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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 FOR DEFAULT AS TO COMPLAINANT ENVIRONMENTAL PROTECTION AGENCY'S ADMINISTRATIVE COMPLAINT; MEMORANDUM IN SUPPORT THEREOF; DECLARATIONS OF RICHARD J. MCNEIL, JOHN KASTRINOS, LEE DELANO AND CRAIG R. FLETCHER IN SUPPORT THEREOF** Proceeding to Assess Class II Civil Penalty Under Clean Water Act Section 311 Hearing Officer: Chief Administrative Law Judge Susan L. Biro Hearing Location: Phillip Burton Federal Courthouse, Courtroom 15 Hearing Date: May 16, 2019 Hearing Time: 9:00 a.m.

MOTION FOR DEFAULT AS TO ADMINISTRATIVE COMPLAINT

Comes now Respondent, VSS International, Inc. ("VSSI"), by and through its attorneys of record, pursuant to Rule 22.17 (a) and (b) of the Consolidated Rules of Practice (40 C.F.R.

§ 22.17(a) and (b)) respectfully requesting entry of a default as to Complainant Environmental Protection Agency's ("Complainant" or "EPA") Administrative Complaint given its willful "failure to comply with the information exchange requirements of § 22.19(a)," as well as its willful failure to comply with orders entered by the Presiding Officer, Chief Administrative Law Judge Susan Biro, issued on April 20, 2018, and February 15, 2019, in a manner evidencing willful manipulation of the rules through eleventh-hour "sleight-of-hand designations of new experts and the submission of a new expert declaration, resulting in extreme prejudice to Respondent, as follows.[1]

MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT

I. INTRODUCTION

This action involves alleged violations of Spill Prevention Control and Countermeasure ("SPCC") and Facility Response Plan ("FRP") requirements.

There has been no spill, threatened spill or harm to any person or to the environment resulting from the alleged violations, which EPA nevertheless has ardently, persistently and vigorously pursued, seeking a maximum penalty and litigating aggressively.

VSSI maintains, and has maintained during on the order of a dozen discussions with EPA over the past five years, that a Facility Response Plan ("FRP") is not required for its facility.[2] That is predicated on VSSI having commissioned analyses under 40 C.F.R. Section 112.20 that have determined that no discharge from the VSSI facility could reach the Sacramento Deep Water Ship Channel ("SDWSC") and, based on that and for other reasons, could not, because of its location, reasonably be expected to cause substantial harm to sensitive environments. VSSI's

[1] In emails dated March 15, 2019, March 29, 2019 and April 5, 2019, Respondent indicated that it would file this motion and previewed the relief to be requested and then provided on April 5 a draft of the proposed filing. EPA indicated it would oppose the motion. Declaration of Richard J. McNeil ("McNeil Decl."), Par. 4.

[2] VSSI nonetheless voluntarily prepared, and is implementing, an FRP, in deference to EPA's demands.

studies it commission included reports prepared by Haley & Aldrich and WHF, Inc.– in 2014 and 2015, respectively – analyzing the facility's compliance under 40 C.F.R. Part 112, including under Attachment C-III ("Calculation of the Planning Distance"). These reports were contemporaneously shared with EPA and they confirmed VSSI's conclusion.

In addition to receiving, reviewing and, VSSI is given to understand, passing along to its own experts, the Haley & Aldrich report (but apparently not the WHF report), between 2014 and the filing of the Administrative Complaint in this action in February 2018, and even thereafter, both EPA and VSSI met, discussed, and analyzed the applicability of the FRP regulations to the VSSI facility. As noted above, VSSI disagreed with EPA's position (which was never explained, nor its expert report shared, until after EPA commenced this action) but VSSI nonetheless voluntarily agreed to comply with the FRP requirements as if they were applicable.

In addition, EPA and VSSI also discussed and attempted to address VSSI's compliance with its obligations to keep records of inspections and tests of aboveground storage tanks at the VSSI Facility and satisfy other SPCC requirements. VSSI retained an expert for this purpose. EPA did not retain, or designate, an expert on this subject, opting instead to rely on its enforcement personnel to determine and, apparently, to testify as to the nature of the applicable industry standards. This dichotomy was reflected in the initial and rebuttal prehearing exchanges in this matter (as to which EPA continued to assert it had no need of an expert on this subject while VSSI designated an expert).

Accordingly, even though it obviously was no secret or surprise to either EPA or VSSI that a planning distance calculation (required by 40 C.F.R. Section 112.20) would ultimately be an integral issue in this proceeding, EPA never submitted a planning distance calculation

supporting its contention that VSSI had to prepare a FRP -- including not doing so on ***all*** of the below occasions:

- not between 2014 and 2018 when the parties were discussing FRP requirements;
- not in 2016 when Mr. Michaud prepared his expert FRP applicability report, as to which Mr. Michaud freely acknowledges: "I did not generate a written calculation for the D3 planning distance in my [2016] review." [Proposed CX 55, pages 2-3 of 9.];[3]
- not in February 2018 when EPA filed its Administrative Complaint;
- not in April or July 2018 when EPA made its initial and its rebuttal prehearing exchanges;
- not in August 2018 when EPA filed its Motion for Accelerated Decision;
- not after December 2018 when this Tribunal noted the significance of EPA having not performed a planning distance calculation; and
- not when EPA filed its Motion to Supplement its exchange in January, 2019 – after it had been served with this Tribunal's Order strongly suggesting that EPA's expert's failure to perform and/or present a planning distance calculation was a potentially fatal flaw to EPA's Complaint.

Respecting the tank testing question, EPA also during this time did not take any of these opportunities to designate an expert witness on the VSSI facility inspection and testing and records of tank inspections and related industry standards, even though, if Ms. Witul, who was intimately involved in all aspects of this case throughout 2012 to the present, were in fact an

[3] This report, for reasons unknown to VSSI, was not provided to VSSI by the EPA until 2018 [RX 91, page 1 of 2.]

expert on this subject, one would think she would have documented that expertise in the prehearing exchange filings associated with this proceeding before March 14, 2019.

Despite working with VSSI for over five years regarding an FRP for the VSSI facility, EPA consciously chose to delay until barely two months before the scheduled hearing in this matter to submit a detailed, highly technical planning distance calculation – and, furthermore, to designate additional FRP expert witnesses both on the FRP and the tank integrity issues.

The complexity and depth of this proffered testimony cannot at this date be timely analyzed and responded to by VSSI's designated witnesses on this and the tank testing subjects, Mr. DeLano and Mr. Kastrinos. Declaration of Lee DeLano ("DeLano Decl."), ¶10; Declaration of John Kastrinos ("Kastrinos Decl.."), ¶5; Declaration of Craig R. Fletcher ("Fletcher Decl.") ¶ 4.[4]

EPA executed neither of these stratagems with leave of Court, though clearly that was required.

