UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S POST-HEARING REPLY BRIEF IN OPPOSITION TO RESPONDENT'S INITIAL POST-HEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

I. INTRODUCTION

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's June 19, 2019, Order Scheduling Post-Hearing Submissions, the United States Environmental Protection Agency, Region 9 ("EPA" or "Complainant") hereby submits this brief in reply to Respondent's September 13, 2019 Initial Post-Hearing Brief ("Respondent's Brief"). Unless otherwise noted, Complainant hereby incorporates and maintains all the factual assertions and legal arguments made in its Initial Post-Hearing Brief ("Complainant's Brief").

II. RESPONDENT'S ARGUMENTS ABOUT THE VIOLATIONS

Complainant relies on Complainant's Brief to demonstrate Respondent's liability for the violations alleged in its Administrative Complaint and Opportunity to Request a Hearing, filed February 13, 2018 ("Complaint") and takes this opportunity to respond to unaddressed arguments and factual misstatements in Respondent's Brief.

A. Count I –Respondent's violation of 40 C.F.R. § 112.7(a)(3) warrants a substantial penalty

While Respondent states that it "respectfully accepts the Presiding Officer's prior ruling" on liability for Count I, it contends that since it "substantially" complied with Section 112.7(a)(3), either no penalty or a d*e minimis* penalty should be assessed for this violation of the requirement to have a facility diagram that marked the location and contents of each fixed oil storage container, as required by 40 C.F.R. § 112.7(a)(3), for Respondent's facility located at 3785 Channel Drive, West Sacramento, CA ("Facility"). Respondent's Brief at 1-3. In making this argument, Respondent ignores the importance of the facility diagram to the regulatory scheme and the duration of Respondent's noncompliance.

It is worth noting that the law in this matter does not provide for "substantial" or any other "gradation" of compliance; anything less than full compliance is a violation of the law. Respondent's assertion that providing the required information throughout various figures, tables and pages in several different documents (e.g., the 2012, 2014, and 2016 SPCC Plans) constitutes "substantial compliance" with the facility diagram requirement of Section 112.7(a)(3) defies credibility, particularly in light of the purpose of the requirement.

The facility diagram is used for prevention, planning, inspections, management, and response considerations. See 67 Fed. Reg. 47042, 47097 (Jul. 17, 2002) (addressing the importance of the facility diagram); see also CX 34 (EPA's publicly-available SPCC Guidance for Regional Inspectors, dated December 16, 2013 ("2013 SPCC Guidance")[1]) at 250. As the 2013 SPCC Guidance explains, "[p]roviding information on a container-specific basis helps the owner or operator of the facility to prioritize inspections and maintenance of containers based on characteristics such as age, capacity, or location and helps to formulate contingency planning, if such planning is necessary." CX 34 at 245. The 2013 SPCC Guidance further explains that the facility diagram is important to responders and provides as follows:

> Diagrams may help responders avoid certain hazards by informing them of the location and content of containers and of the response equipment. The facility diagram may also assist responders in determining the flow pathway of discharged oil and to take more effective measures to control the flow of oil to potentially avert damage to sensitive environmental areas; protect drinking water sources; and prevent discharges to other conduits, to a treatment facility, or to navigable water or adjoining shorelines. Federal and state facility inspectors and facility personnel need to be aware of the location of all containers, piping, and transfer areas subject to the SPCC rule. The diagram may also be used to visually address other rule requirements such as discharge/drainage controls and the flow path of a discharge (§ 112.7(a)(3)(iii) and 112.7(b), respectively). Additionally, the diagram may be attached to a facility inspection checklist to identify areas, containers, or equipment subject to inspection.

[1] The 2013 SPCC Guidance is available at https://www.epa.gov/sites/production/files/2014-04/documents/spcc_guidance_fulltext_2014.pdf.

Id. at 250; see also 67 Fed. Reg. 47042, 47097 (Jul. 17, 2002). Accordingly, the lack of accurate detail and the disorganized presentation provided in Respondent's April 6, 2012 Spill Prevention, Control and Countermeasure ("SPCC") Plan ("2012 SPCC Plan"), October 2014 Hazardous Materials, Environmental Compliance, and Contingency Business Plans ("2014 Combined Plan"), and January 2016 Hazardous Materials, Environmental Compliance, and Contingency Business Plans ("2016 Combined Plan") undermined the ability for personnel at the Facility to undertake prevention activities, for EPA to perform effective inspections, and for responders to take effective measures.

Additionally, the period that Respondent violated 40 C.F.R. § 112.7(a)(3) was lengthy and must be considered. The Presiding Officer found that Respondent's 2012 SPCC Plan, 2014 Combined Plan, and 2016 Combined Plan did not meet the requirements of 40 C.F.R. § 112.7(a)(3) for the period from February 13, 2013 to May 1, 2017, which totals 1,538 days. See December 26, 2018 Order at 20. The requirement to have an accurate facility diagram is clear. See 40 C.F.R. § 112.7(a)(3) (plainly stating that the facility diagram "must mark the location and contents of each fixed oil storage container and the storage area where mobile or portable containers are located"). EPA has even provided publicly available examples of what such a diagram might look like. See, e.g., CX 34 at 259. The long duration in failing to comply with an important and relatively straightforward requirement, particularly after EPA alerted Respondent to the violation, demonstrates Respondent's culpability and a lack of good faith efforts to comply. [2]

[2] The dates that Complainant sent letters identifying the violations at the Facility and conveying the findings of the inspections to Respondent provide the appropriate benchmark in the record to measure the duration that Respondent had notice of its violations. See CX 4 at 7 (inspection checklist from EPA's 2012 inspection of the Facility which Complainant transmitted to Respondent in 2014 as an enclosure to RX 6 shows that the "no" in the "field" box is checked for

For these reasons, Count I warrants the assessment of a substantial penalty.

