UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
VSS International, Inc.,	)	**Docket No. OPA-09-2018-0002**
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA"), Director of Enforcement, Region IX ("Complainant"), initiated this proceeding on February 13, 2018, by filing a Complaint ("Compl.") against VSS International Incorporated ("Respondent"), pursuant to 33 U.S.C. § 1321(b)(6)(B)(ii). The Complaint alleges five counts of violation of the Clean Water Act ("CWA"),[1] as amended by the Oil Pollution Act of 1990 ("OPA"), at 33 U.S.C. § 1321(b), and oil pollution prevention regulations within 40 C.F.R. Part 112 ("Oil Pollution Prevention regulations"), over a total period from February 27, 2012 to May 1, 2017.[2] For these alleged violations, the Complaint seeks the imposition of civil penalties against Respondent in a total amount not to exceed $230,958. Respondent, through counsel, filed an Answer on March 21, 2018. In its Answer, Respondent denies the violations alleged in the Complaint, and otherwise asserts defenses against the civil penalty proposed by Complainant.[3]

I was designated to preside over this matter on April 19, 2018. On April 20, 2018, I issued a Prehearing Order, directing the parties to file and serve prehearing exchanges. Consistent therewith, Complainant submitted an Initial Prehearing Exchange ("C. PHE") on May 31, 2018, with Complainant's proposed exhibits ("CX") 1-24;[4] Respondent submitted its

[1] The Clean Water Act is the common name of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

[2] Specifically, as discussed below, the Complaint alleges that Respondent violated 40 C.F.R. §§ 112.3 (Count I), 112.3(d) (Count II), 112.5(a) (Count III), 112.7(e) (Count IV), and 112.20 (Count V). Although the total period of alleged violation is from February 27, 2012 to May 1, 2017, Complainant identifies differing dates of violation for each count in the Complaint, as outlined in greater detail below.

[3] Notably, although Respondent's Answer includes references to appendices, no appendices were filed in conjunction with the Answer.

[4] In its Initial Prehearing Exchange, Complainant additionally filed a curriculum vitae for William Michaud, P.E., but did not include an exhibit number on this document.

Prehearing Exchange ("Resp. PHE") on June 22, 2018, with Respondent's proposed exhibits ("RX") 1-97; and Complainant filed a Rebuttal Prehearing Exchange on July 5, 2018, with CX 25-32 and a document marked as "PE 1."[5] Following the submission of the parties' prehearing exchanges, I issued a Notice of Hearing Order on July 20, 2018, scheduling the hearing in this matter to commence on January 29, 2019, in San Francisco, California.[6]

Complainant filed a Motion for Accelerated Decision as to Liability ("Motion for Accelerated Decision" or "AD Mot."), along with a Memorandum in Support of its Motion for Accelerated Decision as to Liability ("Accelerated Decision Memorandum" or "AD Mem."), and declarations from Janice Witul ("Witul Decl."), Joseph Troy Swackhammer ("Swackhammer Decl."), William Michaud, P.E. ("Michaud Decl."), and Daniel Meer ("Meer Decl."), on August 3, 2018. Respondent timely filed an Opposition to Complainant's Motion for Accelerated Decision ("Opposition" or "Opp.") on August 20, 2018, along with objections to the Witul, Swackhammer, Michaud, and Meer declarations filed by Complainant, and declarations from Randall Tilford ("Tilford Decl."), Kari Casey ("Casey Decl."), and Lee Delano, P.E. ("Delano Decl.").[7] Thereafter, Complainant timely filed its Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision as to Liability ("Reply") on August 30, 2018, along with replies to Respondent's objections to the Witul, Swackhammer, Michaud, and Meer declarations.

II. STANDARD OF REVIEW FOR MOTION FOR ACCELERATED DECISION

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice"). With regard to accelerated decision, the Rules of Practice provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). As the standard for accelerated decision under 40 C.F.R. § 22.20(a) is reflective of the standard for summary judgment under Rule 56 of the FRCP, jurisprudence relating to Rule 56 provides applicable guidance for motions for accelerated decision. *See P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Accordingly, the Environmental

[5] In its Rebuttal Prehearing Exchange, Complainant referred to this document as "PE 7." However, the document itself is marked as "PE 1."

[6] The specific location of the hearing was set by the Notice of Hearing Time and Location issued on October 2, 2018.

[7] Notably, Lee Delano is identified in portions of the record by the name A. Lee DeLano. *See e.g.*, CX 23 at 1; RX 88 at 1. For purposes of continuity within this document, this individual is identified as Lee Delano.

Appeals Board has consistently relied upon Rule 56 and jurisprudence regarding summary judgment for guidance in adjudicating motions for accelerated decision under the Rules of Practice. *See, e.g., Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The governing substantive law determines which facts are material for summary judgment, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is genuine if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Id*.

Rule 56 requires a party asserting that a fact cannot be or is genuinely in dispute to support its assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Affidavits and declarations used to support or oppose a motion for summary judgment must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The party moving for summary judgment bears the initial responsibility of informing the tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

In considering a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. When contradictory inferences may be drawn from the evidence, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, in opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49.

Applying the jurisprudence for summary judgment to the present matter, Complainant, as the party moving for accelerated decision as to liability, bears the initial responsibility of informing this Tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact with regard to liability. *See*

Celotex Corp., 477 U.S. at 323. In considering Complainant's Motion for Accelerated Decision, the evidence of Respondent, the non-moving party, is to be believed, and all justifiable inferences are to be drawn in Respondent's favor. *See Anderson*, 477 U.S. at 255.

III. RESPONDENT'S OBJECTIONS TO DECLARATIONS

As noted, Respondent filed objections to each of the declarations submitted by Complainant in support of its Motion for Accelerated Decision. In turn, Complainant filed replies to Respondent's objections regarding these declarations, contesting the stated objections. Accordingly, before addressing Complainant's Motion for Accelerated Decision, I must resolve Respondent's objections regarding these declarations. Notably, Respondent's objections to each of the declarations fall into two categories: rote objections provided without sufficient supporting explanation, and objections that the content of the declarations is confusing because it misstates or ignores evidence supplied by Respondent.[8]

As for the objections to declarations falling into the first category, I do not find such rote objections adequately supported by Respondent. As discussed, pursuant to Rule 56 of the FRCP, declarations in support of a motion for summary judgment must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The rote objections offered by Respondent to each of declarations offered by Complainant in support of its Motion for Accelerated Decision fail to establish that these declarations do not meet the standard outlined in Rule 56.[9] As a result, such objections are not sufficiently supported by Respondent.

With regard to the objections to declarations falling into the second category, Respondent appears to be objecting to conflicts between the content of the declarations offered by Complainant and evidence it has supplied in this matter. I do not find conflicts between statements in the declarations and the evidence supplied by Respondent to be confusing, and therefore reject the premise of these objections. Accordingly, Respondent's objections to the declarations supplied by Complainant in support of its Motion for Accelerated Decision are hereby **OVERRULED**.

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[8] It is notable that Respondent's objections to the declarations, submitted in a brief chart format, appear to have been formatted to conform with the California Rules of Court. *See* Cal. Rules of Court, rule 3.1354. Such rules, however, are not applicable to this proceeding.

[9] Among its rote objections, Respondent identifies several objections on the basis of hearsay. Notably, hearsay evidence is admissible in administrative hearings. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971) (finding that hearsay evidence may constitute substantial evidence in an administrative proceeding). More specifically, hearsay has been found to be admissible in EPA administrative enforcement proceedings, such as this matter. *See, e.g.*, *J.V. Peters & Co*., 7 E.A.D. 77, 104 (EAB 1997); *Great Lakes*, 5. E.A.D. 355, 368-69 (EAB 1994); *Cent. Paint & Body Shop*, 2 E.A.D. 309, 311 (EAB 1987) (discussing admissibility of hearsay within the context of EPA administrative proceedings). The relevant standard for the admissibility of evidence within the Rules of Practice, at 40 C.F.R. § 22.22(a)(1), provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value."

IV. GOVERNING SUBSTINATIVE LAW

The CWA, 33 U.S.C. §§ 1251-1387, was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, the OPA amended Section 311 of the CWA, 33 U.S.C. § 1321, to strengthen the provisions of the CWA pertaining to oil pollution. *See* OPA, Pub. L. No. 101-380, 104 Stat.484 (1990). As amended by the OPA, the CWA directed the President to issue regulations "establishing procedures, methods, and equipment . . . to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges." 33 U.S.C. § 1321(j)(1)(C). The CWA further authorizes the Administrator of the EPA to assess civil penalties to any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility, who fails to comply with regulations issued pursuant to 33 U.S.C. § 1321(j). 33 U.S.C. § 1321(b)(6)(A). Relevant to this matter, proceedings for the enforcement of such civil penalties, in circumstances where the offender is found within the United States, must be commenced within five years from the date when the claim accrued. *See* 28 U.S.C. § 2462 (applicable statute of limitations provision).

In accordance with the CWA's directive in 33 U.S.C. § 1321(j), the EPA developed the Oil Pollution Prevention regulations within 40 C.F.R. Part 112. Among other entities, the Oil Pollution Prevention regulations apply to owners or operators of non-transportation related onshore facilities that are "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products," have oil in any aboveground container, and which, due to location, "could reasonably be expected to discharge oil in quantities that may be harmful . . . into or upon the navigable waters of the United States or adjoining shorelines."[10] 40 C.F.R. § 112.1(b). In making the determination as to whether a facility, due to its location, could reasonably be expected to have such a discharge, the Oil Pollution Prevention regulations provide that this determination must be "based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) and must exclude consideration of manmade features such as dikes, equipment or other structures." 40 C.F.R § 112.1(d)(1)(i). For purposes of the Oil Pollution Prevention regulations, discharges of oil in quantities that may be harmful have been defined to include discharges of oil that "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. § 110.3(b); *see also* 40 C.F.R. § 112.1(b) (referencing this definition).

The Oil Pollution Prevention regulations require that owners or operators of such regulated facilities prepare in writing and implement a Spill Prevention, Control, and Countermeasure Plan ("SPCC plan"). 40 C.F.R. § 112.3. Relevant to the allegations in this matter, regulated facilities that were in operation on or before August 16, 2002, were required to implement SPCC plans no later than November 10, 2011. 40 C.F.R. § 112.3(a)(1). The owner or operator of a facility required to have a SPCC plan must maintain a complete copy of the

[10] The Oil Pollution Prevention regulations define an onshore facility as "any facility of any kind located in, on, or under any land within the United States, other than submerged lands." 40 C.F.R. § 112.2. Facilities with an aggregate aboveground storage capacity of 1,320 gallons or less of oil are excepted from the requirements of the Oil Pollution Prevention regulations. 40 C.F.R.§ 112.1(d)(2)(ii).

SPCC plan at the facility, if it is attended at least four hours per day, and must have the SPCC plan available to the Regional Administrator for an on-site review during normal working hours. 40 C.F.R. § 112.3(e).

Pursuant to the Oil Pollution Prevention regulations, a SPCC plan must be prepared in accordance with good engineering practices, and must "have the full approval of management at a level of authority to commit the necessary resources to fully implement the Plan." 40 C.F.R. § 112.7. Additionally, the Oil Pollution Prevention regulations require that a SPCC plan include a description of the physical layout of the facility with a diagram that marks "the location and contents of each fixed oil storage container and the storage area where mobile or portable containers are located," as well as "all transfer stations and connecting pipes." 40 C.F.R. § 112.7(a)(3). The SPCC plan for a facility must also address the type of oil in each fixed container and its storage capacity, 40 C.F.R. § 112.7(a)(3)(i); discharge prevention measures, 40 C.F.R. § 112.7(a)(3)(ii); and "[d]ischarge or drainage controls such as secondary containment around containers and other structures, equipment, and procedures for the control of a discharge," 40 C.F.R § 112.7(a)(3)(iii).

Further, a SPCC plan must be reviewed and certified by a licensed Professional Engineer to satisfy the requirements of the Oil Pollution Prevention regulations. 40 C.F.R. § 112.3(d). Such certification must include attestation from the Professional Engineer stating -

> (i) That he is familiar with the requirements of this part;
> (ii) That he or his agent has visited and examined the facility;
> (iii) That the Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of this part;
> (iv) That procedures for required inspections and testing have been established; and
> (v) That the Plan is adequate for the facility.
> (vi) That, if applicable, for a produced water container subject to [40 C.F.R.] § 112.9(c)(6), any procedure to minimize the amount of free-phase oil is designed to reduce the accumulation of free-phase oil and the procedures and frequency for required inspections, maintenance and testing have been established and are described in the Plan.