Instead, EPA slid its planning distance calculation and its additional FRP experts, Janice Witul, Troy Swackhammer and its newly-designated tank expert, Ms. Witul, at the end of a supplemental prehearing exchange description that had been ordered by the Court in granting a motion that permitted the filing of *none of this information,* but rather was explicitly limited to

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[4] As noted, this also includes EPA attempting to transmute Ms. Witul from a fact witness into an expert (again, only after this Tribunal advised EPA that her lay designation was "problematic" "as Complainant has not identified Ms. Witul as an expert witness competent to provide [ ] expert opinion evidence on [the applicable industry standards of the tank testing and inspection protocol] with regard to the subject matter of Count IV." VSSI's expert on this subject, Mr. Fletcher, has been blindsided by this designation and cannot timely undertake the necessary analysis in order to prepare a response. Declaration of Craig R. Fletcher ("Fletcher Decl.", ¶4.)

other specifically identified documents -- none of which even remotely encompassed EPA's newly submitted planning distance calculation or FRP or tank testing expert witnesses.

The EPA's disregard of this Court's prior orders regarding the timing and purpose of the prehearing exchange and the parameters of the supplement to prehearing exchange, coupled with EPA's withholding of key information and the proffered expert status of three key witnesses until two months' before hearing, warrants entry of default.

This is especially because, clearly, it was deliberately deceitful and has prejudiced Respondent to an extraordinary degree as Respondent simply cannot adequately prepare for the hearing, having only recently been inundated with this new information.

EPA's delay in producing and disclosing this evidence cannot be viewed in any light other than one that makes clear that EPA intended to place VSSI at a disadvantage at the May 2019 hearing. This is especially the case here given that EPA already had filed a motion only two months previously to supplement its exchange and said nothing about the new designations and declarations.

As discussed below, and even though EPA has already broken its fair share of the prehearing exchange rules regarding supplemental exchanges, among those is a requirement that any supplement be "prompt." Here, because the parties have been discussing the FRP issue, including the planning distance calculations, for years, in no way can the supplemental exchange be viewed as being "prompt."

With less than two months until the hearing, VSSI's witnesses have insufficient time to review, assess, and render opinions on the planning distance calculation and EPA's expert's testimony on secondary containment. The same is the case for the tank testing issue. VSSI is gravely prejudiced by EPA's election to disregard the applicable procedures contained in the

Rules of Practice and set forth in this Tribunal's prior orders and, for that reason, default should be entered against Complainant.

II. BACKGROUND FACTS

Complainant EPA filed its Administrative Complaint And Opportunity To Request A Hearing (the "Complaint") on February 12, 2018. In its Complaint, the EPA alleges five counts against VSSI pursuant to the Clean Water Act (33 U.S.C. § 1321 *et seq.*), as amended by the Oil Pollution Act of 1990. Counts I through III address various and sundry SPCC requirements (depiction of certain facility equipment on a facility diagram, affixing proper signatures and certifications, updating plans based on the installation of new equipment, etc.)

In Count IV (*see* Compl., ¶¶ 61-67), the EPA 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 period of three years . . . ." Compl., ¶ 65.

In Count V (*see* Compl., ¶¶ 68-78), the EPA alleges that VSSI was "required to prepare and submit a [facility response plan ("FRP")] and the response plan cover sheet on or about March 21, 2012," but "failed to timely submit such an FRP, along with such a completed response plan cover sheet." Compl., ¶¶ 70-71.

A. Judge Biro Issues A Prehearing Order On April 20, 2018

On April 20, 2018, this Tribunal (Chief Administrative Law Judge Biro) issued a Prehearing Order in the above-captioned matter. Noting that the Prehearing Order was issued under Section 22.19(a) of the Rules of Practice, Judge Biro set forth the requirements for a prehearing exchange between the parties. *See* Prehearing Order, at p. 2. Specifically, Judge Biro ordered that the parties file, and serve on the opposing party, "a list of all exhibits, numbered in sequential order, that the party intends to produce at the hearing, along with a copy of each

exhibit marked for identification as follows: i. Complainant's exhibits shall be identified as 'CX.'. . . ." *Id.*, at p. 3. In addition, EPA was required to submit, as part of its Rebuttal Prehearing Exchange, "any documents in response to [VSSI's] Prehearing Exchange . . . ." *Id.* Complainant's initial prehearing exchange was set for June 1, 2018; Respondent's prehearing exchange was set for June 22, 2018; and Complainant's rebuttal prehearing exchange was set for July 6, 2018. *Id.*, at p. 4.

Rule 22.19(a) also provides that "[e]xcept 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."

The Prehearing Order likewise recited this language from Rule 22.19(a) and further emphasized as follows:

"Therefore each party should thoughtfully prepare its prehearing exchange" (emphasis supplied).

The Prehearing Order provided for supplementation of the Prehearing Exchange. Specifically, the order requires that

> [a]ny addition of a proposed witness or exhibit to the prehearing exchange, submitted pursuant to Section 22.19(f) of the Rules of Practice, must be filed with an accompanying motion to supplement the prehearing exchange only when supplementation is sought within 60 days of the scheduled hearing.

Prehearing Order, at p. 4.

At the same time, Rule 22.19(f) requires any supplementation (by motion or otherwise) to be made "promptly . . . . when the party learns that the information exchanged or response provided is incomplete, inaccurate, or outdated . . . ."

Beyond the requirements and schedule for the parties prehearing exchange, the Prehearing Order also set forth additional requirements for the filing of motions. In particular, the order provided that prior to filing a motion, "the moving party must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other party or parties." Prehearing Order, at p. 4.

Finally, the Prehearing Order admonished the parties regarding the repercussions of failing to comply with the Prehearing Exchange requirements.

As to the EPA, the Prehearing Order was quite explicit, and warned that "*its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice*." Prehearing Order, at p. 5 (emphasis in original).

The parties timely made their respective initial, and rebuttal, prehearing exchanges according to the schedule set forth in the Prehearing Order.

B. Complainant EPA Violates The Prehearing Order When Moving For An Accelerated Decision On VSSI's Liability

On August 3, 2018, EPA filed a Motion For Accelerated Decision As To Liability ("Motion For Accelerated Decision") against VSSI. In contravention of the Prehearing Order, EPA failed to meet and confer with VSSI (e.g., failed to contact Respondent to determine whether Respondent had any objection to the granting of the relief sought) before filing its Motion.

In its brief opposing Complainant's motion, VSSI sought dismissal of the motion under 40 C.F.R. section 22.17(a) on the grounds that EPA had failed to comply with an "order of the Presiding Officer," *i.e.*, the Prehearing Order. Respondent VSS International, Inc.'s Opp'n To Complainant's Mot. For Accelerated Decision, p. 2.

In reply, EPA stated that it expressed "regret[ ] that it failed to comply with the instruction in the Prehearing Order . . . ." Complainant's Reply To Respondent VSS International, Inc.'s Opp'n To Complainant's Mot. For Accelerated Decision As To Liability ("Reply"), p. 2.

