not in bad faith.

40 C.F.R. § 22.19(a) provides, in relevant part, that, “[i]n accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in section 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.” 40 C.F.R. § 22.19(f) further provides that “[a] party who has made an information exchange under paragraph (a) of this section...shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.” Where the supplement is not

prompt or where the existing information is not incomplete, inaccurate, or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice, supplements to prehearing exchanges may be denied. See *In the Matter of 99 Cents Only Stores*, Docket No. FIFRA-9-2008-0027, 2009 WL 1900069 at 4 (June 18, 2009).

In this case, the Presiding Officer issued the Prehearing Order on April 18, 2018, which provides in pertinent part that, “[a]ny addition of a proposed witness or exhibit to the prehearing exchange...must be filed with an accompanying motion to supplement the prehearing exchange only when supplementation is sought within 60 days of the scheduled hearing.” (Emphasis added.) Prehearing Order at 4. Accordingly, as the Presiding Officer alludes to in her February 15, 2019 Order Granting Complainant’s Motion to Supplement and Correct the Prehearing Exchange, Complainant filed its Motion to Supplement and Correct the Prehearing Exchange on January 11, 2019, before issuance of the order rescheduling the hearing from January 29, 2019. Based on the hearing date at that time, Complainant had to file a motion to supplement to comply with the Prehearing Order as well as 40 C.F.R. § 22.22(a)(1),¹ because Complainant was seeking to supplement and correct its Prehearing Exchange approximately seventeen days before the scheduled hearing. When the hearing date was rescheduled to May 16, 2019, pursuant to the Prehearing Order, the 60-day deadline to supplement moved to March 18, 2019.

¹ 40 C.F.R. § 22.22(a)(1) provides that, “[i]f, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under section 22.19(a), (e), or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit, or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.”

The February 15, 2019 Order directed Complainant to strictly comply with the Prehearing Order regarding the identification and labelling of Complainant's proposed exhibits. Contrary to Respondent's assertion, the February 15, 2019 Order did not bar Complainant from further supplement. The Prehearing Order continues to control the timing of supplemental exchanges. The Presiding Officer's January 2019 Order recognized this understanding as correct in noting that the then apparent need for leave to supplement the Prehearing Exchange was avoided where, "as the hearing in this matter has subsequently been rescheduled to...greater than 60 days prior to Complainant's Motion to Supplement, it is appropriate to grant Complainant's request to supplement its Prehearing Exchange at this juncture." February 15, 2019 Order at 1.

Thus, in supplementing its Prehearing Exchange, Complainant complied with the Consolidated Rules of Practice, the Presiding Officer's Prehearing Order and the directives of the February 15, 2019 Order. In addition, it did so in a timely manner and not in bad faith.

II. Complainant's Supplement to the Prehearing Exchange presents no prejudice to Respondent

While Complainant's March 15, 2019 Supplement to the Prehearing Exchange did include some documents that were not anticipated in its January motion or the February 15, 2019 Order, these additional documents did not add any new facts or provide any consequential substantive information. The addition of Janice Witul's and Troy Swackhammer's resumés does not change their expected testimony at hearing but merely expands their ability to render such testimony as experts, if deemed necessary. With respect to the planning distance calculation provided in Mr. Michaud's Second Declaration, under the Consolidated Rules of Practice, Complainant was neither required to provide the declaration nor the planning calculation in its Prehearing Exchange; Respondent is only entitled to a "brief narrative summary" of the witness' expected testimony. See 40 C.F.R. § 22.19(a)(2). Although Complainant maintains that no

drawn-out calculation of a planning distance is necessary, Complainant nonetheless provided the declaration in the event that this subject of testimony is elicited during hearing.² Furthermore, the declaration uses variables from Respondent's own expert's report.³ CX 55 at ¶14. As the Presiding Officer's concluded in *In Re: 99 Cents Only Stores* at 5, Mr. Michaud's Declaration with the planning distance calculation that Complainant supplied "can only assist Respondent in preparing for hearing." Finally, Respondent has had more than 60 days before the hearing to consider and prepare for these documents supplemented into Complainant's Prehearing Exchange. Consequently, Respondent's claim that these supplements have resulted in "extreme prejudice" let alone any prejudice to Respondent is without merit.

If, however, the Presiding Officer finds that these additions to Complainant's Prehearing Exchange have resulted in some prejudice to Respondent, Complainant requests that the Presiding Officer only strike the exhibits objected to in Respondent's motion.

40 C.F.R § 22.19(g) provides that "[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

- (1) Infer that the information would be adverse to the party failing to provide it;
- (2) Exclude the information from evidence; or
- (3) Issue a default order under § 22.17(c).

The general principles of law disfavors default as a means of concluding cases. See *In re: JHNY, Inc., A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 381 (EAB 2005). Moreover,

² This potential became apparent following the discussion raised in the Order on Complainant's Motion for Accelerated Decision as to Liability. Order on Complainant's Motion for Accelerated Decision as to Liability, Dec. 26, 2018, p. 32.

³ Mr. Michaud made one change, the response time variable, based on his reading of the prescriptive regulation and which actually favors Respondent. Mr. Michaud reaches a different calculation based on these numbers principally due to what appears to be a mathematical error in Respondent's calculation. CX 55 at ¶ 6.

the Office of Administrative Law Judges Practice Manual (“Practice Manual”) provides that the appropriate remedy to seek if an opposing party believes that a supplement is prejudicial to its case: “file a motion to strike the supplement.” Practice Manual at 21.

III. Respondent failed to follow the Consolidated Rules of Practice and the Prehearing Order

It should be noted that, while Respondent without basis alleges that Complainant willfully did not comply with the Consolidated Rules of Practice, the Presiding Officer’s Prehearing Order and the February 15, 2019 Order Granting Complainant’s Motion to Supplement and Correct the Prehearing Exchange, Respondent’s own filing of its present motion failed to comply with the Consolidated Rules of Practice and the Prehearing Order. Respondent did not request leave to file its Motion, filed less than 60 days before the hearing date, nor provide any showing of good cause for not promptly filing it when it indicated in emails dated March 15, March 29 and April 5 that it would file this Motion. See Respondent’s Motion at 2, footnote 1.

CONCLUSION

Based on the foregoing reasons, Respondent’s Motion for Default should be denied.

Respectfully submitted,

4/22/19

Date

R A Sugerman

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

CERTIFICATE OF SERVICE

I, Rebecca Sugerman, hereby certify that on April 22, 2019, I caused to be filed electronically the foregoing Response to Respondent's Motion for Default 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, hereby certify that on April 22, 2019, I served a true and correct copy of the foregoing Response to Respondent's Motion for Default in the Matter of VSS International, Inc via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: April 22, 2019

Respectfully Submitted,

R A Sugerman

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