40 C.F.R. § 112.3(d)(1).

Besides requiring owners or operators of regulated facilities to prepare and implement SPCC plans, the Oil Pollution Prevention regulations place additional requirements on owners and operators of facilities requiring a SPCC plan. The Oil Pollution Prevention regulations require an owner or operator of a regulated facility to "[p]rovide appropriate containment and/or diversionary structures or equipment" to prevent a discharge of oil in quantities that may be harmful. *See* 40 C.F.R. § 112.7(c). To satisfy this requirement, the Oil Pollution Prevention regulations provide that "[t]he entire containment system, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary

containment system, such as a tank, will not escape the containment system before cleanup occurs." 40 C.F.R. § 112.7. Likewise, the Oil Pollution Prevention regulations require the owner or operator of a regulated facility to conduct inspections and tests in accordance with written procedures for the facility, and maintain "a record of the inspections and tests, signed by the appropriate supervisor or inspector, with the SPCC Plan for a period of three years." 40 C.F.R. § 112.7(e). Pursuant to 40 CFR 112.8(c)(6), such inspection and testing must be in accordance with industry standards. Additionally, the Oil Pollution Prevention regulations require that the owner or operator of a regulated facility must amend the SPCC plan for the facility, within six months, "when there is a change in the facility design, construction, operation, or maintenance that materially affects its potential for a discharge as described in [40 C.F.R.] § 112.1(b)." 40 C.F.R. § 112.5(a). The owner or operator of a regulated facility must further complete a review and evaluation of the SPCC plan at least once every five years, and must amend the SPCC plan within six months of such review "to include more effective prevention and control technology if the technology has been field-proven at the time of the review and will significantly reduce the likelihood of a discharge as described in [40 C.F.R.] § 112.1(b) from the facility." 40 C.F.R. § 112.5(b).

In addition to the SPCC requirements, the Oil Pollution Prevention regulations place additional requirements on owners or operators of "any non-transportation-related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines." 40 C.F.R. § 112.20(a). Owners or operators of these facilities must prepare and submit a facility response plan ("FRP") to the Regional Administrator. *Id.*

The Oil Pollution Prevention regulations, in 40 C.F.R. § 112.20(f)(1), specify certain criteria under which a facility could, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, and therefore require a FRP pursuant to 40 C.F.R. § 112.20. Among such criteria, the Oil Pollution Prevention regulations provide that a facility meets this classification if the facility has a total oil storage capacity greater than or equal to one million gallons, and the facility "does not have secondary containment for each aboveground storage area sufficiently large to contain the capacity of the largest aboveground oil storage tank within each storage area plus sufficient freeboard to allow for precipitation." 40 C.F.R. § 112.20(f)(1)(ii)(A). Likewise, the Oil Pollution Prevention regulations provide that a facility meets this classification if the facility has a total oil storage capacity greater than or equal to one million gallons, and the facility is located at a distance "such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments." 40 C.F.R. § 112.20(f)(1)(ii)(B). For purposes of providing facility owners and operators a means of determining whether a facility is located at such a distance, the Oil Pollution Prevention regulations provide planning distance formulas within Appendix C to 40 C.F.R. Part 112. Additionally, the Oil Pollution Prevention regulations otherwise provide that this distance may be calculated by a "comparable formula" to those provided in Appendix C to 40 C.F.R. Part 112. 40 C.F.R. § 112.20(f)(1)(ii)(B). Notably, in circumstances where a facility meets the criteria set forth under 40 C.F.R. § 112.20(f)(1), after August 30, 1994, as a result of a planned change in design, construction, operation, or maintenance of the facility, the owner or operator of the facility must submit a FRP, along with a response plan cover sheet provided in 40 C.F.R. Part 112, Appendix F, to the Regional

Administrator prior to the commencement of operations at the potion of the facility undergoing the change. 40 C.F.R. §112.20(a)(2)(iii).

The Oil Pollution Prevention regulations further provide that the Regional Administrator may at any time require the owner or operator of any non-transportation related onshore facility to prepare and submit a FRP, following a determination made in consideration of specified factors, if the Regional Administrator notifies the owner or operator of the facility of this determination in writing, providing a basis for the determination.[11] 40 C.F.R. § 112.20(b). In circumstances where the Regional Administrator has required the submission of a FRP upon notification of such a determination, the owner or operator must submit a FRP to the Regional Administrator within six months of such notification.[12] 40 C.F.R. § 112.20(b).

The Oil Pollution Prevention regulations require that FRPs are consistent with the requirements of applicable Area Contingency Plans prepared pursuant to 33 U.S.C § 1321(j)(4) ("Area Contingency Plans"). 40 C.F.R. § 112.20(g). Additionally, the Oil Pollution Prevention regulations set forth, in detail, the required content of a FRP in 40 C.F.R. § 112.20(h). *See* 40 C.F.R. § 112.20(h). Among other elements, FRPs must include provisions regarding self-inspection, drills/exercises, and response training. *See* 40 C.F.R. § 112.20(h)(8).

V. FACTUAL BACKGROUND

Respondent is a corporation organized under California law,[13] which is the owner and operator of a bulk storage and aggregation facility for petroleum surfacing materials located at 3785 Channel Drive, in West Sacramento, California ("Facility").[14] Compl. ¶¶ 7, 9, 10; Answer ¶¶ 7, 9, 10; *see also* CX 11 at 3; RX 2 at 3; RX 3 at 2. Respondent, or its corporate predecessors, began operating the Facility prior to August 16, 2002. Compl. ¶ 24; Answer ¶ 24. The Facility covers approximately 10.5 acres and is situated approximately 200 feet north of the Sacramento Deep Water Ship Channel ("SDWSC").[15] Compl. ¶ 11; Answer ¶ 11. The Facility is both a non-transportation related facility within the meaning of 40 C.F.R. § 112.2 Appendix A, Compl. ¶ 20;

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[11] Specified factors for making such a determination are addressed within 40 C.F.R. § 112.20(f)(2)(i).

[12] Notably, in circumstances where an owner or operator disagrees with the Regional Administrator's determination that a facility could, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, the Oil Pollution Prevention regulations provide that the owner or operator may submit a request for reconsideration, providing additional information to support this request, to the Regional Administrator within 60 days of the receipt of the Regional Administrator's decision.

[13] Respondent also does business under the trade name "VSS Emultech." CX 11 at 3; RX 2 at 3; RX 3 at 2. The record reflects that Basic Resources, Inc. is a parent corporation to Respondent. *See* CX 11 at 3; RX 2 at 3; RX 3 at 2.

[14] The parties specifically agree that Respondent is an owner and operator of the Facility within the meaning of 33 U.S.C. § 1321(a)(6) and 40 C.F.R. § 112.2. Compl. ¶ 9; Answer ¶ 9. Additionally, it is uncontested that Respondent is a "person" within the meaning of 33 U.S.C. §§ 1321(a)(7), 1362(5), and 40 C.F.R. § 112.2. Compl. ¶ 8; Answer ¶ 8.

[15] Significantly, the parties agree that the SDWSC is a navigable water of the United States, within the meaning of 40 C.F.R.§ 112.2 and 33 U.S.C. § 1362(7). Compl. ¶ 16; Answer ¶ 16.

Answer ¶ 20, and an onshore facility within the meaning of 33 U.S.C. § 1321(a)(10) and 40 C.F.R. § 112.2, Compl. ¶ 21; Answer ¶ 21.

At the Facility, Respondent is engaged in storing oil or oil products, including asphaltic cement. Compl. ¶¶ 10, 19; Answer ¶¶ 10, 19. Oil or oil products are stored at the Facility in aboveground storage tanks ("ASTs"). *See* Compl. ¶ 13; Answer ¶ 13 (referencing such aboveground storage at the Facility); *see also* CX 11 at 3-4; CX 16 at 8-11; RX 2 at 3-4, 15-17, 34-35; RX 3 at 2-3; RX 40 at 8-11(discussing such ASTs at Facility); RX 54-68 (reflecting testing performed on ASTs at the Facility). At some point during the period from early 2012 through the beginning of 2016, Respondent increased the total oil storage capacity of the Facility, by putting into service ASTs numbered 2001 ("Tank 2001") and 2002 ("Tank 2002"). *See* Compl. ¶¶ 49-52; Answer ¶ 14 (discussing Tanks 2001 and 2002); RX 37 at 5; Tilford Decl. ¶ 2; Witul Decl. ¶ 13.[16] The Facility has an aggregate aboveground storage capacity greater than 1,320 gallons of oil in containers that each have a shell capacity of at least 55 gallons. Compl. ¶ 13; Answer ¶ 13. The total oil storage capacity of the Facility exceeded 4.5 million gallons as of December 2017. Compl. ¶ 15; Answer ¶ 15.

On November 27, 2012, EPA performed an inspection of the Facility ("2012 Inspection"), conducted by Janice Witul, an Oil Program Inspector with EPA's Region IX. *See* CX 4; CX 11 at 3; RX 2 at 3; RX 3 at 2; RX 45;[17] Witul Decl. ¶¶ 1, 12. Upon request, Respondent provided EPA with a copy of the SPCC plan for the Facility in place at the time of the 2012 Inspection, dated April 6, 2012 ("2012 SPCC Plan"). *See* RX 2 at 4, 9-51; *see also* CX 16; RX 40 (copies of the 2012 SPCC Plan). Ms. Witul reviewed the 2012 SPCC Plan for the Facility and completed a SPCC Field Inspection and Plan Review Checklist for the 2012 Inspection, dated September 23, 2013 ("2013 SPCC Checklist"). *See* Witul Decl. ¶ 17; CX 4. At the time of 2012 Inspection, Respondent had not prepared a FRP for the Facility. *See* CX 11 at 4; RX 2 at 4; Witul Decl. ¶ 12; *see also* CX 16 at 20; RX 2 at 26; RX 40 at 20 (copies of the 2012 SPCC Plan noting that no FRP was prepared for Facility).

Following the 2012 Inspection, Respondent obtained a report addressing the applicability of the FRP requirements of the Oil Pollution Prevention regulations to the Facility, which was prepared by the firm of Haley & Aldrich, Inc., authored by John Kastrinos, a hydrogeologist, and James Schwartz, a geologist, and dated January 10, 2014 ("Haley and Aldrich Report"). *See* CX 15; RX 89. Thereafter, on May 22, 2014, David Wampler, the Acting Assistant Director for the Enforcement Division of EPA's Region IX, issued a letter to Respondent ("2014 Letter") alleging that Respondent violated the CWA at 42 U.S.C. § 1321, by violating the Oil Pollution Prevention regulations. RX 6; *see also* Witul Decl. ¶ 19. Specifically, the 2014 Letter identified

[16] As discussed further below, the parties disagree regarding the dates which Tanks 2001 and 2002 went into service at the Facility. Complainant alleges that Tank 2001 went into service at the Facility in or about March 2012, Compl. ¶ 49, and Tank 2002 went into service at the Facility in or about July 2015, Compl. ¶ 51. In contrast, Respondent asserts that Tank 2001 went into service at the Facility on March 21, 2013, RX 37 at 5, and Tank 2002 went into service at the Facility in January 2016, Tilford Decl. ¶ 2.

[17] Notably, in the statement provided by Randall Tilford in RX 45, dated July 22, 2013, Mr. Tilford indicates that this inspection was performed on November 27, 2013, rather than November 27, 2012. RX 45 at 1. However, the date of this statement, and the representations in the statement regarding the passage of time since the inspection, indicate that the identification of 2013 as the year of this inspection is erroneous.

violation of 40 C.F.R. § 112.8(c)(6) for "failure to conduct integrity testing for above ground containers in accordance with industry standards," and violation of 40 C.F.R. § 112.20 for "failure to have a Facility Response Plan." RX 6 at 1.

At some point following the 2012 Inspection, Respondent provided Complainant with a document entitled "Hazardous Materials, Environmental Compliance, and Contingency Business Plans," dated October 24, 2014 ("2014 Combined Plan"), which purported to satisfy requirements for both a SPCC plan and FRP for the Facility.[18] *See* Witul Decl. ¶¶ 22, 24; CX 17; RX 92; *see also* Answer ¶ 54 (acknowledging an "updated version of the SPCC plan dated October 2014"). Following the date of the 2014 Combined Plan, Respondent obtained a report from WHF, Inc., Environmental and Engineering Group, addressing the applicability of the FRP requirements to the Facility, which was authored by Lee Delano, P.E. and Kari Casey, and dated June 23, 2015 ("WHF Report"). *See* Delano Decl. ¶ 1; CX 23; RX 88. Respondent subsequently developed a revised version of the 2014 Combined Plan dated January 15, 2016 ("2016 Combined Plan"), which again purported to satisfy requirements for both a SPCC plan and FRP for the Facility.[19] *See* Witul Decl. ¶¶ 22-23; CX 18.