The EPA also stated that it could offer no excuse for its failure to abide by the Prehearing Order and, instead, apologized to the Court. *Id.*

In this regard, EPA stated:

> "Complainant sincerely regrets that it failed to comply with the instruction in the Prehearing Order . . . . Complainant offers no excuses and apologizes to this Court for its oversight."

Reply, p. 2.

That said, EPA vigorously argued that dismissal of either its Complaint or Motion was unwarranted, for a variety of reasons. This Court on that occasion sided with EPA in that instance, confirming that EPA had "failed to follow the appropriate process for filing a motion as set forth in the Prehearing Order [but concluding that] this singular deviation is not substantial enough to warrant a finding for default in this proceeding." Order On Complainant's Mot. For Accelerated Decision As To Liability, p. 14.

Further, this Court found that dismissal of the Motion was likewise unwarranted because the record did not reflect any harm or prejudice to VSSI arising from EPA's violation of the Prehearing Order. *Id.*

C. The Court Denies EPA's Motion For Accelerated Decision Partly Due To Lack Of Competent Evidence

In its Motion For Accelerated Decision, EPA sought adjudication in its favor of all five counts in its Complaint. As to Count IV, EPA sought a finding that VSSI had violated 40 C.F.R. § 112.7(e) by failing to (i) develop written procedures for inspections and tests at the VSSI

facility and (ii) maintain records of such inspections and tests. Mot. For Accelerated Decision, pp. 26-30. As to Count V, EPA asked the Court to find that VSSI had violated the FRP requirement of 40 C.F.R. § 112.20 by failing to timely file and implement an FRP for the VSSI facility. *Id.*, pp. 30-32.

This Court denied the Motion For Accelerated Decision (except as to Count I, as to which the motion was granted) because it determined a genuine issue of material fact existed as to all such counts.

Moreover, as to Count IV and its allegations that VSSI's 2012 SPCC Plan did not meet the requirements of the Oil Pollution Prevention regulations, the Court found that EPA relied "solely" on the declaration of Janice Witul for support of that allegation. Motion For Accelerated Decision, p. 26.

EPA, however, had not designated Ms. Witul as "an expert witness competent to provide such expert opinion evidence on this technical subject matter," and had failed to submit a resume or curriculum vitae in support of her qualification as an expert witness. *Id.*

As a result, the Court found Ms. Witul's declaration "insufficient to establish the industry standards applicable to inspection and testing for the ASTs" at the VSSI facility. *Id.*

Likewise, the Court found a genuine issue of material fact existed as to whether or not the VSSI facility was located at a distance from the Sacramento Deep Water Shipping Channel ("SDWSC") such that a discharge from the VSSI facility could cause injury to fish, wildlife, and sensitive environments. Motion For Accelerated Decision, p. 32.

Although EPA provided declarations from Troy Swackhammer and William Michaud claiming that the VSSI facility was within the planning distance from the SDWSC requiring VSSI to submit an FRP, neither gentleman actually provided an analysis of the planning distance

calculation for VSSI that identified the specific inputs each relied upon to make the calculation. *Id.*

On the other hand, VSSI's experts provided planning distance calculations and related analyses that concluded, among other things, that a spill from a ruptured tank at the VSSI facility would not reach the SDWSC. *Id.* Consequently, the Court found EPA's evidence incomplete and inadequate to support a finding in favor of Complainant. *Id.*

D. EPA Files A Motion To Supplement And Correct Documents Already Included In Its Prehearing Exchange

On January 11, 2019, EPA filed its Motion to Supplement and Correct the Prehearing Exchange ("Motion to Supplement"). Although EPA had (and had had) this Court's December 26 Order for over two weeks when it filed its January 11, 2019 Motion, and even though it represented that, as of that date, "Complainant has learned that a portion of its prehearing exchange is incomplete, inaccurate or outdated" (further asserting: "The specific supplements and corrections are provided below"), Complainant neither referred to nor sought to correct any incomplete, inaccurate or outdated matters which may have come to its attention upon reviewing this Court's December 26, 2018 Order, including its failure to designated Ms. Witul and/or Mr. Swackhammer as expert witnesses or its failure to have presented, among other defects, planning distance calculations.

Rather, and seemingly completely ignoring this Court's December 26, 2018 Order, in the Motion to Supplement instead EPA identified seven (7) specific documents that it sought to correct or add to its prehearing exchange. Mot. To Supplement, pp. 1-3.

Below are the seven documents that were the subject of Complainant's January 11, 2019 motion (and the justification, in Complainant's view, that supplementation was warranted):

- CX 20 (which Complainant explained it had mismarked)

- CX 22 (which Complainant explained was an updated 2018 version of a prior 2011 version of a "costs of compliance" document)
- CX 33 (which Complainant explained was the entire version of a map as to which an excerpt previously had been exchanged)
- CX 35 (which Complainant explained was an updated version of a document which previously had been exchanged)
- CX 36 (which Complainant explained was an updated version of a document which previously had been referred to during the prehearing exchange); and
- PE 7 (which Complainant explained was a correction substituting the identification label of expert William Michaud's CV with the identification label of the Region 9 Hearing Clerk's report respecting any response to the public comment of the publication of the administrative complaint commencing this proceeding)

EPA also requested that it be allowed to "adopt and include" in its prehearing exchange any of the exhibits Respondent identified in its Prehearing Exchange. *Id.*, p. 3.

In addition, and consistent with the foregoing, in support of its motion EPA argued the motion should be granted because VSSI would not be prejudiced by the inclusion of these documents in its prehearing exchange because the motion only

> seeks to correct or clarify documents already included in the Prehearing Exchange, does not prejudice Respondent because Respondent is or should be familiar with these documents or the content of these documents, . . . or the documents are favorable to Respondent, . . . or may narrow the focus at hearing because many of these documents are documents that are included in Respondent's Prehearing Exchange.

Mot. To Supplement, p. 4.

E. The Court Grants Complainant's Motion To Supplement Prehearing Exchange But On Very Specific And Limited Conditions

On February 15, 2019, the Court granted Complainant's Motion To Supplement. Order On Complainant's Mot. To Supplement And Correct The Prehearing Exchange ("Order On Mot. To Supplement"), pp. 1-2. Although the Court noted that it was "appropriate to grant" Complainant's Motion to Supplement given that the (then calendared) June 2019 hearing was more than 60 days away, there is no indication that this Tribunal intended to grant Complainant unfettered and wholesale license to supplement its prehearing exchange. *See id.*, pp. 1-2.

Quite to the contrary, the Court granted the Motion to Supplement "under the conditions provided for below." *Id.*, p. 1. To begin, those conditions specified that the Court ordered that Complainant submit a Supplemental Prehearing Exchange by March 15, 2019, *strictly complying* with the directives of the Prehearing Order – precisely because previously "Complainant did not comply with the directives in the Prehearing Order regarding identifying and labeling its proposed exhibits[.]" Order On Mot. To Supplement, p. 2.

