

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)	
)	
)	DOCKET NO. OPA 09-2018-0002
VSS International, Inc.)	
)	Complainant's Opposition to Respondent's
)	Amended Motion for Reconsideration and
Respondent.)	Appeal
)	
_____)	

Complainant submits this opposition to Respondent VSS International, Inc.'s Amended Motion for Reconsideration and Appeal.

The Consolidated Rules of Practice (40 C.F.R. Part 22) govern these proceedings, and govern interlocutory appeal from or review of orders or rulings other than initial decisions.

Specifically, section 22.29(a) provides that

[a] party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

In the present case, when Respondent initially filed its Motion for Reconsideration and Appeal of the Presiding Officer's Order on Complainant's Motion for Accelerated Decision as to Liability dated December 26, 2018 (Order), Respondent failed to request that the Presiding Officer forward the Order to the Environmental Appeals Board and failed to state any grounds

for the appeal. Complainant filed its opposition to the initial Motion, which pointed out the deficiencies in the initial Motion.

Respondent now attempts to cure its “defective” initial Motion by filing this Amended Motion without providing good cause as to why this amendment should replace its initial Motion and therefore be considered timely. Respondent should not be allowed to use the pretext of “amendment” to do what it could have and should have addressed initially. *Cf. In the Matter of Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301 (Oct. 21, 2005) (Order on Respondent’s Motion Requesting Recommendation of Interlocutory Review of Prior Orders Denying Such Same Relief, And/Or for Reconsideration, and to Set-aside Joint Stipulation (hereinafter “Martex Order”) (“if a respondent were permitted to continually seek a ‘recommendation for review’ of previous denials of such recommendations on the same underlying Orders, then such motions could go on *ad infinitum* without ever reaching the EAB”)). It should be noted that Respondent did not seek to amend until after Complainant filed its opposition to the initial Motion, which pointed out the deficiencies in the initial Motion. Accordingly, Respondent failed to file its Amended Motion within 10 days of service of the Order and therefore failed to follow the procedural prerequisites at 40 C.F.R. § 22.29 for filing an appeal.

In addition, Respondent’s Amended Motion still fails to request “that the Presiding Officer forward the [Order] to the Environmental Appeals Board for review and stat[e] briefly the grounds for this appeal” that meet the standard warranting such a review. Section 22.29(b) provides that the Presiding Officer may recommend any order or ruling for review when: (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion and (2) either an immediate appeal will materially

advance the ultimate termination of the proceeding or review after the final order is issued will be inadequate or ineffective. Nothing in Respondent's Amended Motion suggests that Respondent's request meets the standard for review provided in 40 C.F.R. § 22.29(b).

Respondent also has not met the standard to prevail on a Motion for Reconsideration. Although the Consolidated Rules of Practice do not contain a provision for reconsideration of a Presiding Officer's order or decision, this Presiding Officer has found that the standard for ruling on a motion to reconsider an interlocutory order "should be at least as strict as the EAB's standard for reconsidering a final decision at 40 C.F.R. § 22.32." Martex Order at 5. The standard at 40 C.F.R. § 22.32 requires that such a motion "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. Moreover, the preamble to the 1999 amendments to the Consolidated Rules of Practice states that a "motion for reconsideration is not intended as a forum for rearguing positions already considered or raising new arguments that could have been made before." 64 Fed. Reg. 40138, 40168 (July 23, 1999). This tribunal further stated that a motion for a Presiding Officer to reconsider "may be granted, if at all, where there is an 'obvious error of law' or 'clear error' has been shown, or perhaps where there is merely a 'mistake of law or fact,' but not merely where there are grounds for a different opinion." Martex Order at 6. Respondent's Amended Motion fails to demonstrate that there is an obvious error of law, clear error, or a mistake of law or fact but rather is merely an attempt to reargue its position or raise new arguments.

The Order states that "[t]he record reflects that there is no question of material fact that the Facility did not have a SPCC plan containing all of the information required by 40 C.F.R. § 112.7" Order at 19. The Oil Pollution Prevention regulations require that the SPCC plan

include a facility diagram, which must mark the location and contents of each container, and “also address in your plan the type of oil in each container and its storage capacity.” 40 C.F.R. § 112.7(a)(3)(i). Table 3 of VSS’s SPCC Plan dated April 6, 2012 (2012 Plan), titled “ASTs Identifications and Capacities (Oil Product ASTs), indicates that Tanks 817, 818, and 848 contain oil products: asphalt, asphalt petroleum, and bitumen, respectively.¹ CX 16 at 29. Figure 3 of the 2012 SPCC Plan, titled “Facility Detail,” does not indicate the location of these tanks. CX 16 at 24. Therefore, the SPCC Plan failed to meet the regulatory requirements. The Presiding Officer’s Order states that “this deficiency, among others, was noted by Ms. Witul following the 2012 Inspection, in the 2013 SPCC Checklist.” Order at 19 citing CX 4 at 8. Respondent was afforded the opportunity to fully address in its Opposition to Complainant’s Motion for Accelerated Decision what it now frames as a new issue based on the same exhibits that were available when Respondent was drafting its Opposition.

Regarding the Rubberized Asphalt Plant, Respondent’s “chart detailing the four materials with an arrow” fails to meet the requirement at 40 C.F.R. § 112.7(a)(3), which states that the facility diagram “must mark the location and contents of each container.” A chart with a list and an arrow pointing to a general area does not meet the regulatory requirement because it does not depict actual tank locations.

Lastly, 40 C.F.R. § 112.7(a)(3) requires that the facility diagram include “all transfer stations and connecting pipes.” Consequently, a diagram that does not show connecting pipes does not meet the requirement. This is true even if the diagram states “piping not shown,” since

¹ That these products are “oil” within the definition at 40 C.F.R. § 112.1 is uncontested.

that diagram obviously fails to show the required piping. Respondent points to the May 1, 2017 Facility Response Plan to show that piping details were included. But putting details in the FRP does not satisfy the requirements to have these details in the SPCC Plan nor would compliance in May 2017, if such compliance was achieved, resolve Respondent's civil penalty liability for a violation that continued from November 27, 2012 to May 1, 2017.²

For these reasons, Complainant respectfully requests that Respondent's Amended Motion for Reconsideration and Appeal be denied.

For Complainant United States Environmental Protection Agency:

Dated: January 22, 2019

/s/ Rebecca Sugerman

Rebecca Sugerman
Rebekah Reynolds
U.S. EPA, Region IX
Attorneys for Complainant

² These are the dates set out in the Complaint, filed February 13, 2018. Due to the applicable statute of limitations, the Presiding Officer determined here that the liability for Count I begins on February 13, 2013 rather than November 27, 2012.

CERTIFICATE OF SERVICE

I, Rebecca Sugerman, hereby certify that on January 22, 2019, I caused to be filed electronically the foregoing Complainant's Opposition to Respondent's Amended Motion for Reconsideration and Appeal 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 January 22, 2019, I served a true and correct copy of the foregoing Complainant's Opposition to Respondent's Amended Motion for Reconsideration and Appeal via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: January 22, 2019

Respectfully Submitted,

/s/ Rebecca Sugerman

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