EPA obtained an analysis of the applicability of the FRP requirements to the Facility, performed by William Michaud, P.E., dated August 23, 2016 ("Michaud Report"). *See* Michaud Decl. ¶ 1; CX 14 (copy of Michaud Report). Following the Michaud Report, Ms. Witul conducted a second EPA inspection of the Facility on September 30, 2016, ("2016 Inspection"). *See* Witul Decl. ¶ 20; CX 6; CX 7; RX 39. During and subsequent to the 2016 Inspection, Ms. Witul reviewed the 2016 Combined Plan for the Facility and completed a SPCC Field Inspection and Plan Review Checklist for the 2016 Inspection, dated November 30, 2016 ("2016 SPCC Checklist"), based upon her review of this plan. *See* Witul ¶ 23; CX 8; RX 23 at 103-28.

Following the 2016 Inspection, Respondent produced a FRP for the Facility dated January 9, 2017 ("January 2017 FRP"), CX 19, *see also* Compl. ¶¶ 72, 74, Answer ¶ 72, 74, and a FRP for the Facility dated May, 1, 2017 ("May 2017 FRP"), CX 20; CX 21. Both the January 2017 FRP and May 2017 FRP were submitted to EPA and reviewed by Ms. Witul. *See* Witul Decl. ¶¶ 25-27; CX 12; CX 24. The parties, in their pleadings, agree that Respondent prepared a SPCC plan for the Facility that included discussion of management approval; a facility diagram with all regulated fixed containers, storage areas and connecting pipes; and a facility diagram with containment or diversionary structures for tanks not permanently closed by May 1, 2017.[20] Compl. ¶ 34; Answer ¶ 34. Complainant subsequently commenced this proceeding by filing the Complaint.

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[18] While Respondent acknowledges this plan, it argues that this plan was a draft, as discussed in further detail below. *See* Opp. at 17-18.

[19] As with the 2014 Combined Plan, Respondent appears to argue that this plan was a draft, as discussed further below. *See* Opp. at 17-18.

[20] It does not appear that either of the parties has submitted a copy of the SPCC plan Respondent prepared by May 1, 2017, referenced in the pleadings. Complainant indicates that this plan is contained within CX 20. *See* C. PHE at 4. However, CX 20 appears to be a copy of the May 2017 FRP, which is also contained within CX 21.

As noted above, the Complaint alleges five counts of violation of the CWA, as amended by the OPA, at 33 U.S.C. § 1321(b), through violation of the Oil Pollution Prevention regulations over a total period of time from February 27, 2012 to May 1, 2017. Counts I through IV of the Complaint allege that Respondent violated the Oil Pollution Prevention regulations relating to the SPCC plan for the Facility and associated testing and recordkeeping requirements during varying periods over the course of the total period of violations alleged in the Complaint. Specifically, in Count I, the Complaint alleges that Respondent violated 40 C.F.R. § 112.3 for a total of at least 1,614 days, from November 27, 2012 to May 1, 2017, by failing to have a SPCC plan for the Facility with the contents set forth in 40 C.F.R. § 112.7, including management approval of the plan pursuant to 40 C.F.R § 112.7(a); a diagram of the Facility with all regulated fixed containers, storage areas, and connecting pipes, stating the oil type and capacity for containers pursuant to 40 C.F.R. § 1 12.7(a)(3); and a diagram of the Facility including containment or diversionary structures for tanks not permanently closed pursuant to 40 C.F.R. § 112.7(c). Compl. ¶¶ 30-37. Likewise, Count II of the Complaint alleges that Respondent violated 40 C.F.R. § 112.3(d) from October 24, 2014 to January 15, 2016, by failing to have a SPCC plan for the Facility that included certification from a Professional Engineer in accordance with the specifications within 40 C.F.R. § 112.3(d). Compl. ¶¶ 41-44. Additionally, in Count III, the Complaint alleges that for a total duration of at least 905 days, Respondent violated 40 C.F.R. § 112.5(a) by failing to update the SPCC plan for the Facility within a six-month period following both the addition of Tank 2001, which it alleges occurred in or about March 2012, and the addition of Tank 2002, which it alleges occurred in or about July 2015, as required by this regulatory provision. Compl. ¶¶ 49-58. Count IV of the Complaint alleges that Respondent violated 40 C.F.R. § 112.7(e) over a total of at least 1,095 days, beginning on January 1, 2015, by failing to develop written procedures for inspections and tests of the Facility, and further failing to maintain records of such inspections and tests, signed by the appropriate supervisor or inspector, for a period of three years, as required by this regulatory provision.[21] Compl. ¶¶ 63-65.

In contrast to the SPCC plan related charges in Counts I through IV of the Complaint, Count V alleges that Respondent violated the Oil Pollution Prevention regulations by violating the FRP requirement in 40 C.F.R. § 112.20. Count V alleges that Respondent was required to prepare and submit a FRP for the Facility, along with an associated cover sheet, upon the installation of Tank 2001, which it alleges occurred on or about March 21, 2012, because the Facility, at that point, exceeded one million gallons in oil storage capacity, and is located at such a distance from the SDWSC that a discharge could cause injury to fish and wildlife and sensitive environments. Compl. ¶ 70. Although the Complaint asserts that Respondent submitted FRPs for the Facility on or about October 24, 2014, and on or about January 9, 2017, Compl. ¶ 72, the Complaint alleges that these FRPs were insufficient because they each were not based upon the criteria within 40 C.F.R. § 112.20(f)(1) and otherwise did not address each element required under 40 C.F.R. § 112.20(h), Compl. ¶¶ 73-74. As a result, the Complaint alleges that Respondent failed to timely prepare and submit a FRP for the Facility, along with an associated

[21] Notably, the Complaint does not provide a date upon which the violation alleged in Count IV ceased. However, based upon the assertions in the Complaint that the violation in Count IV began on January 1, 2015, and that this violation occurred for over a total of at least 1,095 days, the end date associated with this violation could be no sooner than December 31, 2017. Nevertheless, in its Reply, Complainant asserts that it does not seek a finding of liability on this count after January 2016. Reply at 17.

cover sheet, Compl. ¶ 71, and that it thereby violated 40 C.F.R. § 112.20(a)(2) and (a)(2)(ii) for a total of 1,825 days during the five-year period up until the filing of the Complaint, Compl. ¶¶ 75-76.

In its Answer, Respondent denies each of the five counts of violation alleged in the Complaint. *See* Answer ¶¶ 35, 37, 42, 44, 57-58, 65, 75-76. Addressing the allegations in Count I, Respondent asserts that its SPCC plan for the Facility included management approval, Answer ¶ 30; a diagram of the Facility with all regulated fixed containers, storage areas, and transfer station connecting pipes, stating the oil type and capacity for containers, Answer ¶ 31; and a diagram of the Facility including containment or diversionary structures, Answer ¶ 32. In response to the allegations in Count II, Respondent denies that it failed to have a Professional Engineer certify the SPCC plan for the Facility pursuant to 40 C.F.R. § 112.3(d), Answer ¶ 42, but does confirm that it obtained Professional Engineer certification of the SPCC plan for the Facility on January 15, 2016, without conceding any prior non-compliance with this requirement, Answer ¶ 43. Additionally, Respondent denies that it violated 40 C.F.R. § 112.5(a) by failing to update the SPCC plan for the Facility, as alleged in Count III. Answer ¶ 57. Likewise, Respondent denies that it violated 40 C.F.R. § 112.7(e) by failing to keep records of inspections and tests of the Facility for a period of three years as alleged in Count IV. Answer ¶ 65.

With regard to the allegations in Count V of the Complaint, pertaining to violation of 40 C.F.R. § 112.20 for failure to have a FRP for the Facility, Respondent denies that it was required to prepare and submit a FRP and associated cover sheet to the EPA on or about March 21, 2012. Answer ¶ 70. Respondent states that the total oil storage capacity for bulk containers at the Facility was less than one million gallons during at least a portion of the relevant period, prior to the addition of Tanks 2001 and 2002. Answer ¶ 14. Further, Respondent asserts that it relied upon analyses of the applicability of the FRP requirement to the Facility prepared by engineering professionals, which it indicates concluded that it was not required to submit a FRP for the Facility pursuant to the Oil Pollution Prevention regulations. *See* Answer ¶ 18. Without conceding that the Facility is required to have a FRP under the Oil Pollution Prevention regulations, Respondent acknowledges that it voluntarily elected to prepare a FRP to resolve uncertainty. Answer ¶ 18. Respondent acknowledges submitting several draft and final versions of FRPs to the EPA, Answer ¶ 72, but broadly denies that it submitted a FRP that was not compliant with the Oil Pollution Prevention regulations, Answer ¶¶ 73-74.

Notably, in its Answer, Respondent does not assert affirmative defenses to liability. *See* Resp. PHE at 26 (acknowledging that Respondent did not assert any affirmative defenses in the Answer). However, in its Prehearing Exchange, Respondent noted an intent to request leave to amend its Answer "to assert an affirmative defense based on the statute of limitations." Resp. PHE at 26. Nevertheless, Respondent has yet to request leave to amend its Answer, or submit an amended Answer.

VI. RESPONDENT'S PROCEDURAL OBJECTION TO MOTION FOR ACCELERATED DECISION

A. Arguments of the Parties

In addition to substantively challenging Complainant's Motion for Accelerated Decision, as discussed below, Respondent raises a procedural objection to this motion in its Opposition. *See* Opp. at 1-2. Respondent alleges that Complainant did not consult with it regarding the Motion for Accelerated Decision prior to filing this motion. Opp. at 2. As a result, Respondent asserts that Complaint did not comply with the language of the Prehearing Order issued on April 20, 2018, which directed a moving party to contact the other party prior to filing a motion to determine if the other party has any objection to the motion, and further directed the moving party to state the position of the other party in its motion. *See* Opp. at 2. Notably, the only harm identified by Respondent regarding Complaint's failure to consult it prior to filing its Motion for Accelerated Decision is that a number of undisputed facts "could have been eliminated from the Motion, thus narrowing the issues presented to this tribunal for review." Opp. at 2. Nevertheless, Respondent asserts that Complainant's failure to consult it prior to filing the Motion for Accelerated Decision constitutes a default under the Rules of Practice at 40 C.F.R. § 22.17(a), and therefore, that I must dismiss Complainant's Motion for Accelerated Decision on this basis. Opp. at 2.

In response to Respondent's procedural objections, Complainant acknowledges that it did not consult Respondent regarding its Motion for Accelerated Decision prior to filing, but argues that its failure to do so does not merit either a finding of default or denial of this motion. *See* Reply at 2-3. Regarding Respondent's argument that such action compels a finding of default, Complainant notes that Respondent has not filed a motion for default, and argues that even if such a motion were pending, appropriate grounds for denial of such a motion exist as dismissal of this proceeding with prejudice is not proportionate to Complainant's offense. Reply at 2. Complainant further asserts that the Motion for Accelerated Decision should not be dismissed on this basis, as Respondent has not been prejudiced by its failure to consult it regarding the Motion for Accelerated Decision, as it had the opportunity to respond to this motion, and timely filed a substantive response to this motion. Reply at 2. With regard to the harm alleged by Respondent regarding Complainant's failure to consult it regarding the Motion for Accelerated Decision, Complainant notes that this argument is "belied by Respondent's vigorous opposition to the Motion." Reply at 3. Complainant asserts that the parties have "engaged in discussions over the course of several years seeking to find common ground on the issues in this case," and that such efforts have been unsuccessful. Reply at 3. Complainant argues against dismissal of the Motion for Accelerated Decision on the basis that the parties have "spent considerable effort preparing substantive memoranda regarding the Motion," and "a ruling on the Motion could substantially narrow the issues to be presented at hearing thereby saving resources for this Court." Reply at 3.