Nowhere in the Order On Motion To Supplement, explicitly or impliedly, did the Court indicate that EPA could supplement its prehearing exchange beyond that identified in Complainant's motion and the Court's order, s*ee id.*, pp. 1-2 -- and indeed, the opposite is the case as the order limited any further supplementation to those matters that were the subject of the Motion to Supplement and Correct (which, of course, did not include the new exhibits and designations set forth in the March 14, 2019 exchange).

This barred EPA from supplementing the record beyond those matters with exchange items beyond those set forth in its January 11, 2019 Motion or those exhibits already identified in Complainant's Initial or Rebuttal Prehearing Exchange, a bar which EPA violated, as discussed immediately below.

F. EPA Submits A Supplement To Its Prehearing Exchange That Goes Far Beyond The Relief Sought In Its Motion And Granted By This Court

EPA filed and served its Supplemental Prehearing Exchange on March 14, 2019.

Instead of abiding by the Court's very specific conditions in its Order On Motion To Supplement, EPA exploited its Supplemental Prehearing Exchange as an opportunity to expand its expert witnesses designations and reports as well as the factual support for the Complaint.

As noted above, EPA identified two additional expert witnesses – Janice Witul and Troy Swackhammer – in its supplemental prehearing exchange. Complainant's Supplement To Prehearing Exchange ("Supplemental Prehearing Exchange"), pp. 1-3. (Previously, EPA had only identified Ms. Witul's and Mr. Swackhammer as fact witnesses.) Complainant's Prehearing Exchange, p. 2.)

Clearly, after failing to prevail on its motion for accelerated decision -- particularly on Counts IV and V of its Motion For Accelerated Decision – EPA, unhappy with that decision and surreptitiously looking for a way to undo it, decided to unilaterally designate both Ms. Witul and Mr. Swackhammer as expert witnesses and expand the scope of their testimony at the hearing on this matter and add an entirely new declaration for Mr. Michaud.

This was no accident. It was not done to "correct" or "clarify" an incomplete, inaccurate or outdated exchange. Rather, it was done to seek a calculated strategic advantage. Ms. Witul is now expected to also testify regarding "the SPCC tank inspection and testing requirements, and her calculation of a proposed penalty for the Oil Pollution Prevention violations at the Facility," while Mr. Swackhammer will additionally testify regarding "the application of EPA's regulations, tank testing and integrity requirements and the use of the 'substantial harm' criteria for determining applicability of 40 C.R.F. § 112.20" to VSSI's facility. Supplemental Prehearing Exchange, pp. 2-3. EPA has submitted Ms. Witul's and Mr. Swackhammer's resumes in support

of their expert designations. *Id.*, pp. 2, Exh. CX 50 and CX 51. Mr. Michaud's declaration (CX 55) purports to set forth a planning distance calculation to determine the applicability of an FRP to the VSSI facility (*see* CX 59, p. 2), as well as an analysis of secondary containment at the VSSI facility. *Id.*, p. 7. This analysis was glaringly missing from Complainant's Motion For Accelerated Decision. *See* Motion For Accelerated Decision, pp. 30-32.[5]

Unlike EPA's prior failure to follow the prehearing exchange rules (which it chalked up to "oversight"), EPA's decision to substantively enhance the record with additional experts and reports on the FRP and tank testing issues in its March 14 supplemental exchange was no accident, that should simply be overlooked.

To begin with, as noted above, EPA already had this Tribunal's December 26, 2018 Order for over two weeks when its filed its Motion to Supplement on January 11. One must assume that EPA had read and reflected on it. Especially as to Counts IV and V it is hard to believe that the import of EPA's failure to designate (in the case of Count IV) or adequately prepare (in the case of Count V) its experts went unnoticed by EPA.

Next, and the lapse in EPA funding during most of January notwithstanding, the record reflects that EPA counsel were fully engaged on this matter during this time, and therefore do not have that as an excuse available to them.

For example, counsel for EPA previously informed Ms. Priest and Respondent's counsel that "Complainant has been preparing for this hearing as essential employees through the shutdown and can be ready for hearing with a week notice." Declaration of Richard J. McNeil in Support of Respondent VSS International's Motion for Default of Complainant Environmental

[5] Mr. Michaud's newly-minted declaration is neither dated nor signed despite being submitted 10 months after the initial prehearing exchange and three months after the Court's Order On Motion For Accelerated Decision, *see id.*, p. 9, not to mention nearly four years after VSSI first submitted its written planning distance calculations performed by Mr. DeLano in 2015 (CX 23 page 34 of 41).

Protection Agency's Administrative Complaint ("McNeil Decl."), ¶2, Ex. 1. Having represented to this Tribunal that EPA was ready for hearing even in the absence of the subsequent exchange it filed in March, it certainly would not be unfair to hold EPA to this standard, which it itself advocated.

In addition, not only was counsel aware of the prior order and its significance, and fully authorized and prepared to prosecute this matter during the shutdown, a number of same day post-filing corrections to matters related to the filing and service of EPA's "corrected" exhibits further indicate that EPA was fully engaged on this matter and well aware of what it had filed, as it continued to fine-tune its filing even after it had been made. McNeil Decl.", ¶3, Exs. 2 and 3 (counsel for EPA attending to, and notifying Ms. Priest and counsel for Respondent of, post-filing corrections and clarifications regarding the confirming that she and her co-counsel had been designated "essential employees through the shutdown . . ." McNeil Decl., ¶2, Ex. 1.

G. Complainant's Unsanctioned Late Submittal Of Janice Witul and Troy Swackhammer As An Expert And Mr. Michaud's Second Declaration Prejudices VSSI's Defense

EPA filed its Complaint over a year ago on February 12, 2018. In its Complaint, Complainant alleged that VSSI was required to prepare an FRP under 40 C.F.R. § 112.20(a) because the VSSI

> Facility exceeded 1,000,000 gallons in oil storage capacity following installation of Tank #2001 in or about March 21, 2012, and because the Facility is located at such a distance from the Sacramento Deep Water Ship Channel that a discharge could cause injury to fish and wildlife and sensitive environments . . . .

Compl., ¶ 70.

Despite this allegation, EPA failed in its initial and rebuttal prehearing exchanges, which concluded nine months' ago, to submit any expert analysis for the planning distance calculation required under 40 CFR 120, Appendix C-III to determine whether a facility, like VSSI, must

prepare an FRP. *See* Complainant's Prehearing Exchange; *see also* Complainant's Rebuttal Prehearing Exchange. Instead, EPA waited until two-months before the May 16, 2019, hearing on this matter to submit an unsigned, undated expert witness declaration on the planning distance calculation. *See* Complainant's Supplemental Prehearing Exchange, p. 3; *see also* CX 55.

The dispute over the FRP applicability question did not arise in March 2019 -- or for that matter in January 2019.