B. Count II –Respondent violated 40 C.F.R. § 112.3(d) by failing to obtain a Professional Engineer certification that attests to all five applicable statements

In addition to its contention that the 2014 and 2016 Combined Plans were drafts, which Complainant rebutted in its Brief at 11 - 12,[3] and Respondent eventually conceded,[4] Respondent argues that 40 C.F.R. § 112.3(d) does not require a professional engineer ("PE") to repeat verbatim the five applicable elements of 40 C.F.R. § 112.3(d)[5] as part of the PE's certification. But, the language of the regulation does, in fact, require the PE to attest to the five applicable elements as part of the certification: "by means of this certification the Professional Engineer attests: (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." 40 C.F.R. § 112.3(d); see also 67

---

both 112.7(a)(3) and (i), indicating that the 2012 SPCC Plan did not represent conditions in the field); see also CX 23 at 109 (inspection checklist from EPA's 2016 inspection of the Facility which Complainant transmitted to Respondent in 2016 shows that the "no" in the "plan" and "field" boxes are checked for 112.7(a)(3) and (i) which demonstrates that the violations had not been corrected in the 2016 Combined Plan).

[3] Complainant's Brief provides more detail, but in summary neither the 2014 or 2016 Combined Plans that EPA received (CX 17 and CX 18) had any indications that they were drafts (including no "draft" watermark); and EPA did not receive a 2015 version of an SPCC Plan. Complainant's Brief at 11-12.

[4] See Respondent's Brief at 4 (stating the plans were released to the Facility "so that the facility would have a current plan onsite in the event of an emergency").

[5] The relevant regulation lists six items total, but 40 C.F.R. § 112.3(d)(1)(vi) is specific to produced water, "if applicable." Since it is not applicable in this case it is not addressed in this brief.

Fed Reg. 47042, 47085 ("new certifications after the effective date of this rule must include the required attestations"); CX 34 at 39 (technical amendments to the rule include "making the PE certification and associated attestation more specific").

Additionally, EPA has consistently maintained that a written certification that spells out each of the elements is required. See, e.g., CX 34 at 492 (sample SPCC plan in which EPA provides the language of a proper PE certification that copies verbatim the language of 40 C.F.R. § 112.3(d)(1)(i)-(v)). In addition, EPA's inspector checklist, which is used by SPCC inspectors nationally (Tr. 156: 25 - 157: 2), includes a box to check next to each element of the attestation for a total of five lines of boxes, demonstrating that if even one element of the attestation is missing the PE certification is not compliant with 40 C.F.R. § 112.3(d). See CX 34 at 617; see also CX 4 at 4.

The requirement to attest to all five statements provides a simple way of ensuring that a PE has given a serious review of a facility in the context of the Oil Pollution Prevention (OPP) regulations. The requirement to include the proper certification is straightforward. Indeed, Respondent should have known what was required because it had previously met this requirement in its 2012 SPCC Plan.[6] Moreover, Respondent's consultant, Mr. Delano, had experience developing SPCC plans and was even designated as an expert in preparation of SPCC plans at hearing. Tr. 515: 10-16.

[6] 40 C.F.R. § 112.5(c) requires that a PE certify any technical amendments in accordance with 40 C.F.R. § 112.3(d). The 2014 Combined Plan was a significant amendment to the 2012 SPCC Plan because, *inter alia*, it addressed Tank # 2001 and included new procedures for tank inspections and testing, thereby requiring a new PE certification. See 67 Fed. Reg. 47042, 47085 (July 17, 2002) ("all material amendments require PE certification").

Moreover, contrary to Respondent's assertion, its PE certification does not include any cross reference to the five elements of attestation in 40 C.F.R. § 112.3(d)(1). Respondent's Brief at 5 ("But the regulation does *not* state that its provisions also must be recited therein in full, as opposed to being cross-referenced, which in this case clearly was done." (Emphasis in original)). Here, whether a cross-reference would be adequate is moot because there were no such cross-references in Respondent's plans.

C. Count III – Respondent violated 40 C.F.R. § 112.5(a) by failing to amend its SPCC plan within six months of a material change

Through evidence and testimony, EPA has established that March 21, 2012, is the most reliable date for when Tank # 2001 was put into service.[7] To rebut this showing, Respondent argues that the most reliable evidence is the statement in the 2012 SPCC Plan that Tank # 2001 was under construction. This argument relies on an incorrect assumption that the 2012 SPCC Plan reflected current conditions on April 6, 2012 (the date of the 2012 SPCC Plan). First, on page 4 of the 2012 SPCC Plan, the date of last plan review is marked as March 13, 2012, suggesting that the 2012 SPCC Plan would not have incorporated any changes to the Facility made after March 13, 2012, including bringing Tank # 2001 into service on March 21, 2012. CX