B. Analysis

Contrary to Respondent's arguments, Complainant's failure to consult with Respondent regarding its Motion for Accelerated Decision does not compel a finding of default under the Rules of Practice. Pursuant to the Rules of Practice, a party *may* be found in default, after

motion, upon failure to comply with the information exchange requirements, provided for in 40 C.F.R. § 22.19(a), or an order of the Presiding Officer. 40 C.F.R. § 22.17 (emphasis added). In the present matter, Respondent has not filed a motion for default, as required by the Rules of Practice. *See id*. Further, I do not find that Complainant's actions in failing to consult Respondent regarding its Motion for Accelerated Decision constitutes a default in this proceeding. Complainant participated in the prehearing exchange of information as directed pursuant to the Prehearing Order, and its failure to consult Respondent regarding its Motion for Accelerated Decision is not, as Respondent suggests, a failure to comply with the information exchange requirements, in 40 C.F.R. § 22.19(a). Although Complainant failed to follow the appropriate process for filing a motion as set forth in the Prehearing Order, this singular deviation is not substantial enough to warrant a finding for default in this proceeding.

Additionally, I do not find that Complainant's failure to consult with Respondent regarding its Motion for Accelerated Decision warrants dismissal of this motion in the current circumstances. Despite Complainant's failure to comply with the directive in the Prehearing Order regarding contacting the opposing party prior to filing a motion, the record does not reflect that there has been any resulting harm from this failure. Respondent was given the opportunity to file a response to Complainant's Motion for Accelerated Decision, and indeed, it timely did so by filing its Opposition. The record does not support that Respondent was in any way prejudiced by Complaint's failure to consult it prior to filing the Motion for Accelerated Decision. Respondent's argument that Complainant's failure to consult it regarding this motion impaired its ability to identify undisputed facts is without merit. Respondent certainly had the opportunity to identify any relevant undisputed facts in its Opposition. Notably, the fact that Respondent's Opposition contests liability on all five counts of the Complaint, and requests that I deny Complainant's Motion for Accelerated Decision in totality suggests that it is unlikely that the parties would have meaningfully agreed upon the substance of this motion. Given these circumstances, I decline to dismiss Complainant's Motion for Accelerated Decision upon Respondent's procedural objection.

VII. FOUNDATIONAL SUBSTANTIVE ISSUES REGARDING COMPLAINANT'S MOTION FOR ACCELERATED DECISION

In its Motion for Accelerated Decision, Complainant requests that I grant it accelerated decision as to liability in this matter. AD Mot. at 1. In support of this request, Complainant, in its Accelerated Decision Memorandum, asserts that "there are no genuine issues of material fact regarding Respondent's liability for the violations alleged in the Complaint." AD Mem. at 1. Complainant argues that Respondent is subject to the Oil Pollution Prevention regulations, as an owner or operator of a non-transportation related onshore facility that is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products; has oil in aboveground containers; and which, due to its location could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines. *See* AD Mem. at 9-13; Reply at 5. With regard to Counts I-IV of the Complaint, Complainant asserts that the record demonstrates that Respondent violated the Oil Pollution Prevention regulations by failing to comply with provisions relating to SPCC plans and associated testing and recordkeeping requirements, as alleged in the Complaint. *See* AD Mem. at 22-30; Reply at 11-17. Additionally, with regard to

Count V, Complainant asserts that Respondent is subject to the FRP requirements of the Oil Pollution Prevention regulations, in 40 C.F.R. § 112.20, as the owner or operator of a non-transportation related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines. *See* AD. Mem. at 15; Reply at 5. Further, Complainant asserts that the record establishes that Respondent failed to comply with the FRP requirements in 40 C.F.R. § 112.20, and therefore Complainant concludes that there is no issue of material fact with regard to Respondent's liability for the violation alleged in Count V. *See* AD Mem. at 30-32; Reply at 18-20.

In addition to its argument that Complainant's Motion for Accelerated Decision must be denied on procedural grounds, Respondent argues in its Opposition that this motion should be denied on the substantive basis that Complainant has not demonstrated that there is an absence of genuine issues of material fact in this proceeding. *See* Opp. at 1-2. Respondent appears to contest that it is subject to the Oil Pollution Prevention regulations, arguing that there is an issue of material fact with regard to whether discharges from the Facility could reasonably be expected to reach the SDWSC in quantities that may be harmful. *See* Opp. at 3, 4-5. However, in making this argument, Respondent appears to conflate the standard applicable to facilities requiring FRPs in 40 C.F.R. § 12.20(a), with the standard applicable to determining which facilities are subject to the Oil Pollution Prevention regulations, contained in 40 C.F.R. § 112.1(b). *See* Opp. at 4-5; *see also* 40 C.F.R. §§ 112.1(b), 12.20(a).

Addressing the allegations contained in Counts I-IV of the Complaint, Respondent refutes that it violated the Oil Pollution Prevention regulations by failing to comply with provisions relating to SPCC plans and associated testing and recordkeeping requirements, as alleged in the Complaint, and argues that there are issues of material fact with regard to each of these alleged violations. *See* Opp. at 4, 17-19, 21. With regard to Count V, Respondent argues that it is not subject to the FRP requirements in the Oil Pollution Prevention regulations at 40 C.F.R. § 112.20, because it does not fall within the criteria of this regulation. *See* Opp. at 3, 5-17. Specifically, Respondent refutes that a discharge from the Facility could cause substantial harm to the environment, Opp. at 5-14, 21, and argues that "'[w]hether a discharge from the Facility would in fact reach the channel and cause substantial harm to the environment is the central issue in this case," Opp. at 5. Further, Respondent contests that it failed to submit a timely and adequate FRP. Opp. at 19-21. It asserts that it committed to preparing a FRP, despite the belief that the FRP requirements did not apply to the Facility, Opp. at 19-20, and argues that during the relevant period it was an unresolved question between EPA and Respondent as to whether it was subject to the FRP requirements, Opp. at 19-21.

Having reviewed the evidence of record, it is evident that Respondent, as the owner and operator of the Facility, is subject to the Oil Pollution Prevention regulations, and that there is no issue of material fact with regard to this question. Although Respondent generally refutes the applicability of the Oil Pollution Prevention regulations in its Opposition, as noted, it does so by erroneously applying the incorrect standard for this determination, conflating the applicable standard under 40 C.F.R. § 112.1(b) with the standard for determining which facilities are subject to the FRP requirements in 40 C.F.R. § 12.20(a). *See* Opp. 4-5. To establish that Respondent is subject to the Oil Pollution Prevention regulations, Complainant must demonstrate

that Respondent (1) is the owner or operator of non-transportation related onshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products; (2) this facility has oil in any aboveground storage container; and (3) this facility due its location, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines. *See* 40 C.F.R. § 112.1(b). Complainant, upon its Motion for Accelerated Decision, has established each of these elements, and demonstrated that there is no genuine issue of material fact with regard to this determination.

As noted, Respondent has admitted that it is the owner and operator of the Facility. *See* Compl. ¶¶ 9, 10; Answer ¶¶ 9, 10; *see also* CX 11 at 3; RX 2 at 3; RX 3 at 2. Additionally, Respondent has admitted that the Facility is a non-transportation related facility, and an onshore facility, within the meaning of the Oil Pollution Prevention regulations. *See* Compl. ¶ 21; Answer ¶ 21. Further, Respondent has acknowledged it is engaged in storing oil or oil products, including asphaltic cement, at the Facility. *See* Compl. ¶¶ 10, 19; Answer ¶¶ 10, 19. Accordingly, the record establishes that Respondent is the owner or operator of non-transportation related onshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products. Additionally, the record reflects that the oil or oil products are stored at the Facility in aboveground storage containers, namely the ASTs at the Facility. *See* Compl. ¶ 13; Answer ¶ 13 (referencing such aboveground storage at the Facility); *see also* CX 11 at 3-4; RX 2 at 3-4, 34-35; RX 3 at 2-3 (discussing ASTs at Facility); RX 54-68 (reflecting testing performed on ASTs at the Facility).

Finally, Complainant has demonstrated that the Facility, due to its location, could reasonably be expected to discharge oil, in quantities that may be harmful, into or upon the navigable waters of the United States or adjoining shorelines. It is undisputed that the Facility is situated approximately 200 feet north of the SDWSC, Compl. ¶ 11; Answer ¶ 11, and that the SDWSC is a navigable water of the United States, Compl. ¶ 16; Answer ¶ 16. Accordingly, the record supports that the Facility, due to its particular location, could be reasonably expected to discharge oil into or upon a navigable water of the United States. Notably, this finding is consistent with the 2012 SPCC plan for the facility, which states that the Facility is "located near a navigable water of the United States into which a spill could reasonably be expected to discharge." CX 16 at 7; RX 2 at 13; RX 40 at 7. Additionally, the record reflects that the Facility could discharge oil in quantities that may be harmful to the SDWSC during the total period of the alleged violations. As previously discussed, for purposes of the Oil Pollution Prevention regulations, discharges of oil in quantities that may be harmful have been defined to include discharges of oil that "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. § 110.3(b). The 2012 SPCC Plan states that the Facility's "total oil storage capacity for aboveground storage oil is over 1,320-gallons," CX 16 at 7; RX 2 at 13; RX 40 at 7, and further, that the Facility "has greater than 10,000-gallons of aboveground oil storage capacity," CX 16 at 8; RX 2 at 14; RX 40 at 8. Given this substantial oil storage capacity, the facility could reasonably be expected to discharge oil in quantities sufficient to result in the effects discussed in 40 C.F.R. § 110.3(b). Therefore, Complainant has established that the Facility, due to its location, could reasonably be expected to

discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.

As a result, Complainant has demonstrated as a matter of law that Respondent is subject to the Oil Pollution Prevention regulations. Additionally, the record otherwise reflects that Respondent is an owner or operator of the Facility within the meaning of 33 U.S.C. § 1321(a)(6), Compl. ¶ 9; Answer ¶ 9, and that the Facility is an onshore facility within the meaning of 33 U.S.C. § 1321(a)(10), Compl. ¶ 21; Answer ¶ 21. Therefore, the record additionally reflects that Respondent would be liable for any violation of the Oil Pollution Prevention regulations pursuant to the CWA at 33 U.S.C. § 1321(b)(6)(A). Having established that the Oil Pollution Preventions regulations apply to Respondent, and that Respondent would be liable for any violations of these regulations pursuant to the CWA, I must evaluate whether Complainant has demonstrated an absence of a genuine issue of material fact with regard to liability for violation of these regulations alleged in the five counts of the Complaint. In making this determination, I have considered the evidence of record and the parties' arguments with regard to liability for each count in the Complaint, as discussed in detail below.

VIII. COUNT I

A. Arguments of the Parties

As discussed, Count I of the Complaint alleges that Respondent violated the Oil Pollution Prevention regulations, at 40 C.F.R. § 112.3, from November 27, 2012 to May 1, 2017,[22] by failing to have a SPCC plan for the Facility with the contents set forth in 40 C.F.R. § 112.7, including management approval of the plan pursuant to 40 C.F.R § 112.7(a); a diagram of the Facility with all regulated fixed containers, storage areas, and connecting pipes, stating the oil type and capacity for containers pursuant to 40 C.F.R. § 1 12.7(a)(3); and a diagram of the Facility including containment or diversionary structures for tanks not permanently closed pursuant to 40 C.F.R. § 112.7(c). Compl. ¶¶ 30-37. In support of its request for accelerated decision as to liability on this count, Complainant argues that the 2012 SPCC Plan, the 2014 Combined Plan, and the 2016 Combined Plan, each fail to meet the required criteria for a SPCC plan under 40 C.F.R § 112.7. *See* AD Mot. at 22-24. Specifically, Complainant asserts that the 2012 SPCC Plan for the Facility did not comport with the requirements in 40 C.F.R. § 112.7 as it did not include all ASTs identified in Table 3 of the plan in the Facility diagram, and "did not address containment and/or diversionary structures or equipment to prevent a discharge required for the rail car transfer rack at the facility." AD Mem. at 23. Likewise, Complainant asserts that the 2014 Combined Plan did not satisfy the requirements in 40 C.F.R. § 112.7 as this plan did not include management approval including a signature, AD Mem. at 22-23, and did not include a sufficient diagram of the Facility, AD Mem. at 23. Finally, Complainant alleges that the Combined 2016 Plan did not meet the requirements in 40 C.F.R. § 112.7, because this plan did not include management approval including a signature, AD Mem. at 22-23, and did not include

[22] Although the Complaint sets the dates of the violation alleged in Count I as November 27, 2012 to May 1, 2017, Compl. ¶¶ 35, 37, Complainant, in its Accelerated Decision Memorandum, appears to assert that this violation began in April 2012 (presumptively based upon the date of the 2012 SPCC Plan), *see* AD Mem. at 23-24. In that Complainant did not properly amend its Complaint to allege that the violations in Count I began in April 2012, I did not consider liability prior to November 27, 2012 for this count.

a sufficient diagram of the Facility with details of the rubberized asphalt plant and piping details of the production storage and manufacturing area, AD Mem. at 23. As a result, Complainant concludes with regard to Count I, that "there is no genuine issue of material fact that Respondent's failure to comply with 40 C.F.R. § 112.7 was a violation of 40 C.F.R. § 112.3." AD Mem. at 22.