To the contrary, it is well documented that this dispute has been the subject of debate between VSSI and EPA for over five years, including the following:

- On June 26, 2013, EPA advised VSSI that it was requesting "additional information related to its compliance with the requirements for Facility Response Plans . . . ." (RX 1, page 1 of 12.)
- On January 29, 2014, VSSI advised EPA that VSSI had "undertaken to provide additional analysis regarding the potential applicability of the Facility Response Plan requirements to the VSS Emultech facility. This report is attached [(Haley & Aldrich report dated January 10, 2014 (RX pages 44-68 of 68)]. Our conclusion is that an FRP is not required at this time however we remain willing to discuss this question further with you, should you desire. (RX 4, page 1 of 68.)
- On May 22, 2014, EPA advised VSSI that "EPA believes that violations of Section 311 of the Clean Water Act ("CWA"), 42 U.S.C. Section 1321, have occurred at the facility [including] failure to have a Facility Response Plan (40 C.F.R. Section 112.20) . . . ." (RX 6, page 1 of 2.)
- In September 2014, EPA and VSSI met in person in San Francisco and VSSI committed voluntarily to prepare an FRP to show good faith, notwithstanding that it

did not believe it was required to do so, which was confirmed in a letter from VSSI to EPA dated October 2, 2014, which stated: "As I also mentioned, we still will be following up with the Facility Response Plan that we discussed in our recent meeting." (RX 9, page 1 of 29.)

- On October 24, 2014, VSSI submitted a Hazardous Materials, Environmental Compliance, and Contingency Business Plan that included a Facility Response Plan. (CX 17, pages 1-2 of 131.)
- On June 23, 2015, VSSI submitted to EPA a "Substantial Harm Criterion Determination" that provided further analysis and support for VSSI's conclusion that a FRP was not required for the VSSI facility. (CX 23, pages 1-41.)
- On January 15, 2016, VSSI submitted an updated Hazardous Materials, Environmental Compliance, and Contingency Business Plan that included a Facility Response Plan Planning Distance Calculation. (CX 18 page 83 of 161.)
- On August 23, 2016, EPA's expert William Michaud prepared an FRP Applicability Evaluation. (CX 14, pages 1-20.)
- Mr. Michaud's report was not provided to VSSI until May 4, 2018. (RX 91, page 1 of 2.)
- In connection with Complainant's Motion for an Accelerated Decision, EPA's expert William Michaud submitted a declaration that stated, among other things, as follows:
    - "the focus of my Expert Report was to determine whether the Facility satisfies the substantial harm criteria at 40 C.F.R. Section 112.20 . . . ." (*id.* at 2).
    - "I determined that because the Facility was located less than 0.5 miles from the SRDWS, to evaluate the proximity of the Facility to a fish and wildlife

and sensitive environment, it was necessary to determine the D3 planning distance, i.e., the distance downstream from a discharge of a navigable water to the nearest fish and wildlife and sensitive environment" (*id.* at 4).

- "I determined that a discharge to the SRDWSC would be a discharge directly to a fish and wildlife and sensitive environment, or, in other words, that the distance 'downstream' from the discharge point to a fish and wildlife and sensitive environment is immediate" (*id.* at 4).
- "Therefore, I concluded that because the Facility is within the 0.5 mile to the fish and wildlife and sensitive environment, any discharge from the Facility could cause injury to fish and wildlife and sensitive environments" (*id.*).

In opposition to Complainant's Motion For An Accelerated Decision, Respondent contended, in part, as follows:

- "Nor did Complainant's other expert, Mr. Michaud, calculate a planning distance. Rather, similar to Mr. Swackhammer's conclusory declaration, the Michaud Declaration merely tracks the regulatory language in 40 C.F.R. Section 112.20 and provides no analysis or factual basis for his conclusions that there is a 'reasonable expectation' that a discharge to a sensitive environment would be 'virtually instantaneous'" (*id.*, at pages 8-9, other citations omitted).
- "But performing a planning distance calculation is mandatory under Attachment C-III to Appendix C to 40 C.F.R. Section 112.20 . . . ." (*id.*).

In its reply, EPA was revealingly coy about the fact that Mr. Michaud's declaration was devoid of any planning distance calculation, contending: "calculating a planning distance is not necessary, and certainly if not done, though it was done here, is not fatal." Opposition, page 10.

Notwithstanding EPA's attempts to trivialize the necessity of a planning distance calculation, this omission did not go unnoticed by this Tribunal when it issued its December 26, 2018 Order on Complainant's Motion for Accelerated Decision, noting, among other things the following:

- "Likewise, the record reflects a genuine issue of material fact with regard to whether the facility is located at a distance from the SDWSC that a discharge from the Facility could cause injury to fish and wildlife and sensitive environments. As discussed, Complainant argues that the Facility is within the planning distance of the SDWSC as calculated by the appropriate formula . . . [h]owever, as indicated by Respondent, Complainant has not provided an analysis of its planning distance calculation for the Facility that clearly identifies each of the specific inputs relied upon in such a calculation. For example, although Mr. Swackhammer and Mr. Michaud both note in their statements regarding the planning distance calculation that the appropriate formula considers the velocity of the relevant water body . . . . neither of these sources has identified the velocity of the SDWSC applied in any calculation of the planning distance . . . ."

In addition to the foregoing, the December 26, 2018 Order on Complainant's Motion for Accelerated Decision also notes a potentially fundamental flaw in Complainant's case as respects Count IV (tank integrity testing) inasmuch as Complainant failed to designate an expert witness to testify as to industry standards respecting tank integrity testing, an expert issue. This Tribunal noted in this regard:

- "Further, with regard to the inspection and testing provisions in the 2012 SPCC Plan, Complainant relies solely upon the declaration of Ms. Witul for support of

its position that the inspection and testing provisions in the 2012 SPCC Plan do not meet the requirements of the Oil Pollution Prevention regulations as they do not incorporate the applicable industry standards into the testing and inspection protocol, and that the applicability industry standards require internal inspection and ultrasonic testing. Such reliance is problematic, as Complainant had not identified Ms. Witul as an expert witness competent to provide such expert opinion . . . ." (*id.* at 26).

Unfortunately, this does not provide sufficient time for VSSI's experts, John Kastrinos of Haley & Aldrich, or Lee DeLano of WHF, to thoroughly review and analyze the information set forth in Mr. Michaud's second declaration in the context of the claim made by the EPA and the report he previously drafted. Declaration Of John R. Kastrinos, ¶ 5. Declaration of. Lee DeLano, ¶ 10.

As part of their responsibilities, Mr. Kastrinos and Mr. DeLano calculated a planning distance calculation under 40 C.F.R. § 112.20. Id., ¶ 3. Although Mr. Kastrinos has been working with VSSI to prepare to testify at the hearing in May, he has not revisited the question of the planning distance calculations since receiving a copy of the Court's order on EPA's Motion For Accelerated Decision, i*d*., ¶ 4, for the reasons stated therein. The same is true for Mr. DeLano.