[7] For example, Respondent's August 23, 2013 response to EPA's information request (RX 2 at 4), 2014 Combined Plan (CX 17 at 106) and 2017 SPCC Plan (RX 96 at 12) all indicate that Tank # 2001 was put into service on March 21, 2012, and those dates should be found most persuasive because the Facility owner or operator is responsible for ensuring that information in a response to EPA's information request and its SPCC plans is accurate. Tr. 165: 17-23; see also U.S. v. Murphy Oil, 155 F. Supp. 2d 1117, 1150 (W.D. Wis. 2001) ("It is not plaintiff's [EPA's] responsibility to check all of the information in spill prevention plans; to the contrary, plaintiff is entitled to rely on the information provided in the plan"); see also CX 52 at 1 (aerial photo showing rail cars at the Facility in May 2012); Tr. 140: 2-7; 162-166 (testimony regarding use of aerial photos in investigations, and testifying to presence of loading racks during 2012 inspection); and RX 2 at 14 (2012 SPCC Plan which states that railroad spur lines were constructed to "allow delivery of asphalt slurry products via railroad cars" to the two new 2.5 million gallon ASTs).

16 at 4. In addition, the dates of publication printed on the vicinity map, the site map, and the facility detail, all clearly state February 7, 2012, which further demonstrates that the information in the 2012 SPCC Plan did not represent conditions at the Facility on April 6, 2012. CX 16 at 22-24. Accordingly, all of the statements in the 2012 SPCC Plan that Tank # 2001 was under construction were outdated and should be discarded as not compelling. Nonetheless, no matter what date of service the Presiding Officer ultimately finds most compelling, whether Complainant's offered date of March 2012 or Respondent's offered date of March 2013, the evidence demonstrates that Respondent did not amend its SPCC Plan until October 2014, significantly more than six months after the material change of adding Tank # 2001.

Since it is undisputed that a plan amendment did not occur within six months of bringing Tank # 2001 into service, to avoid liability Respondent next argues that it did not need to amend the 2012 SPCC Plan because Tanks # 2001 and 2002 were included in the 2012 SPCC Plan. Here again, Respondent's argument breaks from the plain facts, since the 2012 SPCC Plan expressly stated that since Tanks # 2001 and 2002 "are currently under construction and are not in use, they have not been included as part of this SPCC Plan." CX 16 at 8. Moreover, even if Respondent had intended for the 2012 SPCC Plan to include Tanks # 2001 and 2002, the discussion of Tanks # 2001 and 2002 in the 2012 SPCC Plan fell far short of meeting the requirements in 40 C.F.R. §112.5. For example, the 2012 SPCC Plan does not: list Tanks # 2001 and 2002 in the list of facility containers as required by 40 C.F.R. § 112.7(a)(3)(i) (CX 16 at 9-11); include the Bulk Asphalt Containment Storage Area in the discharge flows as required by 40 C.F.R. § 112.7(b) (CX 16 at 15-16); include a discussion of containment around Tanks # 2001 and 2002 in the section on containment as required by 40 C.F.R. § 112.7(c) (CX 16 at 16); include proper integrity testing procedures for Tanks # 2001 and 2002 as required by 40 C.F.R.

§ 112.7(d); or include a correct analysis of the applicability of the substantial harm criteria as required by 40 C.F.R. Part 112, Appendix C (CX 16 at 42-43).

Respondent then goes on to argue that plan amendment was not triggered by adding Tank # 2002 because Tank # 2002 was "merely additive of the first tank," because it was the same size as Tank # 2001. Respondent's Brief at 7. But, adding approximately 2.3 million gallons of capacity, which nearly doubles the storage capacity at the Facility, is a clear example of what the regulations meant to constitute a change in facility design, construction, operation, or maintenance that materially affects a facility's potential for an oil discharge. See, e.g., Tr. 76-78 (addition of an over two-million-gallon tank constitutes material change); see also 67 Fed. Reg. 47042, 47091 (compare "a replacement of one tank with more than one identical tank resulting in greater storage capacity is a material change because the storage capacity of the facility, and its consequent discharge potential, have increased" with "[o]rdinary maintenance or non-material changes which do not affect the potential for the discharge of oil do not [trigger the amendment requirement]").

The range of changes that trigger amendment of an SPCC Plan are broad. See 40 C.F.R. § 112.5(a) ("[e]xamples of changes that may require amendment of the Plan include but are not limited to: *commissioning or decommissioning* containers; replacement, reconstruction, or movement of containers; reconstruction, replacement, or *installation of piping systems*; construction or demolition that might alter secondary containment structures; changes of product or service; or revision of standard operation or maintenance procedures at a facility" (emphasis added)). In fact, even facility owners who decrease storage capacity are subject to the plan amendment requirement. Id. ("amendment is necessary when a facility change results in a decrease in volume stored or a decrease in the potential for an oil spill because EPA needs this

information to determine compliance with the rule"). Moreover, for the same reasons noted above, neither the 2012 SPCC Plan nor the 2014 Combined Plan serves as a *de facto* amendment to satisfy the requirement that Respondent should have amended its SPCC plan upon bringing into service Tank # 2002.

D. Count IV – Respondent violated 40 C.F.R. § 112.7(e) by failing to keep complete records of tank inspections and tests; its delayed partial compliance does not relieve it of civil penalty liability

1. The Complaint alleges the dates of the violation

The Complaint, filed February 13, 2018, alleges Respondent failed to keep records of inspection and tests of the Facility for a period of three years, from January 1, 2015 to January 1, 2018. Complainant has not amended its Complaint. Therefore, the dates of violation in this matter remain January 1, 2015 to January 1, 2018. Prior to hearing, Respondent had notice that Complainant sought penalties for that duration because Complainant's Prehearing Brief, dated April 26, 2019, reiterated the time frame set out in the Complaint. Complainant's Prehearing Brief at 17 (stating that "[t]he Complaint seeks penalties for at least 1,095 days, from January 1, 2015, until approximately the date of the Complaint, and the Complaint has not been amended"). Respondent argues that Complainant conceded the dates of the violation by citing to Complainant's assertions in its Memorandum in Support of its Motion for Accelerated Decision. Intentional or otherwise, Respondent takes Complainant's statements therein grossly out of context, where Complainant's assertions were of facts beyond dispute to support an accelerated decision.