In its Answer, Respondent argues that its SPCC plans for the Facility during the relevant period were in compliance with the Oil Pollution Prevention regulations or were "drafts exchanged with Complainant for the purpose of cooperatively developing said plans." Answer ¶ 34. As discussed, Respondent, in its Answer, denies the violation alleged in Count I, and asserts that its SPCC plan included management approval, Answer ¶ 30; a diagram of the Facility with all regulated fixed containers, storage areas, and transfer station connecting pipes, stating the oil type and capacity for containers, Answer ¶ 31; and a diagram of the Facility including containment or diversionary structures, Answer ¶ 32. Consistent with the Answer, Respondent, in its Opposition, argues that there are issues of material fact with regard to whether its SPCC plans included management approval; a diagram of the Facility with all regulated fixed containers, storage containers, storage areas, and connecting pipes; and containment of diversionary structures for tanks not permanently closed. Opp. at 4. Respondent asserts that with regard to the SPCC plan for the facility, the 2012 SPCC Plan remained in effect for the full duration of the period at issue in Count I, and it indicates that other versions of SPCC plans were merely drafts submitted while Respondent was in the process of refining its submissions. Opp. at 17. Respondent further claims that Complainant, it its Accelerated Decision Memorandum, "acknowledged that the [2012 SPCC Plan] was compliant with applicable requirements." Opp. at 17. Notably, Respondent does not otherwise cite to any evidence in support of its assertion that the 2012 SPCC Plan for the Facility met the requirements for SPCC plans within the Oil Pollution Prevention regulations. *See* Opp. at 4, 17.

In Response to Respondent's arguments regarding liability for Count I, Complainant argues that there is no support for Respondent's assertion that the 2014 Combined Plan and 2016 Combined Plan were drafts, as Respondent did not inform Complainant that these were drafts and these plans bear no markings identifying them as drafts. Reply at 11-12. Further, Complainant argues that -

> Even if this Court accepts Respondent's contention that only the April 2012 and May 2017 SPCC Plans should be considered for determining the scope of Respondent's SPCC violations, Complainant has demonstrated, and Respondent has not rebutted, that the April 2012 SPCC Plan falls short of SPCC requirements; specifically, it fails to include each fixed oil storage container and the storage area where mobile or portable containers are located, the type of oil in each fixed container and its storage capacity, and associated piping, as required by 40 C.F.R. § 112.7(a)(3).

Reply at 12. Complainant further denies that it acknowledged that the 2012 SPCC Plan met the requirements of the Oil Pollution Prevention regulations, noting that the language cited by Respondent in support of this statement is actually referring to the allegations regarding

certification of the SPCC plan by a Professional Engineer, as addressed in Count II of the Complaint. Reply at 12. Finally, in support of its allegations in Count I, Complainant refers to a summary of deficiencies of Respondent's SPCC plans for the Facility created by Ms. Witul and provided with her declaration. Reply at 12.

B. Analysis

The record reflects that there is no question of material fact that the Facility did not have a SPCC plan containing all of information required by 40 C.F.R § 112.7, from November 27, 2012, until Respondent prepared an SPCC plan on May 1, 2017 with this information. As discussed in further detail below, Complainant has established that the 2012 SPCC Plan, the 2014 Combined Plan, and the 2016 Combined Plan, each fail to meet the required criteria for a SPCC plan under 40 C.F.R § 112.7. Accordingly, the record reflects that there is no issue of material fact that Respondent violated 40 C.F.R. § 112.3, as the owner and operator of a facility regulated under the Oil Pollution Prevention regulations, by failing to have a SPCC plan for the Facility compliant with the requirements of 40 C.F.R. § 112.7 from November 27, 2012 until May 1, 2017, as alleged in Count I in the Complaint. Respondent, in opposing Complainant's Motion for Accelerated Decision with regard to liability for Count I, notably did not identify any genuine issue of material fact with regard to this count. Accordingly, it is appropriate to grant Complainant's request for accelerated decision with regard to liability for Count I.

Complainant has established the 2012 SPCC Plan, the 2014 Combined Plan, and the 2016 Combined Plan, each fail to meet the required criteria for a SPCC plan under 40 C.F.R § 112.7. Specifically, the record reflects that each of these plans fails to have a facility diagram which marked the location and contents of each fixed oil storage container, as required by 40 C.F.R § 112.7(a)(3). Given this evident deficiency in each of these plans, I do not find it necessary to further evaluate the other alleged deficiencies of these plans under 40 C.F.R. § 112.7 for purposes of establishing liability for Count I.

The 2012 SPCC Plan, in Table 3, identifies ASTs containing oil products at the Facility, including ASTs numbered 817, 818, and 848. CX 16 at 29; RX 29. However, the diagram of the Facility in the 2012 SPCC Plan does not identify the location of ASTs numbered 817, 818, and 848. *See* CX 16 at 24; RX 40 at 24. Notably, this deficiency, among others, was noted by Ms. Witul following the 2012 Inspection, in the 2013 SPCC Checklist. CX 4 at 8. As the 2012 SPCC Plan failed to include a facility diagram marking the location and contents of each fixed oil storage container, this plan failed to satisfy the requirements of 40 C.F.R. § 112.7(a)(3).

Likewise, the record reflects the 2014 Combined Plan and the 2016 Combined Plan both failed to include a facility diagram meeting the requirements of 40 C.F.R. § 112.7(a)(3), and therefore, these plans also did not satisfy the requirements for a SPCC plan in 40 C.F.R § 112.7. Both the 2014 Combined Plan and the 2016 Combined Plan identify that there are ASTs containing oil products, with a total storage volume of 50,800 gallons, in the rubberized asphalt production area of the Facility. CX 17 at 35 (AST identification in 2014 Combined Plan); CX 18 at 45-46 (AST identification in 2016 Combined Plan). However, in both plans, these ASTs are not depicted within the "Rubberized Asphalt Plant Area" of the included facility diagrams. *See* CX 17 at 17, 20 (diagrams of the Facility in 2014 Combined Plan); CX 18 at 17, 20 (diagrams of

the Facility in 2016 Combined Plan). Notably, Ms. Witul noted this deficiency within the 2016 Combined Plan in the 2016 SPCC Checklist. CX 8 at 7. As both the 2014 Combined Plan and the 2016 Combined Plan failed to include a diagram which marked the location and contents of each fixed oil storage container at the Facility, as required by 112.7(a)(3), it is evident that these plans failed to contain the information required pursuant to 40 C.F.R. § 112.7. Accordingly, Complainant has established that the 2012 SPCC Plan, the 2014 Combined Plan, and the 2016 Combined Plan each failed to comply with the requirements in 40 C.F.R. § 112. 7, and, therefore, that Respondent failed to comply with the requirements of 40 C.F.R. § 112.3.

Although Respondent argues in its Opposition that material issues of fact remain with regard to whether Respondent's SPCC plans for the Facility included a facility diagram with all regulated fixed containers, storage containers, storage areas, and connecting pipes, Opp. at 4, Respondent has failed to identify any such issue of material fact. As discussed, Respondent asserts in its Opposition that the 2012 SPCC Plan remained in effect for the full duration of the period at issue in Count I, and it indicates that other versions of SPCC plans were merely drafts submitted while Respondent was in the process of refining its submissions. Opp. at 17. However, accepting this assertion as true, the 2012 SPCC Plan failed to satisfy the criteria of 40 C.F.R. § 112.7, as discussed in detail above, and therefore even under such circumstances, Respondent failed to comply with the requirements of 40 C.F.R. § 112.3. Notably, the only defense offered by Respondent in support of its contention that the 2012 SPCC Plan met the requirements of 40 C.F.R. § 112.7 as discussed in Count I, is that Complainant acknowledged the sufficiency of this plan in its Accelerated Decision Memorandum. *See* Opp. at 17. However, this assertion is incorrect, Complainant in its Accelerated Decision Memorandum, did not concede that the 2012 SPCC Plan for the Facility was compliant with the requirements of 40 C.F.R. § 112.7. *See* AD Mem. at 22-24. As a result, Respondent provided no basis for finding that a genuine issue of material fact remains with regard to liability for Count I. Further, Respondent has not otherwise provided an affirmative defense with regard to Count I.

As the record reflects an absence of a genuine issue of material fact with regard to liability for Count I, it is therefore appropriate to grant Complainant's request for accelerated decision with regard to this count. However, as seemingly acknowledged by Complainant, *see* AD Mem. at 24, n.8, 33, the statute of limitations applicable to this violation, provides that proceedings for the enforcement of civil penalties, such as this matter, must be commenced within five years from the date when the claim accrued, *see* 28 U.S.C. § 2462; *supra* at 5. Notably, this issue seems to have been raised by Respondent in its Prehearing Exchange, though it has not yet amended its answer to include a statute of limitations defense. *See* Resp. PHE at 26. This proceeding was commenced by Complainant on February 13, 2018. Therefore, it is only appropriate to establish liability for Count I beginning on February 13, 2013, rather than November 27, 2012, as alleged by Complainant. Accordingly, I grant Complainant accelerated decision with regard to Respondent's liability for Count I for the period from February 13, 2013 to May 1, 2017.

IX. COUNT II

A. Arguments of the Parties

With regard to Count II, Complainant alleges in its Complaint that Respondent's SPCC plans for the Facility failed to include certification from a Professional Engineer meeting the requirements of 40 C.F.R. § 112.3(d) from October 24, 2014, until Respondent obtained such certification from a Professional Engineer on its SPCC plan on January 15, 2016. Compl. ¶¶ 41-44. In its Accelerated Decision Memorandum, Complainant acknowledges that the 2012 SPCC Plan for the Facility has sufficient certification from a Professional Engineer. *See* AD Mem. at 25, n. 9. Likewise, Complainant acknowledges that Lee Delano, a registered Professional Engineer, provided a certification in both the 2014 Combined Plan and the 2016 Combined Plan. *See* AD Mem. at 24. However, Complainant argues that the certifications in these plans "lack[] language that the Professional Engineer had visited the facility; that the Plan has been prepared in consideration of applicable industry standards, and in accordance with the Oil Pollution Prevention regulations; that procedures for required inspections and testing have been established; and that the Plan is adequate for the facility." AD Mem. at 24-25 (citing CX 17 at 29; CX 18 at 39). Further, Complainant indicates that these omissions render the Professional Engineer certifications in these plans insufficient under the requirements of 40 C.F.R. § 112.3(d). *See* AD Mem. at 25. As a result, Complainant concludes with regard to Count II that "there is no genuine issue of material fact that from October 2014 through at least January 2016, Respondent failed to have an adequate Professional Engineer certification, as required by 40 C.F.R. § 112(d)(1)."[23] AD Mem. at 25.

In its Answer, Respondent acknowledges that it obtained certification from a Professional Engineer on its SPCC plan on January 15, 2016, "without prejudice to establishing that prior plans likewise were in compliance with the PE certification requirement." *See* Answer ¶ 43. Consistent with its arguments regarding Count I, Respondent asserts in its Opposition that the 2012 SPCC Plan "remained in effect throughout this period," and it notes that Complainant acknowledged that the 2012 SPCC Plan for the Facility contained adequate certification from a Professional Engineer. Opp. at 18. Notably, in support of its position that the 2014 Combined Plan was a draft, rather than a final SPCC plan, Respondent provided a copy of the 2014 Combined Plan identified with a watermark on each page identifying it as a draft. *See* RX 92.

Responding to Respondent's argument that the 2014 Combined Plan and the 2016 Combined Plan for the Facility were drafts, rather than final SPCC plans, Complainant asserts in its Reply that "Respondent has not demonstrated that [the 2014 Combined Plan or the 2016 Combined Plan] were drafts." Reply at 13. However, Complainant does not cite to any evidence in support of its position that there is no genuine issue of material fact on this issue.

[23] Confusingly, in its Accelerated Decision Memorandum, Complainant rebuts the allegation in the Complaint that Respondent obtained the required certification from a Professional Engineer on its SPCC plan on January 15, 2016. *See* Compl. ¶ 43; AD Mem. at 25, n. 9. In fact, Complainant in its Accelerated Decision Memorandum asserts that "Respondent still has not demonstrated to EPA compliance with the Professional Engineer certification requirements." AD Mem. at 25, n.9. Nevertheless, Complainant asserts that with regard to Count II, it is "only seeking a finding of liability from October 2014 to January 2016 in this proceeding." AD Mem. at 25, n.9.