However, after reviewing Mr. Michaud's second declaration, Mr. Kastrinos estimates he would need 80 hours to digest and analyze Mr. Michaud's declaration and associated filings. *Id.*, ¶ 5. Mr. Kastrinos, however, does not have 80 hours between now and the May hearing to devote to such analysis given his other commitments he has on other projects that he cannot reschedule or cancel. *Id.* Likewise, Mr. DeLano, who estimates he would need 120 hours to

undertake this task, which he also does not have during the next six weeks. Declaration of. Lee DeLano, ¶ 10.[6]

III. LEGAL STANDARD

Under the Consolidated Rules of Practice ("CROP"), a "party's failure to adhere to procedural requirements may be grounds for a finding of default by a Presiding Officer." *In Re: JHNY, Inc.*, 2005 WL 2902519, * (E.A.B. Sept. 30, 2005).

Specifically, a "party may be found to be in default: after motion . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer[.]" 40 C.F.R. § 22.17(a).

Moreover, a "[d]efault by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice." 40 C.F.R. § 22.17(a); *see also In the Matter of: Village of Noble, Respondent*, 1999 WL 1678474 *1, at *1 (EPA Region VI July 13, 1999).

With respect to prehearing exchanges, CROP requires parties who have submitted their prehearing exchange to "promptly supplement . . . the exchange when the party learns that the information exchanged . . . is incomplete . . ., and the additional . . . information has not otherwise been disclosed to the other party . . . ." 40 C.F.R. § 22.19(f). *See also In the Matter of: 99 Cents Only Stores*, 2009 EPA ALJ LEXIS 9 ("99 Cents Only Stores"), *11 (E.P.A. June 18, 2009) (quoting 40 C.F.R. § 22.19(f)). CROP (§ 22.19(g)(3)) further provides that if a party fails to provide information within its control, as required by [Section 22.19], the Presiding Officer may, in his discretion . . . . [i]ssue a default order under § 22.17(c).

[6] As noted, Mr. Fletcher would need approximately 100 hours and six weeks to prepare for the anticipated testimony of Expert Janice Witul, as the prior rulings in this matter as well as the CROP and prehearing orders indicated that the universe of the record was such that Ms. Witul would not be testifying as an expert on tank industry standards.

It has been held that where a supplemental prehearing exchange 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." *Id.*

The reason for this, as stated in the *99 Cents Only Stores* case, was noted as being at least in part: "to prevent parties from strategically waiting until 15 days [under 40 C.F.R. section 22.22(a)(1)] prior to the proposed hearing to submit proposed exhibits and witnesses, and in order to enforce Rule 22.19(f), [thus] the undersigned requires parties to submit a motion to supplement their prehearing exchanges, to explain the reasons for not submitting it sooner."[7]

The constitutional and legislative foundation of the importance to the parties and the system for integrity in the prehearing exchange process was further articulated by the Environmental Appeals Board ("EAB") in *In Re: JHNY, Inc., A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372 (E.P.A.), 2005 WL 2902519 ("JHNY"), in which the EAB stated as follows:

> At its heart, this case concerns the authority of ALJs to regulate administrative proceedings in a manner that is transparent, predictable, allows for meaningful preparation by parties and the court, and permits timely repose. In particular, it concerns an ALJ's authority to sanction through default a party's disregard of a procedural order – one directing the parties' prehearing exchange. JHNY's arguments notwithstanding, we do not regard the prehearing exchange as a procedural nicety. Rather, because federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition and does not allow for the kind of discovery available, for example, under the

[7] In n. 2 of the *99 Cents Only Stores* case, the Court explained further its rationale for requiring that supplemental prehearing exchanges be "prompt," stating: "Parties may attempt to unfairly disadvantage their opponent by holding back significant information until a couple of weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits. Accepting supplements to prehearing exchanges without reasons for filing information after the prehearing exchange would in effect make the prehearing deadlines meaningless."

> Federal Rules of Civil Procedure, the prehearing exchange plays a pivotal function – ensuring identification and exchange of all evidence to be used at hearing and other related information (e.g., identification of witnesses). By compelling the parties to provide this information in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing. Given the key role of the prehearing exchange to administrative practice, it is not surprising that the regulations recognize that failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default. *See* 40 C.F.R. § 22.17(a); *infra* Part III.B . . . . *8 As noted below, defaults can be avoided when a party demonstrates a good cause basis for not complying with the prehearing exchange order. Likewise, once entered a default can be set aside with a good cause justification. In this case, however, JHNY ignored the ALJ's order directing the prehearing exchange and then offered no meaningful justification for having done so. JHNY rather asserted, without support or elaboration, that certain financial issues prevented it from filing earlier. The ALJ found that this justification fell well short of a good cause showing, and we agree. Indeed, the paucity of the explanation suggests that the oversight was the product of neglect rather than good cause.

Thus, whether a party seeks to avail itself of the time period set forth in Section 22.22(a)(1) (15 days and requiring an additional demonstration of good cause), or claims it should be deemed to have complied with the prehearing exchange order (both of which would apply to EPA's March 14 supplemental filing), the party must nevertheless adequately explain, or demonstrate, how the following matters are (or are not) the case – that is to say, the party seeking to exchange outside the prehearing order and/or CROP rules (including the requirement that exchanges be prompt) must affirmatively make their case in either event that:

- the exchange is prompt
- the information corrected incomplete, inaccurate or outdated information
- there was no bad faith
- there were no delay tactics

- there is no undue prejudice to Respondent
- Complainant did not delay to seek a strategic advantage

In the absence of adequately explaining why these factors are not present, the filing such a supplemental exchange is grounds for default. *JHNY; 99 Cents Only Stores*.

Admittedly, there is no preordained number of times a party must violate the CROP or the applicable hearing orders to warrant a default. As stated in *JHNY*, "there is no hard and fast rule in our jurisprudence upholding default only upon a party's repeated failure to timely exchange prehearing information. The Agency has in other instances upheld a default order upon a party's single failure to file a timely prehearing exchange . . . . The Board has never adopted the axiomatic principle that default is only warranted after a repeated failure to meet a prehearing deadline, and not adopting a per se rule in this regard is consistent with the fact-contingent nature of the 'totality of the circumstances' test we apply in these situations." (Citations omitted.)

Likewise, there is no specific amount of time prior to a hearing that the various tribunals passing upon such matters have determined to be *per se* prejudicial. To be sure, some cases involved only a couple of weeks (*see, e.g.*, *99 Cents Only Stores*), while other cases involved more on the order of a month (*see, e.g.*, *In the Matter of Strong Steel Products, LLC, Respondent*, 200 5 WL 635064 (February 18, 2005); *In the Matter of Service Oil, Inc., Respondent*, 2006 WL 3406349 (April 12, 2006), others longer. Again, however, the length of time is not in and of itself dispositive; rather, this factor is indicative of the prejudice to be suffered by the other party (especially where the delay was for bad faith or unfair strategic reasons) or where gamesmanship is involved.

Although it is true that default is considered a "harsh and disfavored sanction[] reserved only for the most egregious behavior[,]" it is appropriate "where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays." *In the Matter of: Kent Hoggan, Frostwood 6 LLC, and David Jacobsen*, 2018 WL 6136858, *3 (E.P.A. Nov. 14, 2018). In ordering such sanctions, administrative law judges have "broad discretion." *Id.* This broad discretion is "informed by the type and the extent of any violations and by the degree of actual prejudice" to the moving party. *Id.* As discussed below, default is not only justified in this case but, indeed, the only fair result.