2. Respondent's failure to maintain records during the alleged period is serious

The OPP regulations require regulated entities to conduct inspections and tests in accordance with written procedures developed for the facility, and to keep records of such

inspections and tests for a period of three years. 40 C.F.R. § 112.7(e). Specifically, aboveground containers must be tested or inspected for integrity on a regular schedule and in accordance with industry standards.[8] 40 C.F.R. § 112.8(c)(6). The Complaint alleges Respondent failed to keep records of inspections and tests at the Facility for a period of three years from January 1, 2015, to approximately the date of the Complaint, for a total of 1,095 days. Respondent indicates that it completed formal external inspections for all tanks at some point in 2017.[9] Respondent's Brief at 14 -15. The documents in the Prehearing Exchange, RX 55 through RX 68, which were entered into the record at hearing, only demonstrate steps towards compliance because the documents do not include records of formal inspections on all tanks at the Facility. In addition, Respondent concedes that to date it has not completed formal internal inspections on several tanks, thereby again failing to meet the tank requirements for a significant portion of the alleged time period. Respondent's Brief at 14 – 16 ("to the extent EPA has proven any violation of OPP regulations, it is only for overdue *internal* inspections for a handful of tanks").

Beginning in at least 2002, the SPCC regulations required that SPCC-regulated entities test each aboveground container for integrity on a regular schedule. See 67 Fed. Reg. 47042, 47105. The specifics of the requirement have changed over time, and the currently applicable rule was promulgated in 2008 and took effect in November 2011 for SPCC facilities. The current

[8] A good component of an integrity testing program would include establishing baseline conditions. See, e.g., EPA's July 2012 Bulk Storage Container Inspection Fact Sheet (RX 2 at 56).

[9] Respondent has not added any evidence into the record that demonstrates the dates in 2017 when tanks were replaced. Respondent relies on tank replacements to suggest that the "clock restarts," but it remains true that even before replacement, the tanks still were not inspected and tested in accordance with the schedule in the Fletcher Report. See RX 9 at 6 (stating that API 653 external inspections should be conducted on all tanks not considered to be permanently closed with the exception of Tank # 2001 during the "2014-2015 Winter Season").

regulation provides that an integrity testing program be documented in the SPCC Plan, and implemented accordingly.[10] 40 C.F.R. § 112.7(e). Respondent refers to EPA's July 2012 Bulk Storage Container Inspection Fact Sheet ("Fact Sheet")[11] that suggests a company "should schedule integrity testing within the first five-year review cycle of the SPCC plan" to achieve complete compliance. RX 2 at 58. No matter what time frame you use, whether you use five years to achieve compliance from November 2011 (when the rule took effect), or five years from April 6, 2012 (the date of Respondent's first SPCC revision after the rule became effective in 2011and therefore the start of its five year SPCC Plan review cycle), or the schedule provided in Respondent's 2014 Combined Plan, Respondent does not have records to show it has completely implemented tank testing and inspection requirements in a timely manner, in violation of 40 C.F.R. § 112.7(e). See Respondent's Brief at 14-16.

The Presiding Officer may take the EPA guidance presented in the 2012 or 2013 Fact Sheets into account for purpose of assessing a penalty, particularly if "VSS took good-faith efforts to comply with all of the tank inspection requirements" as Respondent states. Respondent's Brief at 16. But contrary to Respondent's arguments, the record does not demonstrate good faith efforts to meet the regulatory requirements. The record demonstrates that

[10] See 40 C.F.R. § 112.8(c)(6), which provides that a facility can meet the requirement for an integrity testing program, in part, by following existing industry standards as applicable. See also 67 Fed. Reg. 47042, 47052 (Jul. 17, 2002) (stating that "[w]hen the rule or preamble is silent, or no published guidance or policy documents exist, we will generally use industry standards as guidance for rule compliance"); id. at 47055 ("we assume that most facilities follow industry standards, and therefore will not incur additional costs for many provisions where they do").

[11] EPA updated the 2012 Fact Sheet in 2013 to be consistent with the 2013 SPCC Guidance. Both the 2012 Fact Sheet and 2013 Fact Sheet provide guidance for new and existing facilities. Respondent is correct when it says that the guidance is not limited to recently-purchased facilities. See Respondent's Brief at 10-11.

Respondent did not take steps to establish written procedures and document them in its SPCC Plan until several years after the requirement to document the inspection and testing procedures took effect in 2011, and after EPA brought the violation to Respondent's attention on May 22, 2014. See RX 6; see also RX 9. After Respondent took the initial step of establishing a schedule to conduct integrity testing for its tanks, it failed to follow the set schedule (documented and incorporated in its 2014 Combined Plan). See Tr. 638: 25-639: 8; compare RX 54-RX 64 (ten external tank inspections dated June 2016 and November 2016) with RX 9 at 6 (AST inspection schedule requiring external inspections on all tanks during the 2014-2015 winter season). In the process of finally inspecting its tanks, Respondent determined that some of its tanks were not fit for continued service.[12] Six of the tanks at the Facility (817, 818, 831, 832, 848, and 880) still have not had formal internal inspections in accordance with industry standards. See Respondent's Brief at 14 - 16. These facts show the degree of culpability and Respondent's lack of good faith efforts to comply with 40 C.F.R. § 112.7(e).