B. Analysis

Unlike Count I, Complainant has not established that there is an absence of a genuine issue of material fact with regard to Respondent's liability for Count II. The parties agree that the 2012 SPCC Plan for the Facility contains certification from a Professional Engineer that satisfies the requirements in 40 C.F.R. § 112.3(d). *See* AD Mem. at 25, n. 9; Opp. at 18. Accordingly, if the 2012 SPCC Plan were effective at the Facility during the period relevant to the allegations in Count II, from October 24, 2014, until January 15, 2016, as Respondent alleges, Respondent did not violate 40 C.F.R. § 112.3(d) by failing to have a SPCC plan with adequate certification from a Professional Engineer during that period. Respondent has identified evidence in support of its position that the 2012 SPCC Plan was effective at the Facility during the period of alleged violation for Count II. As noted, Respondent has submitted a copy of the 2014 Combined Plan with a watermark on each page identifying it as a draft. *See* RX 92. Additionally, in its Prehearing Exchange, Respondent identified several of its management officials as proposed witnesses for purposes of establishing its compliance with the Oil Pollution Prevention regulations, including Randall Tilford, a corporate environmental manager, and Pat McNairy, the plant manager for the Facility. *See* Resp. PHE at 2, 15-17. It is reasonable that these identified witnesses would be able to provide testimony regarding which SPCC plan was effective at the Facility during the period at issue in Count II. As a result, the record reflects a genuine issue of material fact for Count II as to which SPCC plan was in effect at the time of this alleged violation. Although Complainant argues that Respondent has not demonstrated that the 2014 Combined Plan and the 2016 Combined Plan were merely drafts during the period at issue in Count II, it is Complainant, as the moving party upon its Motion for Accelerated Decision, that bears the burden of demonstrating that there is no genuine dispute as to any material fact regarding liability in Count II. Accordingly, as Complainant has not demonstrated that there is an absence of a genuine issue of material fact with regard to Respondent's liability for Count II, Complainant's request for accelerated decision is appropriately denied for this count.

X. COUNT III

A. Arguments of the Parties

In Count III of the Complaint, Complainant alleges Respondent violated 40 C.F.R. § 112.5(a) by failing to update the SPCC plan for the Facility within a six-month period following both the addition of Tank 2001, which it alleges occurred in or about March 2012, and the addition of Tank 2002, which it alleges occurred in or about July 2015. Compl. ¶¶ 49-58. In its Accelerated Decision Memorandum, Complainant argues that there is no genuine issue of material fact that Respondent failed to amend its SPCC plan following the addition of Tanks 2001 and 2002 in violation of 40 C.F.R. § 112.5(a). *See* AD Mem. at 26. Complainant asserts that the record reflects that Respondent added Tank 2001 into service at the Facility in March 2012, based upon information provided by Respondent in response to an information request, contained in CX 11, and information in the 2016 Combined Plan, in CX 18. *See* AD Mem. at 4, 25-26. Likewise, Complainant asserts that Respondent added Tank 2002 into service at the Facility in July 2015, based upon statements made in Respondent's January 2017 FRP for the Facility, in CX 19. *See* AD Mem. at 4, 26. Complainant further argues that the addition of

Tanks 2001 and 2002 each constituted a change at the Facility that materially altered its ability to discharge, and therefore, that Respondent was required to update its SPCC plan within six months these tank additions pursuant to 40 C.F.R. § 112.5. *See* AD Mem. at 25-26. However, Complainant asserts that Respondent did not timely update the SPCC plan for the Facility within six months of these changes. *See* AD Mem. at 25-26. Although Complainant acknowledges that Respondent "did amend its SPCC [p]lan in January 2016," Complainant argues that this amendment does not satisfy the requirements of 40 C.F.R. § 112.5(a) as Respondent did not identify that Tank 2002 was in service in this plan. AD Mem. at 26 (citing Witul Decl. ¶ 23(c); CX 18 at 45).

In Response to Complainant's arguments regarding liability for Count III, Respondent argues that the dates of operation for Tanks 2001 and 2002 asserted by Complainant "are wrong." Opp. at 18. With regard to Tank 2001, Respondent references a statement provided by Pat McNairy, the plant manager for the Facility, indicating that one of two ASTs at the Facility with a 2.5 million gallon holding capacity went into use on March 21, 2013, and that only one of these tanks was in use as of July 10, 2013. *See* Opp. at 18 (citing RX 37 at 5); RX 37 at 5. As for Tank 2002, Respondent asserts that this tank did not go into service at the Facility until January 2016, and it cites to the declaration of Randall Tillford, a corporate environmental manager for Respondent, in support of this assertion. *See* Opp. at 18 (citing Tillford Decl. ¶ 2). Notably, in his declaration, Mr. Tillford states that Tank 2001 "was not in service in April 2012," and that Tank 2002 did not go into service until January 2016. Tillford Decl. ¶ 2. Additionally, Respondent suggests that the 2016 Combined Plan reflects that Tank 2002 was not in service at the time this document was drafted, as an aerial photograph included in this plan reflects that construction and installation of this tank had not yet been completed, Opp. at 18 (citing CX 18 at 16), and further, that the site map of the Facility in this plan identifies the location of Tank 2002, and reflects that this tank is out of service, *see* Opp. at 18 (citing CX 18 at 17).

Complainant, in rebutting the arguments asserted by Respondent with regard to liability for Count III, asserts that the evidence Respondent relies upon in support of its position regarding the dates Tanks 2001 and 2002 were in service is lacking in probative value. *See* Reply at 14-16. With regard to that date Tank 2001 went into service, Complainant argues that the evidence it has supplied on this issue, including information provided by Respondent upon an information request and the observation of Ms. Witul upon the 2012 Inspection, is more probative than that supplied by Respondent. Reply at 13-15. Likewise, Complainant argues that the evidence submitted by Respondent regarding the date Tank 2002 went into service falls short of rebutting the evidence it presented. *See* Reply at 16. Complainant notes that the date provided in Mr. Tindall's declaration regarding the date Tank 2002 went into service is inconsistent with both the January 2017 FRP and May 2017 FRP for the Facility. Reply at 16 (citing CX 19 at 14; CX 21 at 20). Additionally, Complainant notes that the aerial photograph in the 2016 Combined Plan that Respondent offers as evidence that Tank 2002 was not in service at the Facility in January 2016, is dated April 18, 2014, and that the site map offered by Respondent for the same purpose is undated. Reply at 16 (citing CX 18 at 16-17). Finally, Complainant argues that even if Respondent had established the dates of services for Tanks 2001 and 2002 that it asserts, the record would still reflect that Respondent violated the requirement in 40 C.F.R. § 112.5(a), as Respondent did not update its SPCC plan within six months of these dates as required by this provision. *See* Reply at 15-16.

B. Analysis

The record reflects a genuine issue of material fact with regard to liability for Count III regarding the dates Tanks 2001 and 2002 went into service at the Facility. Given the dispute on this material issue of fact, it is appropriate to deny Complainant's request for accelerated decision with regard to this count. Respondent refutes the dates of service for Tanks 2001 and 2002 asserted by Complainant and has identified evidence to support its position. *See* Answer ¶¶ 49, 51; Opp. at 18. In support of its position that Tank 2001 was not in service until March 21, 2013, Respondent has provided the statement of Mr. McNairy in RX 37, addressing this date of service. *See* Opp. at 18; RX 37 at 5. Likewise, in his declaration, Mr. Tillford stated that Tank 2001 was not in service in April 2012, as alleged by Complainant. *See* Tillford Decl. ¶ 2. With regard to the date Tank 2002 went into service, as noted by Complainant, the aerial photograph in the 2016 Combined Plan referenced by Respondent in support of its position that this tank was not in service until January 2016, appears to be dated April 18, 2014, and therefore does not appear to support Respondent's position with regard to the operational status of Tank 2002. *See* CX 18 at 16. However, Respondent has provided other evidence in support of its position that Tank 2002 did not go into service until January 2016, including the statement of Mr. Tillford in his declaration that this tank did not go into service until January 2016, *see* Tillford Decl. ¶ 2, and the site map of the Facility contained within the 2016 Combined Plan, which appears to identify Tank 2002 as out of service, *see* CX 18 at 17. As noted, Complainant argues that the aforementioned evidence from Respondent regarding the dates of service for Tanks 2001 and 2002 at the Facility is lacking in probative value and is in conflict with evidence it has cited in support of its opposing position. However, as discussed, in considering the Complainant's Motion for Accelerated Decision, the evidence of Respondent, as the non-moving party, is to be believed, and all justifiable inferences are to be drawn in Respondent's favor. *See supra* 3; *Anderson*, 477 U.S. at 255. Considering the evidence in this light, it is clear that the record reflects a material issue of fact with regard to the dates upon which Tanks 2001 and 2002 went into service. As there is a genuine issue of fact regarding the dates that Tanks 2001 and 2002 went into service at the Facility, and determination of the dates these tanks went into service is necessary to make a finding regarding Respondent's liability for violating 40 C.F.R. § 112.5(a) as alleged in Count III, this count cannot be resolved upon Complainant's Motion for Accelerated Decision.

XI. COUNT IV

A. Arguments of the Parties

Count IV of the Complaint alleges that beginning on January 1, 2015, Respondent violated 40 C.F.R. § 112.7(e) for a period of at least 1,095 days by failing to develop written procedures for inspections and tests of the Facility, and further failing to maintain records of such inspections and tests, signed by the appropriate supervisor or inspector, for a period of three years, as required by this regulatory provision. Compl. ¶¶ 63-65. Notably, Count IV more specifically alleges that "Respondent lacked documentation of external tank and internal tank inspections and tests that were due in 2014 based on the schedule in Respondent's applicable SPCC plan." Compl. ¶ 64.

In support of its request for accelerated decision as to liability on Count IV, Complainant argues in its Accelerated Decision Memorandum that Respondent's 2012 SPCC Plan for the Facility fails to satisfy the requirements of the Oil Pollution Prevention regulations regarding inspection and testing of ASTs, and that Respondent failed to maintain records consistent with the provisions regarding inspection and testing of ASTs in its 2014 Combined Plan and 2016 Combined Plan, as required by 40 C.F.R. § 112.7(e).[24] *See* AD Mem. 26-30. Complainant argues that the inspection and testing procedures in Respondent's 2012 SPCC Plan do not satisfy the requirements of Oil Pollution Prevention regulations, as this plan did not accurately characterize the ASTs at the Facility, and otherwise did not incorporate the applicable industry standards into the testing and inspection protocol. AD Mem. at 29. Complainant notes that the 2012 SPCC Plan relied upon visual inspection of the ASTs at the Facility, and it argues that the applicable industry standards for testing of ASTs at the Facility require internal inspection and ultrasonic testing. *See* AD Mem. at 28-29. Notably, Complainant appears to rely solely upon the statements of Ms. Witul, in her declaration, for purposes of identifying the applicable industry standards for inspecting and testing ASTs. *See* AD Mem. at 26-27.

With regard to the inspection and testing provisions of the 2014 Combined Plan and the 2016 Combined Plan, Complainant asserts that such plans "incorporated an integrity testing program developed by Fletcher Consultants, dated September 30, 2014, that described the written procedures and schedules for inspections and tests of the ASTs at the Facility that needed to be performed to comply with 40 C.F.R. § 112.7(e)." AD Mem. at 29 (citing CX 17 at 44-45, 98-105; CX 18 at 55-56, 92-119). However, Complainant argues that Respondent failed to maintain records of inspection and testing performed pursuant to such plans, as required 40 C.F.R. § 112.7(e). In support of this position, Complainant asserts that Respondent was unable to provide Complainant with documentation that it had adhered to the schedule of inspections incorporated into the 2014 Combined Plan and the 2016 Combined Plan for the Facility upon Ms. Witul's review of the 2016 Combined Plan. *See* AD Mem. at 29 (citing Witul Decl. ¶ 23(d)). Complainant notably acknowledges that Respondent provided records of inspections and tests performed between June 1, 2016, and January 15, 2017 in its Prehearing Exchange. AD Mem. at 30 (citing RX 54-68). On this basis, Complainant appears to acknowledge in its Accelerated Decision Memoranda that Respondent ceased the violation of 40 C.F.R. § 112.7(e) alleged in Count IV following January 2016. AD Mem. at 30.