IV. LEGAL ANALYSIS

A. EPA Has, On At Least Three Documented Occasions, Violated The CROP And The Presiding Officer's Orders, Warranting Entry Of Default

Default against a party to an administrative proceeding, including the EPA, may be entered after a motion seeking such relief upon the party's "failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer[.]" 40 C.F.R. § 22.17(a). Technical failures to comply, however, are generally insufficient. Rather, there generally must be evidence of "willful violations of court rules, contumacious conduct, or intentional delay" to justify entry of a default judgment against the party. *In the Matter of Kent Hoggan*, 2018 WL 136858 at *3.

Here, however, EPA has repeatedly engaged in willful violations of court rules and intentional delay with respect to the Court's orders. Presumably, EPA attorneys, who practice before administrative law judges as a matter of course given their official responsibilities (and EPA has had three attorneys of record on this matter), are well-acquainted with the CROP. Likewise, EPA attorneys are presumably familiar with the standard orders issued by administrative law judges, such as a prehearing order.

Nevertheless, the EPA attorneys here have thrice disregarded the CROP and Presiding Officer's orders in their prosecution of this matter, as follows:

First, EPA did not follow the Prehearing Order and its instructions for marking exhibits. Although the Prehearing Order required EPA to mark its exhibits with a "CX" (Prehearing Order, at p. 3), it did not do so for a number of exhibits submitted in its prehearing exchange conducted in April and July 2018. See Order On Mot. To Supplement, p. 2. Respondent did not seek a default order on account thereof, but this non-compliance did not go unnoticed by the Court. More specifically, the Court stated in its February 15, 2019 Order on Complainant's Motion to Supplement and Correct the Prehearing Exchange: "As Complainant did not comply with the directives in the Prehearing Order regarding identifying and labeling its proposed exhibits, it shall submit a Supplemental Prehearing Exchange no later than March 15, 2019, <u>strictly complying with the directives of the Prehearing Order</u>" (emphasis supplied).

Second, EPA completely failed to follow the meet and confer instructions in the Prehearing Order when it filed its Motion For Accelerated Decision in August 2018. Although the Prehearing Order explicitly required the EPA to "contact [VSSI] to determine whether [it] has any objection to the granting of the relief sought in the motion for accelerated decision" (Prehearing Order, at p. 4), EPA did not even attempt to do so. *See* Complainant's Reply Brief In Supp. Of Mot. For Accelerated Decision, p. 2. EPA acknowledged it had no excuse for this failure, though it supposedly expressed "regret[ ] that it failed to comply with the instruction in the Prehearing Order . . . ." Order. *Id.*, p. 2.

Although the Court sided with EPA in not granting a default, one still must wonder, did EPA not know about the meet and confer requirement, was there indifference or arrogance, or

was there some other reason forming its "lack of excuse" and "regret" (although these are perhaps sentiments, they are not really reasons within the meaning of the case law).

Third, more recently, EPA violated this Court's Order On Complainant's Motion To Supplement. That order provided specific conditions under which EPA could supplement and correct its prehearing exchange. Order On Mot. To Supplement, pp. 1-2. As noted above, those conditions included requiring EPA to "strictly" comply with the directives of the Prehearing Order because previously "Complainant did not comply with the directives in the Prehearing Order regarding identifying and labeling its proposed exhibits[.]" *Id.*, p. 2.

More fundamentally, however, the February 15, 2019 Prehearing Order Granting Complainant's Motion to Supplement and Correct the Prehearing Exchange, very explicitly circumscribed the extent to which Complainant could further supplement its exchange, stating:

> In its Supplemental Prehearing Exchange, Complainant shall appropriately identify any proposed exhibits not identified in Complainant's Initial Prehearing Exchange or Complainant's Rebuttal Prehearing Exchange with a "CX" designation, followed by a numeric, sequential exhibit number. ***This must be completed for both the proposed exhibits addressed by Complainant in its Motion to Supplement, as well as any proposed exhibits previously submitted that were either not identified with exhibit numbers in a prehearing exchange document (such as the public notice for this proceeding and the Policy on Civil Penalties dated February 16, 1984), or were improperly identified in a prehearing exchange document with a "PE" designation (such as email correspondence identified as PE 7 in Complainant's Rebuttal Prehearing Exchange).*** Instead of denoting any "revised" exhibits with an alphanumeric identifier following the "CX" designation, as proposed by Complainant, Complainant shall simply identify any such revised exhibits by a sequential, numeric exhibit number following the "CX" designation. [For example, instead of identifying a revised proposed exhibit as CX 20-R, Complainant may identify this document as CX 37 in circumstances where the last previously proposed exhibit is identified as CX 36.] Complainant shall also submit with its Supplemental Prehearing Exchange copies of all such exhibits required to be addressed in the Supplemental Prehearing Exchange

> as outlined above, with these copies appropriately labeled as directed in the Prehearing Order (emphasis supplied).

The February 15 Order gave EPA no berth to supplement its prehearing exchange to include documents, add experts or add new expert declarations beyond those documents that it itself had proposed in its January 11 Motion or those "previously submitted that were either not identified with exhibit numbers . . . . or were improperly identified in a prehearing exchange document with a 'PE' designation . . . ." Stated another way, nowhere in the Order on Motion to Supplement did the Court indicate that EPA had wholesale and unfettered discretion to supplement its prehearing exchange beyond that identified in Complainant's motion and the Court's order. *See id.*, pp. 1-2.

As noted above, there is no preordained rule as to the number of violations of prehearing orders warranting default – it can be but one or in some cases more than one may be necessary. Here, given that there are multiple violations, including violations that cannot even charitably be deemed accidental or innocent, default is the only appropriate remedy.

B. EPA Has Offered No Justification For Unilaterally Expanding The Scope Of This Tribunal's February 15, 2019 Order Or The Requirements Of Rule 22.19

If there is any doubt about the gravity of this latest violation, Respondent requests that this Court review exactly what EPA did in this case.

First, where it had previously identified Janice Witul as a fact witness, EPA used its Supplemental Prehearing Exchange to identify her as an expert. *See* Supplemental Prehearing Exchange, p. 2. Ms. Witul is now expected to testify regarding "the SPCC tank inspection and testing requirements, and her calculation of a proposed penalty for the Oil Pollution Prevention violations at the Facility." *Id.*, p. 2. The same is true for Mr. Swackhammer on the FRP issue. Obviously, this was done based on this Court's December 26, 2018 Order – however it was done

without notifying this Tribunal or Respondent and indeed was willfully omitted from its January 11, 2019 Motion to Correct and Supplement its prior prehearing exchange (which was the basis for this Court's granting of EPA's motion on February 15, 2019).