Respondent's violation is serious. For the time period in question, Respondent stored hundreds of thousands of gallons of oil products in tanks that were over fifty years old and that had never been inspected. When Respondent finally hires a contractor to conduct formal external inspections, the contractor found that for almost every tank inspected, "[c]orrosion is present

[12] Complainant's 2016 SPCC inspection checklist notes that "some tanks found to be unfit for continued service during testing; tanks were returned to service without required actions being performed and reinspection." CX 8 at 13. Respondent eventually replaced eight tanks in 2017 (819, 821, 822, 833, 835, 836, 837, 878), and took seven tanks out of service (838, 839, 849, 852, 878, 883, and 886). Respondent's Brief at 14-16; RX 96 at 57. Respondent's tank expert testified as to why the Respondent might not have conducted formal inspections on tanks it knew it would replace in the future: "it would be sort of similar to like if I had a car that I knew was going to go to the junkyard; I would not pay a mechanic to have him come through and tell me that I had bald tires and the engine was bad. So that's kind of the analogy in that regard." Tr. 634: 13-17. "That's a big investment for the facility." Tr. 634: 25 - 635:1.

along the formed base of the tank;" "the tank is experiencing coating failure throughout the external roof and shell including areas of rusts on the lower shell;" "the existing manway bolts are corroded. Replace the manway bolts …." RX 54 at 2 (Tank # 817); see also RX 55 at 2 (Tank # 818); RX 56 at 2 (Tank # 831); RX 57 at 2 (Tank # 832); RX 61 at 2 (Tank # 848). Respondent took risks it was required by the OPP regulations to avoid and should be penalized accordingly.

E. Count V-Respondent violated 40 C.F.R. § 112.20(a) by failing to develop and implement a compliant Facility Response Plan

Complainant has aptly demonstrated that Respondent violated the requirement to develop a timely and complete FRP from the time Tank # 2001 was put into service until at least the filing of the Complaint and is liable for penalties for five years or 1,825 days. For the foregoing reasons, Respondent fails to refute its liability for this violation and its arguments offer no basis for a reduction in the proposed penalty.

1. Respondent meets the substantial harm criteria

a) Secondary containment at the Facility is insufficient

(1) Three feet two-inches is the most reasonable input for the secondary containment calculation in the Bulk Asphalt Containment Storage Area

Complainant has established that, using sound engineering practices, secondary containment in the Bulk Asphalt Containment Storage Area is not adequate. In its Brief, Respondent has not raised any concern with the formula Mr. Michaud used for calculating whether secondary containment in the Bulk Asphalt Containment Storage Area is sufficient. Rather, Respondent took issue with just one input of the calculation: the input for the height of the secondary containment wall. Yet, Respondent failed to establish why Complainant's use of the input was not appropriate.

As discussed in Complainant's Brief, during hearing EPA's expert, Mr. Michaud, testified as to how he used the three feet two-inch maximum fluid height that was provided in Respondent's own expert report and why using the three feet two inches is reasonable. Tr. 286 – 289. Indeed, using the "3'2" Max Fluid Ht," as the input is based on the plain language of the schematic that is Figure 3 of the Haley and Aldrich report. Absent a compelling reason to disregard this number, it should be used as the most conservative, and therefore the most reliable, input for calculating whether secondary containment in the Bulk Asphalt Containment Storage Area was adequate. See Tr. 287: 8-13 (Mr. Michaud stating "So if, if I were to get this drawing, if I were to say be an engineer for this facility, I would be very cautious about allowing fluid to get above that height because that, that structural engineer who signed - - stamped and signed this document [Figure 3 of the Haley and Aldrich report] said I designed this wall for three-foot-two-inches"). Upon making this showing, the burden shifted to Respondent to prove that the plainly-stated "3"2' Max Fluid Ht" is not the appropriate input in the calculation.

In its Brief, Respondent never explains why Figure 3 included the reference to "3'2" Max Fluid Ht," nor why this height should not be used as the input for the height of the containment wall in the secondary containment calculation. Rather, Respondent focuses on the fact that its consultant, WHF, found that the average height of the secondary containment wall, accounting for the depression inside the containment, was over five feet. But the average height is not relevant to the calculation. As explained in Complainant's Brief, the minimum height of the containment wall is most relevant because once the liquid reaches the minimum height of the containment wall, it will flow over the wall. Complainant's Brief at 22-23; Tr. 288: 19-25; 289:

3–6 (Mr. Michaud stating "I don't care about the maximum height, I do[13] care about the minimum height. Once that liquid gets up to that minimum height, it's going to flow over."). In addition, the purpose of the secondary containment calculations is to determine the total quantity of liquid the area can adequately contain. By calculating that capacity of the secondary containment using a "max fluid height" greater than that established by the structural engineer who designed the wall, Respondent's argument that secondary containment is adequate fails.