In its Opposition, Respondent argues that genuine issues of fact remain in dispute with regard to Respondent's alleged non-compliance with inspection and testing requirements, as addressed in Count IV. *See* Opp. at 3-4, 19. Respondent contends that with regard to the allegations regarding such inspections and testing at issue in Count IV, Complainant "has not provided any instances of specific non-compliance." Opp. at 19. Respondent notes that Complainant concedes that it submitted evidence of inspections and tests performed between

[24] Notably, in its Accelerated Decision Memorandum, Complainant appears to change its position regarding the date upon which the violation alleged in Count IV of the Complaint began. *See* AD Mem. at 29-30. Instead of alleging this violation began on January 1, 2015, as alleged in the Complaint, Compl. ¶ 65, Complainant in its Accelerated Decision Memorandum alleges that this violation began in April 2012, *see* AD Mem. at 29-30. However, as Complainant has not amended its Complaint to reflect the earlier date of violation asserted in its Accelerated Decision Memorandum, I have addressed the issue of liability for this count from January 1, 2015, the date appropriately alleged in the Complaint.

June 1, 2016 and January 15, 2017. Opp. at 19. Respondent asserts that it further provided EPA with the evidence of testing contained in RX 2 on August 23, 2013, and it argues that Complainant has failed to address this evidence. *See* Opp. at 19.

In its Reply, Complainant clarifies that it is not seeking liability for Count IV after January 2016. Reply at 17. It further concludes that "Respondent has not produced any evidence showing that there is a genuine dispute that Respondent failed to keep record of required ultrasonic testing and internal inspections through January 2016." Reply at 17.

B. Analysis

As Complainant did not demonstrate an absence of a genuine issue of material fact with regard to Respondent's liability for the violation alleged in Count IV, its request for accelerated decision on this count is appropriately denied. To the extent that Complainant relies upon the 2014 Combined Plan or the 2016 Combined Plan to support its allegations for Count IV, the record, as already discussed, reflects a genuine issue of material fact regarding whether these plans went into effect at the Facility. *See supra* 21-22. 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 applicable industry standards require internal inspection and ultrasonic testing. *See* AD Mem. at 28-29. Such reliance is problematic, as Complainant has not identified Ms. Witul as an expert witness competent to provide such expert opinion evidence on this technical subject matter, and Complainant also has failed to provide a resume or curriculum vitae in support of Ms. Witul's qualification as an expert witness, as required by the Prehearing Order. As a result, Ms. Witul's declaration is insufficient to establish the industry standards applicable to inspection and testing for the ASTs at the Facility.

Finally, as noted by Respondent, the record does contain some evidence of inspection or testing of ASTs at the Facility, at least some of which relate to the period of violation alleged in Count IV of the Complaint. *See* RX 2; RX 54-68. Such evidence supports Respondent's position that a genuine issue of material fact exists with regard to the allegations in Count IV regarding inspection and testing of the ASTs at the Facility. Accordingly, as Complainant has not demonstrated the absence of a genuine issue of material fact with regard to Respondent's liability for Count IV, its Motion for Accelerated Decision is denied with regard to this count.

XII. COUNT V

A. Arguments of the Parties

As previously discussed, Count V of the Complaint alleges that Respondent violated the FRP requirement in 40 C.F.R. § 112.20 by failing to timely file an adequate FRP for the Facility. *See* Compl. ¶¶ 68-78. In the Complaint, Complainant alleges that Respondent was required to prepare and submit a FRP for the Facility, along with an associated cover sheet, upon the installation of Tank 2001, which it alleges occurred on or about March 21, 2012, on the basis that

the Facility, at that point, exceeded one million gallons in oil storage capacity, and is located at such a distance from the SDWSC that a discharge could cause injury to fish and wildlife and sensitive environments. Compl. ¶ 70. Although the Complaint acknowledges that Respondent submitted a FRP in the 2014 Combined Plan, as well as the January 2017 FRP, Compl. ¶ 72, the Complaint alleges that such plans were insufficient because they each were not based upon the criteria within 40 C.F.R. § 112.20(f)(1) and otherwise did not address each element required under 40 C.F.R. § 112.20(h), Compl. ¶¶ 73-74.

In its Accelerated Decision Memorandum, Complainant argues that the evidence demonstrates that Respondent was required to file a FRP for the Facility since the addition of Tank 2001, as the Facility met the criteria within 40 C.F.R. § 112.20, because the Facility exceeded one million gallons in oil storage capacity at this time, and is located at such a distance from the SDWSC that a discharge could cause injury to fish and wildlife and sensitive environments. *See* AD Mem. at 15, 19-20. Based upon information provided by Respondent in 2013, in CX 11, and Respondent's 2012 SPCC Plan, Complainant concludes that the Facility exceeded one million gallons in oil storage capacity with the addition of Tank 2001 in March 2012. *See* AD Mem. at 15 (citing CX 11 at 3-4; CX 18 at 98). Additionally, Complainant argues that the record reflects that a discharge from the Facility could cause injury to fish and wildlife and sensitive environments, as it asserts that the SDWSC is a sensitive environment and the Facility is within the planning distance of the SDWSC. *See* AD Mem. 19-21. In support of this position, Complainant notes that the SDWSC is identified as an environmentally sensitive site in the Area Contingency Plan for the San Francisco Bay and Delta planning area. AD Mem. at 19 (citing RX 83 at 1). Further, Complainant cites Ms. Witul's declaration, noting the presence of certain types of salmon and steelhead fish in the SDWSC, *see* AD Mem. at 19-20 (citing Witul Decl. ¶ 31(d)); Witul Decl. ¶ 31(d), as well as the declaration of Daniel Meer, an Assistant Director of the Superfund Division of Region IX, concluding that the SDWSC is a "fish and wildlife and sensitive environment" within the meaning of 40 C.F.R. § 112.2, *see* AD Mem. at 20 (citing Meer Decl. ¶ 10); Meer Decl. ¶ 10. Moreover, citing to the declaration of Joseph Troy Swackhammer, a chemical engineer with the Region IX of EPA, Complainant asserts that because the Facility is located within 200 feet of the SDWSC, "there is a reasonable expectation that a discharge from the Facility to a sensitive environment would be virtually instantaneous." AD Mem. at 21 (citing Swackhammer Decl. ¶ 19).[25] As a result, Complainant concludes that the Facility is "within any planning distance that may be calculated" from the SDWSC. AD Mem. at 21 (citing Swackhammer Decl. ¶ 19).[26] Therefore, Complainant argues, "[t]here is no genuine issue of material fact that an oil discharge from the Facility would necessarily reach the [SDWSC] and then could cause injury to fish and wildlife and sensitive environments, thereby satisfying the substantial harm criteria in 40 C.F.R. § 112.20(f)(1)(ii)(B)," and therefore that the Facility is subject to the FRP requirements in the Oil Pollution Prevention regulations. AD Mem. at 21.

[25] Notably, in its prehearing exchanges, Complainant has not identified Ms. Witul, Mr. Meer, or Mr. Swackhammer as an expert witness. Rather, these individuals are only proposed as fact witnesses.

[26] Complainant also cites to the declaration of Mr. Meer at paragraphs 18-19 at this juncture, but there are no paragraphs corresponding with this citation within Mr. Meer's declaration.

In addition to arguing that Respondent was required to submit a FRP for the Facility because it is located at such a distance from the SDWSC that a discharge could cause injury to fish and wildlife and sensitive environments, and thereby met the criteria for a Facility requiring a FRP pursuant to 40 C.F.R. § 112.20(f)(1)(ii)(B) as alleged in the Complaint, Complainant expands upon the allegations in the Complaint regarding Count V in its Accelerated Decision Memorandum, identifying another basis upon which it argues Respondent was required to submit a FRP during the period of alleged violation. *See* AD Mem. at 16-19. Specifically, Complainant argues that Respondent was required to submit a FRP for the Facility because the Facility exceeded one million gallons in oil storage capacity during the relevant period, and had insufficient secondary containment, as addressed in 40 C.F.R. § 112.20(f)(1)(ii)(A), during the relevant period. As previously discussed, Complainant asserts that the evidence of record reflects that the Facility exceeded one million gallons in oil storage capacity with the addition of Tank 2001 on March 2012. *See* AD Mem. at 15 (citing CX 11 at 3-4; CX 18 at 98). Complainant further argues that the Facility did not have adequate secondary containment in the product storage and manufacturing area during the relevant period, based upon the information reflected in the 2014 Combined Plan; calculations within the Michaud Report in CX 14; and the declaration of Mr. Swackhammer. *See* AD Mem. at 17-19. In particular, Complainant asserts that the Facility had insufficient secondary containment in the product storage and manufacturing area, as it had insufficient freeboard to allow for precipitation based upon calculations premised upon a 25-year, 24-hour rainfall event, performed by Mr. Michaud in his report. *See* AD Mem. at 17-18 (citing to CX 14). Complainant further argues that this position is consistent with the 2014 Combined Plan, which indicates that the secondary containment in the product storage and manufacturing area of the Facility is not sufficient to contain 110 percent of the largest capacity AST in this area with adequate freeboard to allow for precipitation. *See* AD Mem. at 18 (citing CX 17 at 44). Based upon such information, Complainant concludes that the Facility had insufficient secondary containment during the period relevant to the violation alleged in Count V, and therefore, that the Respondent was required to submit a FRP on this basis. *See* AD Mem. at 16-19.

In its Accelerated Decision Memorandum, Complainant acknowledges that Respondent submitted FRPs for the Facility, including the FRP within the 2014 Combined Plan, the January 2017 FRP, and the May 2017 FRP. *See* AD Mem. at 31-32. However, Complainant argues that such submissions were not timely, as they were submitted subsequent to March 21, 2012, the date upon which Complainant argues that the Facility required a FRP. *See* AD Mem. at 31. Further, Complainant argues that each FRP for the Facility submitted by Respondent is insufficient, as such plans do not include all the elements required for FRPs pursuant to 40 C.F.R. § 112.20(h). *See* AD Mem. at 32. Specifically, Complainant asserts that such plans do not contain a section addressing self-inspection, drills/exercises, and response training sessions. AD Mem. at 32 (citing to Witul Decl. at Ex. B). As a result, Complainant concludes that "there is no genuine issue of material fact that between October 2014 and February 2018, Respondent failed to have an adequate FRP, in violation of 40 C.F.R. § 112.20(a)(2)." AD Mem. at 32.

In its Opposition, Respondent denies both the applicability of the FRP requirement to the Facility, and the alleged deficiencies of the FRPs for the Facility submitted to EPA. *See* Opp. at 3-17, 19-21. In fact, it is notable that the majority of Respondent's Opposition is dedicated to contesting the violation alleged in Count V. *See* Opp. at 3-17, 19-21. With regard to the

applicability of the FRP requirement to the Facility during the period of alleged violation, Respondent refutes Complainant's assertion that the Facility could, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines in accordance with 40 C.F.R. § 112.20. *See* Opp. at 5-17. Respondent argues that "[w]hether a discharge from the Facility would in fact reach the channel and cause substantial harm to the environment is the central issue in this case." Opp. at 5.

Addressing the Complainant's claim that the Facility met the criteria within 40 C.F.R. § 112.20(f)(1)(ii)(B) during the relevant period, as a discharge from the Facility could cause injury to fish and wildlife and sensitive environments, and therefore the Facility required a FRP on this basis, Respondent argues that the evidence submitted by Complainant is insufficient to establish this allegation. *See* Opp. at 5-15, 17. Respondent asserts that Complainant did not provide evidence that it calculated the planning distance for this classification in support of its Motion for Accelerated Decision, specifically noting that neither the declaration from Mr. Swackhammer, nor the declaration from Mr. Michaud, provide this calculation. *See* Opp. at 6-9. As a result, Respondent argues that Complainant has failed to establish that the Facility met the criteria of 40 C.F.R. § 112.20(f)(1)(ii)(B), because it failed to provide such evidence of this calculation in support of its claim. *See* Opp. at 7-9. Respondent further cites to evidence it submitted, including the WHF Report regarding the Facility and the declaration of Lee Delano, P.E., the vice president and principal engineer of WHF, Inc., which it argues establishes that a discharge from the Facility could not cause injury to fish and wildlife and sensitive environments. *See* Opp. at 11-15. Respondent asserts that flow modeling within the WHF Report reflects that "a worst-case release would not reach (much less cause injury to fish and wildlife therein) the channel." Opp. at 11 (emphasis excluded) (citing RX 88 at 11). Respondent appears to suggest that this flow modeling is comparable to a planning distance calculation, and it argues that both Mr. Swackhammer and Mr. Michaud failed to consider this evidence in their declarations. *See* Opp. at 9-11. Respondent indicates that such evidence raises a genuine issue of material fact with regard to whether a discharge from the Facility could cause injury to fish and wildlife and sensitive environments. *See* Opp. at 11-12.