Second, EPA submitted a second declaration, *unsigned and undated*, for its previously designated expert William Michaud. In this Second Declaration, the EPA – for the first time in the six years VSSI has worked with EPA on its FRP – has provided a planning distance calculation to determine the applicability of an FRP to the VSSI facility. *See* CX 59, p. 2. Again - this analysis was notably missing from the evidence EPA used to support its Motion For Accelerated Decision of its Complaint, *see* Motion For Accelerated Decision, pp. 30-32, and obviously was done to cure this potentially fatal flaw in its *prima facie* case.

While Respondent is certain EPA intended to undo this Court's December 26, 2018 Order, it is nonetheless incumbent upon EPA to explain what its basis was for exceeding the parameters of this Tribunal's order. EPA seems to justify this extra-judicial supplementation by relying on CROP Sections 22.19(f) and 22.22(a) (seventh line, first paragraph), stating: "The rules favor the admission of all relevant evidence and material evidence, and only prohibits inclusion of such evidence if it has not been provided to all parties at least fifteen days prior to hearing. This Supplemental Prehearing Exchange is filed more than 60 days prior to the hearing scheduled for May 16, 2019."

If this is EPA's legal justification for adding Ms. Witul and Mr. Swackhammer as experts, and attempting to resuscitate Mr. Michaud's expert testimony (and none other is offered), it fails.

First, Section 22.22(a) operates as an *exclusion* on the admissibility of evidence, subject to a limited exception, and does not allow the admission of a document, exhibit or testimony

"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." Here, EPA has neither referenced nor attempted to satisfy the good cause requirement so Section 22.22(a) is not of any assistance to it and this supposed basis for supplementation thus should be disregarded.

Second, Section 22.19(f) likewise is of no avail. To begin with, and as noted above, Section 22.19(f) has not been interpreted by the courts as permitting unfettered and wholesale supplementation of a prehearing exchange – as, quite to the contrary, such an interpretation would "undermine" the requirements of the prehearing exchange.

Moreover, by its express terms, Section 22.19(f) requires any supplementation to be "promptly" made. As chronicled in detail above, in this case it has been over a period of years that EPA was (or should have been) aware that its FRP analysis suffered from the lack of the inclusion of a planning distance calculation.

Further, EPA filed – and represented to this Tribunal (and Respondent) – that it sought only to "clarify" and "correct" its prior exchanges, not substantively enhance them to rectify strategy decisions made months or years earlier. In its January 11 Motion, this is how EPA characterized its Motion:

> In the course of preparing for hearing, Complainant has learned that a portion of its Prehearing Exchange is incomplete, inaccurate or outdated and as such seeks to supplement and correct its Prehearing Exchange pursuant to 40 C.F.R. Section 22.19(f). The specific supplements and corrections are provided below.

EPA provided examples of the type of supplement or correction that it deemed to comply with Section 22.19(f), which were as follows:

- CX 20 (which Complainant explained it had mismarked)

- CX 22 (which Complainant explained was an updated 2018 version of a prior 2011 version of a "costs of compliance" document)
- CX 33 (which Complainant explained was the entire version of a map as to which an excerpt previously had been exchanged)
- CX 35 (which Complainant explained was an updated version of a document which previously had been exchanged)
- CX 36 (which Complainant explained was an updated version of a document which previously had been referred to during the prehearing exchange); and
- PE 7 (which Complainant explained was a correction substituting the identification label of expert William Michaud's CV with the identification label of the Region 9 Hearing Clerk's report respecting any response to the public comment of the publication of the administrative complaint commencing this proceeding)

Had the foregoing types of additional supplemental designations represented those included in the March 14, 2019 exchange, Respondent might well have been in a position to absorb them into its preparation. However, the difference between, for example, CX 22 (an updated cost of compliance document) and CX 55 (an entirely new FRP calculation including, for the first time, planning distance calculations), should be evident to anyone.

In addition, and consistent with the foregoing, in support of its motion EPA argued the motion should be granted because VSSI would not be prejudiced by the inclusion of these documents in its prehearing exchange because the motion only

> seeks to correct or clarify documents already included in the Prehearing Exchange, does not prejudice Respondent because Respondent is or should be familiar with these documents or the content of these documents, . . . or the documents are favorable to

> Respondent, . . . or may narrow the focus at hearing because many of these documents are documents that are included in Respondent's Prehearing Exchange.

Mot. To Supplement, p. 4.

Certainly, this representation appears disingenuous in view of what was actually included in the March 14, 2019 exchange.

Yet, despite the significance of the Ms. Witul's "expert" testimony and Mr. Michaud's testimony on these two counts, the EPA did not disclose either in its Initial Prehearing Exchange, its Rebuttal Prehearing Exchange, or in its Motion To Supplement. Rather, it waited and slipped Ms. Witul's and Mr. Swackhammer's designation and Mr. Michaud's Second Declaration into the Supplemental Prehearing Exchange without notice or explanation.

In effect, EPA has tried "to pull a fast one" on VSSI. VSSI has caught it, however, and believes that such gamesmanship should not be tolerated by the Court. Accordingly, VSSI seeks an entry of default judgment given EPA's repeated failure to comply with this Court's orders, including its apparently deceitful submission of significant evidence beyond that identified in the Order on Motion to Supplement and EPA's own representations of how it intended to supplement the record.

C. EPA's Withholding Of Michaud's Planning Distance Calculation – The Key Issue In Count V – Until Two Months Before Hearing And The Addition Of Experts Witul And Swackhammer (As To Counts IV and V) Smacks Of An Attempt To Unfairly Disadvantage VSSI At Hearing And Is Prejudicial To VSSI, Warranting Dismissal

Given the violation of the rules and the gamesmanship involved, this Court has – and should exercise – its broad discretion to enter a default against EPA as to the Complaint. *See In the Matter of Kent Hoggan*, 2018 WL 6136858, *3.

This "broad discretion" is informed by "the type and the extent of any violations and by the degree of actual prejudice" to the moving party. *See id.*

Here, VSSI will be greatly prejudiced if the hearing goes forward and includes Ms. Witul's and Mr. Swackhammer's testimony and Mr. Michaud's declaration, which were submitted in contravention of this Court's Prehearing Order and Order On Motion To Supplement. In short, VSSI's experts simply do not have enough time to review, analyze, and respond to Ms. Witul's and Mr. Swackhammer20's proposed testimony and Mr. Michaud's planning distance calculation to support the May 2019 hearing.

After reviewing Mr. Michaud's second declaration, Mr. Kastrinos estimates he would need 80 hours to digest and analyze Mr. Michaud's declaration and associated filings. *Id.*, ¶ 5. Mr. DeLano would need 120 hours. Neither expert has that allotment of time available over the next six weeks. Mr. Fletcher would have to review the tank testing program from the standpoint of compliance with industry standards, a task he had not undertaken in view of the prior rulings in this matter, and he estimates that that would take 100 hours and six weeks.

V. **CONCLUSION**

For all of the foregoing reasons, VSS International, Inc. respectfully requests that this Court grant its Motion For Default As To Complainant Environmental Protection Agency's Administrative Complaint.

Dated: April 8, 2019

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