(2) Tank # 865 was never "permanently closed"

In its Brief, Respondent makes no objection to the fact that during a period of several years no secondary containment around Tank # 865 existed. See CX 52 at 1-4; CX 8 at 8; CX 55 at 8; CX 9 at 7 (photograph number 13); Tr. 242-244. Rather, Respondent argues that Tank # 865 was permanently out of service and therefore did not need secondary containment. Yet, as a result of her investigation, Ms. Witul found that Tank # 865 did not have the appropriate signage that is a requirement of a permanently closed tank. CX 8 at 8;[14] Tr. 188: 18-189: 11; see also 40 C.F.R. § 112.2 (definition of "permanently closed" requiring "conspicuous sign …posted on each container stating that it is permanently closed and noting date of closure").

The "Tank 865 API 653 External Tank Inspection and Suitability for Service Evaluation" report by Powers Engineering and Inspection, Inc. (Powers), dated June 1, 2016, states that Tank # 865 is currently out of service but never states that Tank # 865 is permanently closed nor do the photographs in the report show signage that Tank # 865 had been permanently closed. RX 66

[13] The Presiding Officer's Order Granting Joint Motion to Conform the Transcript to Actual Testimony, dated July 31, 2019 granted the corrections proposed in the Joint Motion to Conform the Transcript, which including changing "don't" to "do".

[14] At hearing Ms. Witul clarified that there is a typographical error in her inspection checklist (CX 8 at 8), stating "Tank #8" should say "Tank # 865." Tr. 188: 12-17.

at 2 and 23. As explained in Complainant's Brief, if a tank is still available to store oil, it could easily be put back into use. Complainant's Brief at 24 (citing Tr. 243: 14-19; 244: 16-17). Here in fact, it seemed likely that Respondent intended to put Tank # 865 back into use because it had hired Powers to inspect Tank # 865. Tr. 634: 6–17 (Respondent's expert consultant, Craig Fletcher, explaining that there is no reason to inspect a tank that is going to be replaced). Accordingly, Respondent has not shown that Tank # 865 was permanently closed.

b) A discharge from the Facility could cause injury to a fish and wildlife and sensitive environment

(1) For a facility whose nearest opportunity for discharge is within 0.5 mile of a navigable water, no analysis of overland flow is required

The record is clear that the Facility is 200 feet from the Sacramento River Deep Water Ship Channel ("SRDWSC") and the SRDWSC is a navigable water. See December 26, 2018 Order at 16. Respondent mischaracterizes Complainant's position indicating that Complainant argues that "preparation of an FRP is 'automatic' if a facility is within one-half mile of a navigable water." Respondent's Brief at 29. As explained in Complainant's Brief, Complainant's position, which is consistent with the OPP regulations, is as follows:

- A facility owner or operator must first evaluate the distance the facility is from a navigable water.
- If the facility owner or operator determines that the facility's nearest opportunity for discharge is within 0.5 miles of a navigable water, then it must calculate the D3 planning distance.[15] See 40 C.F.R. Part 112 App. C, para. 5.5.

[15] The OPP regulations do not define "nearest opportunity for discharge," but it is clear from the text of Appendix C that it refers to the tank or container closest to the navigable water. See 40 C.F.R. Part 112, App. C, para. 5.3 and Figure C-1.

- D3 is defined as the "[d]istance downstream from the outfall within which fish and wildlife and sensitive environments could be injured …."[16] 40 C.F.R. Part 112 App. C, para. 5.3.
- The D3 calculation, therefore, presumes that a discharge has reached the navigable water and presents the calculation for determining the distance from the discharge point to the fish and wildlife and sensitive environment.[17]

For facilities whose nearest opportunity for discharge is within 0.5 mile of navigable water, preparation of an FRP is required if a fish and wildlife and sensitive environment is within the D3 planning distance calculation. There is no calculation required for overland transport to

[16] In its Brief, Respondent incorrectly states that it is "undisputed that the VSS Facility does not have an outfall directly into the SRDWSC." Respondent's Brief at 30 n. 26. Although there is no definition of "outfall" in the OPA or OPP regulations, the only reasonable interpretation of the meaning of "outfall" as used in the D3 planning distance description is that the outfall is the closest point in which a worst-case discharge from the facility would discharge into a navigable water. The OPP regulations make clear that owners or operators must evaluate the "potential for oil to be transported *over land to navigable water*," and that "it is highly probable that the oil will either flow into the drainage structures *or follow the natural contours of the land and flow into the navigable water.*" 40 C.F.R. Part 112, App. C, para. 5.1-5.2 (emphasis added). Any other meaning vacates all context of the regulations.

Respondent's implication that the discharge must be from a drain or pipe is nonsensical. When a distance to a drain or pipe is required to be considered under the OPP regulations it is specifically stated. For example, the OPP regulations state that "[a] facility that is located at a distance greater than 0.5 mile from a navigable water must also calculate a planning distance (D3) if it is in close proximity … to storm *drains* that flow to navigable waters." 40 C.F.R. Part 112, App. C, para. 5.6 (emphasis added); see also id. at para. 5.4.

[17] In contrast to D1, D2 or D4, the D3 calculation begins at the water, rather than on land (*i.e.*, D1 begins at "X_1," which Figure C-1 depicts as a container at a facility, D2 begins at a storm drain or open concrete channel, and D4 begins at "X_2" which Figure C-1 depicts as a container at a facility).

water when the facility's tanks or containers are within 0.5 mile of a navigable water. Contrary to what Respondent suggests, no further calculation for determining overland transport is prescribed in the OPP regulations. Since Respondent stores oil in tanks located within 0.5 mile of the SRDWSC, and the SRDWSC is a navigable water that is also a fish and wildlife and sensitive environment, Respondent is required to prepare an FRP.