Additionally, Respondent contests Complainant's assertion in its Accelerated Decision Memorandum, that the Facility was subject to the FRP requirement during the period of alleged violation on the basis that it met the criteria of 40 C.F.R. § 112.20(f)(1)(ii)(A) at this time, due to insufficient secondary containment in the product storage and manufacturing area of the Facility. *See* Opp. at 15-17. Respondent asserts that the information Complainant relied upon in support of this claim from the 2014 Combined Plan is inaccurate, and that this document was merely a draft. *See* Opp. at 15-16. Specifically, Respondent asserts that the Complainant's argument with regard to the insufficient secondary containment at the Facility is premised tank number 865 ("Tank 865") being in service, and it indicates that this tank was not in service during the relevant period. *See* Opp. at 16. Respondent cites to the declaration of Kari Casey, a general manager with the Environmental and Engineering Group of WHF, Inc., in support of its position that the 2014 Combined Plan contained inaccurate information regarding Tank 865, and that this tank was not in service at the Facility at the time the 2014 Combined Plan was drafted. Opp. at 16 (citing to Casey Decl. ¶¶ 7-8). Respondent further argues that this position is consistent with information in the WHF Report and the May 2017 FRP for the Facility. *See* Opp. at 16 (citing

CX 21 at 67; CX 23 at 41). As a result, Respondent argues that Complainant has not established that the Facility required a FRP pursuant to 40 C.F.R. § 112.20(f)(1)(ii)(A), and asserts that the record reflects a genuine issue of material fact on this issue. *See* Opp. at 16.

Finally, Respondent contests Complainant's claim that it failed to timely submit a FRP and appears to deny any deficiencies with the FRPs for the Facility submitted to EPA on this basis.[27] *See* Opp. at 19-21. Respondent argues that Complainant was uncertain about the applicability of the FRP requirement to the Facility during the period of violation alleged in Count V, and that such uncertainty is reflected in communications between Complainant and Respondent. Opp. at 20-21 (citing RX 22; RX 34). Nevertheless, Respondent argues that despite such uncertainty, it agreed to prepare a FRP and submitted FRPs to the EPA. *See* Opp. at 19-20. Respondent accordingly disputes deficiency with the FRPs on this basis. *See* Opp. 19-21.

In its Reply, Complainant maintains that there is no genuine issue of material fact with regard to the applicability of the FRP requirement to the Facility for the period relevant to Count V. *See* Reply at 5-11. Complainant concedes that there is an issue of material fact with regard to whether the Facility had adequate secondary containment in the product storage and manufacturing area, acknowledging that there is an issue of material fact regarding whether Tank 865 was active during the relevant period. Reply at 11. However, Complainant argues that the FRP requirement was applicable to the Facility during the relevant period because "there is no genuine issue of material fact that the Facility is located such that a discharge from the Facility could cause injury to a fish and wildlife and sensitive environment and therefore cause substantial harm to the environment." Reply at 11. Complainant reiterates its position that the SDWSC is a sensitive environment, *see* Reply 6-7, and further argues that the Facility is within the planning distance from the SDWSC upon application of the appropriate formula, *see* Reply at 8-9. Without specifically citing to evidence reflecting its planning distance calculations, Complainant asserts that it "determined that any discharge from the Facility necessarily satisfies the planning distance calculation." Reply at 8. Complainant concludes that application of the appropriate planning distance calculation "requires a finding that a discharge from the Facility could cause substantial harm." Reply at 8. Further, Complainant argues that even though it performed the planning distance calculations for the Facility, doing so is not necessary pursuant to the Oil Pollution Prevention regulations, as it is clear given the proximity of the Facility to fish and wildlife and a sensitive environment that this area would be impacted by a discharge. *See* Reply at 10. As a result, the Complainant concludes that there is an absence of a genuine issue of material fact with regard to whether the Facility was subject to the FRP requirement at the relevant time, as it has established that a discharge from the Facility could cause injury to fish and wildlife and a sensitive environment. *See* Reply at 6, 10.

Likewise, in its Reply, Complainant again contends that the record reflects that Respondent failed to submit a timely and adequate FRP for the Facility. *See* Reply at 18-20. Addressing Respondent's argument that it was unclear whether a FRP was required for the Facility during the relevant period, Complainant notes that a strict liability standard is applicable

[27] Although Respondent indicates that it contests Complainant's allegation that it failed to submit a timely and adequate FRP for the Facility, it is notable that Respondent does not appear to provide analysis of the substantive adequacy of the FRPs for the Facility submitted to the EPA in its Opposition. *See* Opp. at 19-21.

to the violation alleged in Count V, and further argues that "it is not EPA's role to determine whether an individual facility is subject to FRP requirements." Reply at 18. Additionally, Complainant notes that EPA indicated in the 2014 Letter to Respondent that the Facility was subject to the FRP requirement, and it argues that "EPA never withdrew its formal determination that the Facility was subject to [the] FRP requirement[]."[28] Reply at 18-19. Further, Complainant reiterates its position that the FRPs submitted for the Facility did not meet the requirements of the Oil Pollution Prevention regulations, Reply at 19-20, and also asserts that Respondent failed to demonstrate that it is implementing required provisions of a FRP, including provisions regarding training, exercises, and drills.

B. Analysis

Contrary to Complainant's assertion that there is no issue of material fact with regard to liability for Count V, the record reflects genuine issues of fact with regard to liability for this count. Specifically, the record reflects genuine issues of material fact regarding whether, at the time of the alleged violation, the Facility could have, because of its location, reasonably been expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, and therefore required a FRP pursuant to 40 C.F.R. § 112.20. Although the Complainant identified two bases upon which it alleges that the Facility met the criteria of 40 C.F.R. § 112.20 during the relevant period, Complainant concedes in its Reply that there is a genuine issue of material fact with regard to whether the Facility met the criteria of 40 C.F.R. § 112.20 on the basis that that it had insufficient secondary containment, as addressed in 40 C.F.R. § 112.20(f)(1)(ii)(A), during the period of alleged violation. *See* Reply at 11. Accordingly, the only remaining basis upon which Complainant asserts that the Facility met the criteria of 40 C.F.R. § 112.20 during the period of alleged violation for Count V is that the facility satisfied criteria of 40 C.F.R. § 112.20(f)(1)(ii)(B), as a facility with a total oil storage capacity greater than or equal to one million gallons, located at a distance such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments. As the record reflects genuine issues of material fact with regard to this basis for the Facility meeting the criteria of 40 C.F.R. § 112.20 during the relevant period, Complainant has not established that there is an absence of a genuine issue of material fact with regard to liability for Count V.

With regard to Complainant's position that the Facility satisfied the criteria of 40 C.F.R. § 112.20(f)(1)(ii)(B) during the period of alleged violation at issue in Count V, the record reflects genuine issues of fact with regard to both (1) whether the facility had a total oil storage capacity greater than or equal to one million gallons on March 21, 2012, and (2) 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 noted, Complainant alleges that the Facility exceeded one million gallons in oil storage capacity upon the addition of Tank 2001 on March 21, 2012. *See* Compl. ¶ 70; AD Mem. at 15. However, as previously discussed, Respondent disputes that Tank 2001 went into service at the Facility on March 21, 2012, and the

[28] To the extent that Complainant is attempting to assert an argument that the 2014 Letter is a formal determination of the Regional Administrator compelling Respondent to submit a FRP pursuant to 40 C.F.R. § 112.20(b), it is notable that it has not alleged this as a basis that the Facility required a FRP in the Complaint, and otherwise has not provided support that the 2014 Letter meets the requirements of such a determination established in 40 C.F.R. § 112.20(b).

record reflects a genuine dispute with regard to this issue. *See supra* 23-24; *see also* Opp. at 18. As a genuine issue of fact remains with regard to whether the facility had a total oil storage capacity greater than or equal to one million gallons on March 21, 2012, the record reflects a genuine issue of material fact with regard to whether Respondent satisfied the criteria of 40 C.F.R. § 112.20(f)(1)(ii)(B) during the period of alleged violation at issue in Count V.

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 within Appendix C to 40 C.F.R. Part 112. *See* AD Mem. at 21; Reply at 8-9. Notably, Complainant has provided statements from Mr. Swackhammer and Mr. Michaud asserting that the Facility is within the planning distance from the SDWSC. *See* Swackhammer Decl. ¶ 19; CX 14 at 9; Michaud Decl. ¶¶ 8-9. However, 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, *see* Swackhammer Decl. ¶¶ 18-19; CX 14 at 9, neither of these sources has identified the velocity of the SDWSC applied in any calculation of the planning distance for the Facility, s*ee* Swackhammer Decl. ¶¶ 18-19; CX 14 at 9; Michaud Decl. ¶¶ 8-9. As a result, the evidence submitted by Complainant regarding the planning distance calculations is incomplete, and therefore, Complainant's assertion that the Facility is within the planning distance of the SDWSC lacks adequate support.

Additionally, as previously noted, Complainant argues that reliance on the planning distance calculation is not required to determine that the Facility is located at a distance from the SDWSC that a discharge from could cause injury to fish and wildlife and sensitive environments, as it is evident from the very proximity of the Facility to the SDWSC that the Facility meets this standard. *See* Reply at 10. However, Respondent refutes that the Facility is located at a distance from the SDWSC that a discharge could cause injury to fish and wildlife and sensitive environments and has provided evidence in support of this contention. The Haley and Aldrich Report submitted by Respondent asserts that the viscosity of the asphalt stored in ASTs at the Facility would preclude a discharge from reaching the SDWSC. *See* CX 15 at 13-15. Likewise, the WHF Report submitted by Respondent provides an asphalt flow calculation for the Facility with consideration of the viscosity of the asphalt within ASTs at the Facility, CX 23 at 8-12; RX 88 at 8-12, and concludes based upon this calculation that a spill from a tank rupture would not reach the SDWSC, CX 23 at 14; RX 88 at 14. Additionally, Lee Delano asserts, in the declaration submitted by Respondent in support of its Opposition, that a spill of asphalt from an AST at the Facility would cool and solidify before reaching any navigable waters. *See* Delano Decl. ¶ 9. Notably, upon Complainant's Motion for Accelerated Decision, the evidence of Respondent, the non-moving party, is to be believed, and all justifiable inferences are to be drawn in Respondent's favor. *See supra* 3; *Anderson*, 477 U.S. at 255. Considering the evidence submitted by Respondent with regard to whether the Facility is located at a distance from the SDWSC that a discharge could cause injury to fish and wildlife and sensitive

environments, pursuant to 40 C.F.R. § 112.20(f)(1)(ii)(B), in this light, the record reflects a genuine issue of material fact on this issue.

Accordingly, the record reflects genuine issues of material fact regarding whether, during the period alleged violation in Count V, the Facility could have, because of its location, reasonably been expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, and therefore required to submit a FRP pursuant to 40 C.F.R. § 112.20. As a result, Complainant has not demonstrated that there is an absence of a genuine issue of material fact with regard Respondent's liability for the allegations in Count V, and therefore, it is appropriate to deny Complainant's Motion for Accelerated Decision with regard to this count. Given this finding, I need not further address the issue of whether Respondent failed to submit a timely and adequate FRP for the Facility, as disputed by the parties.

CONCLUSION

As discussed above, the evidence of record supports granting Complainant's Motion for Accelerated Decision with regard to a finding of liability for Count I for the period from February 13, 2013 to May 1, 2017, as the record reflects that there is no genuine issue of material fact with regard to Respondent's liability for this count during this period. However, as the record reflects genuine issues of material fact remain with regard to liability for Counts II-V of the Complaint, Complainant's Motion for Accelerated Decision is appropriately denied with regard to each of these counts.

ORDER

Respondent's objections to the declarations submitted by Complainant in support of its Motion for Accelerated Decision are hereby **OVERRULED**.

Complainant's Motion for Accelerated Decision is hereby **GRANTED IN PART**, and **DENIED IN PART**, as follows:

Complainant's Motion for Accelerated Decision is **GRANTED** with regard to liability for Count I, as discussed above, for the period from February 13, 2013 to May 1, 2017.

Complainant's Motion for Accelerated Decision is **DENIED** with regard to liability for Counts II-V.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: December 26, 2018
Washington, D.C.

In the Matter of *VSS International, Inc.*, Respondent.
Docket No. OPA-09-2018-0002

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order on Complainant's Motion for Accelerated Decision as to Liability, dated December 26, 2018, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original and One Copy by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
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Copy by Electronic Mail to:

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Dated: December 26, 2018
Washington, D.C.