(2) The portion of the Sacramento River Deep Water Ship Channel closest to the Facility is designated as a fish and wildlife and sensitive environment in the applicable area contingency plan

As was established in the record and at hearing, an area contingency plan ("ACP") is one means to determine what areas are "fish and wildlife and sensitive environments." 40 C.F.R. § 112.2; Tr. 19: 10-15; Tr. 62: 2-7; Complainant's Brief at 6, 25-26. ACP2, which is the ACP relevant to Respondent's Facility, includes the SRDWSC, defined as the "deep channel" that "extends from the Port of Sacramento to its mouth on Cache Slough." CX 2; RX 83 at 56.

A review of the record and any map of the area surrounding the Facility shows that the area of the SRDWSC that is 200 feet from the Facility is within the area covered by ACP2. See, e.g., CX 2; RX 83. In its Brief, Respondent suggests that having EPA's witness, Mr. Meer,[18] identify the exact location of the Facility during the hearing is a prerequisite to finding that the Facility is located 200 feet from an area of the SRDWSC that has been designated in ACP2 as an environmentally sensitive site. This is not the case because the location of the Facility is undisputed and stipulated.

[18] In Respondent's Brief, Respondent implies that Mr. Meer was called as an expert witness in the case. Respondent's Brief at 31 ("Despite EPA having in its employ, and having called as expert witnesses in this case, what EPA characterized as national experts on Area Contingency Plans and fish and wildlife and sensitive environments"). At hearing, EPA never moved to have Mr. Meer established as an expert. This is a typical example of the misrepresentation and misstatements of Respondent.

Respondent further attempts to suggest that the area of the SRDWSC closest to the Facility is not within ACP2 because the "site strategies" section of the appendix narrows the sensitive site in ACP2 to only the Cache Slough and Lake Washington (east of the Port). Respondent's Brief at 33, n. 28. But this reading of ACP2 is illogical. The "site description" section clearly defines the boundary of the "site" as extending "from the Port of Sacramento to its mouth on Cache Slough." RX 83 at 56. ACP2 makes clear that the "resources of primary concern" are located throughout the entire "site" not just the Cache Slough and Lake Washington. ACP2 also provides that the "concerns and advice to responders" is to contain oil in the channel. The "site strategies section" of ACP2 provides two strategies for containing an oil spill in the channel so that any oil spilled is contained within the channel. It in no way limits the fish and wildlife and sensitive environment to just the portion of the channel consisting of Cache Slough and the Port of Sacramento. Tr. 25: 12 – Tr. 26: 7.

Respondent also implies that the boundaries of the sensitive site in ACP2 should be limited to within the red bullseye denoting 2-859 on page 1. Respondent's Brief at n. 28; RX 83 at 1. Again, this reading of ACP2 is illogical. The map on page 1 is a high-level area map intended to give the reader a general idea where the sensitive sites in the North Delta (geographic response area 8) section of ACP2 are located. In order to understand the boundaries of the sensitive site listed as 2-859, the reader must go to the site description section of 2-859 on page 56 of RX 83. The site description (RX 83 at 56), which specifies that the site "extends from the Port of Sacramento to its mouth on Cache Slough," is clearly broader than within the boundaries of the red bullseye (RX 83 at 1) and should be determinative as to the scope of the site.

Respondent's arguments also are inconsistent. In making its argument that the "site" should be limited to the two areas described in the "site strategies" section (Cache Slough and

Lake Washington), Respondent concedes that Lake Washington is covered by 2-859. Yet, Lake Washington, which is located in West Sacramento and just upstream of the Facility at 3785 Channel Drive, is not within the boundaries of the red bullseye on page 1 of 2-859.

In short, Complainant has established, and Respondent has not refuted, that the area of the SRDWSC that is 200 feet from the Facility is within the sensitive site that has been designated in ACP2 and therefore a fish and wildlife and sensitive environment within the meaning of the OPP regulations.

(3) A facility located within the planning distance could cause injury

In its Brief, Respondent does not address the straightforward mathematics performed by EPA's expert, William Michaud, to calculate the D3 planning distance, which determines the distance that a worst-case discharge will travel downstream from the Facility. See generally, Respondent's Brief; see also CX 45 at 92 (in its SPCC Plan Respondent relies on the same formula that Mr. Michaud used to calculate the D3 planning distance). In performing this calculation, Complainant has shown that the Facility's planning distance is at least 22.4 miles (and may be as much as 40.4 miles) and that the Facility is within the applicable planning distance. Complainant's Brief at 26-28.

Instead, Respondent argues that Complainant has failed to demonstrate that a discharge from the Facility would cause "injury." Respondent's Brief at 33-34. The definition of injury is broad. See 40 C.F.R. § 112.2 (providing the definition of injury as "a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions resulting from a discharge"). EPA purposefully did not limit the definition of "injury" to a discharge that would have the potential to cause substantial harm. See 59 Fed.

Reg. 34070, 34079-34080 (July 1, 1994) ("EPA notes that there is nothing in the definition of 'injury' that refers to the term harm (or substantial harm), and that the term 'injury' is not equivalent to these terms"). This broad definition of "injury" is consistent with Congress' stated intent when enacting OPA that "it is the Policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States." 33 U.S.C. § 1321(b)(1).

Respondent's argument ignores that the very purpose of calculating the planning distance is to quantify the distance in which a discharge from a facility could cause such a broad injury within the meaning of the OPP regulations. The introduction to the discussion of calculation of the planning distance makes this plain:

> The facility owner or operator must evaluate whether the facility is located at a distance such that a discharge from the facility *could* cause injury to fish and wildlife and sensitive environments or disrupt operations at a public drinking water intake.

40 C.F.R. Part 112, App. C, para 1.1 (Emphasis added). Here, since the fish and wildlife and sensitive environment, the SRDWSC, is within the planning distance of the Facility, there could be an "injury" within the meaning of the OPP regulations.

(4) EPA's expert's analysis shows that a worst-case discharge from the Facility is reasonable and foreseeable

As summarized in Complainant's Brief, Complainant has shown through the testimony and report of its expert witness, Mr. Michaud, that it is reasonable and foreseeable that portions of a worst-case discharge could reach the SRDWSC.[19] Complainant's Brief at 29-30.

[19] The regulations direct owners or operators to "evaluate the likelihood that portions of a worst case discharge would reach navigable waters via open channel flow or from sheet flow across the land …." 40 C.F.R. Part 112 App. C, para. 5.1.

Complainant established that the WHF Analysis is not the only analysis for analyzing how oil from a worst-case discharge from the Facility might flow overland, that the WHF Analysis was overly simplistic, and that the analysis offered by Mr. Michaud provides Complainant, and the Presiding Officer, with a reasonable basis to conclude that it is likely that a portion of oil from a worst-case discharge at the Facility could reach the SRDWSC.[20]

2. Respondent failed to submit a timely and complete facility response plan

As demonstrated through evidence and testimony, summarized in Complainant's Brief and further discussed above, Respondent failed to correctly apply the "substantial harm" criteria at 40 C.F.R. § 112.20(f)(1) and therefore was required to submit an FRP when it brought Tank # 2001 into service. The OPP regulations take all the guesswork out of the appropriate format of an FRP by providing a model in Appendix F to 40 C.F.R. Part 112 and only allow deviations from the model where a facility has prepared an equivalent response plan acceptable to the Regional Administrator to meet State or Federal requirements. 40 C.F.R. § 112.20(h). The record is clear that the FRP in the 2014 Combined Plan (CX 17), the January 2017 FRP (CX 19) and May 2017 FRP (CX 21) did not follow the format of the model FRP included in Appendix F to 40 C.F.R. Part 112, nor provide an adequate cross-walk. As such, Respondent missed several requirements in the OPP regulations for an FRP.

Upon being notified that it was subject to FRP requirements on May 22, 2014 (RX 6), Respondent contracted with an SPCC consultant to meet the FRP requirements. Neither Respondent nor its consultant appeared to be familiar with the FRP regulations. Respondent's

[20] For the reasons outlined in Complainant's Brief, Respondent's arguments regarding overland flow are not relevant to determining the applicability of the FRP regulations. Complainant's Brief at 28-30.

consultant admitted at hearing that this was the first time she developed an FRP. Tr. 496: 20-21. The company-designated representative for VSS admitted he did not know there was a model FRP in the regulations. Tr. 390: 16-19; 424: 9-12. The record is clear that Respondent failed to submit a timely FRP and once it did submit an FRP, after EPA notified it of the violation, the FRP submitted was not adequate. Complainant's Brief at 31-32.

a) If a Facility meets the substantial harm criteria, no notice to submit a facility response plan is required

Respondent raises what it refers to as a "standard of review" argument, claiming that EPA was required to follow the procedures in 40 C.F.R. §§ 112.20(b)(1) and (c) before it could require Respondent to submit an FRP. See Respondent's Brief at 16-17. This argument relies on a misreading of the regulations. The OPP regulations require that an owner or operator of a facility must submit an FRP if such owner's or operator's facility meets the "substantial harm" criteria at 40 C.F.R. § 112.20(f)(1). 40 C.F.R. § 112.20(a)(2); Tr. 57: 19-25. There is no requirement for the Regional Administrator to notify an owner or operator of a facility of the need to submit an FRP if a facility otherwise meets the "substantial harm" criteria at 40 C.F.R. § 112.20(f)(1).[21] Because its facility meets the substantial harm criteria at 40. C.F.R. § 112.20(f)(1), Respondent is subject to the requirement to submit an FRP.

[21] For facilities that do not meet the "substantial harm" criteria set forth in 40 C.F.R. § 112.20(f)(1), the OPP regulations provide an additional mechanism for requiring facilities to submit an FRP. This additional mechanism, which is set forth at 40 C.F.R. §§ 112.20(b) and (c) sets forth a process in which a Regional Administrator may evaluate whether a facility that does not meet the criteria in § 112.20(f)(1) should submit an FRP because the facility otherwise meets the factors showing substantial or significant harm set forth in 40 C.F.R. §§ 112.20(f)(2) and (f)(3). See, e.g., Attachment C-1 (flowchart illustrating that a facility not meeting the factors in 112.20(f)(1) may still be subject to the requirement to submit an FRP based on the exercise of discretion by the Regional Administrator); and 40 C.F.R. § 112.20(a)(2) (requiring an owner or operator to submit an FRP if it satisfies the criteria in (f)(1) "*or* that is notified by the Regional Administrator pursuant to paragraph (b) of this section" emphasis added). This does not mean

b) Respondent's arguments regarding promises of compliance assistance and no action assurance are not persuasive

Along a similar vein, Respondent attempts to evade liability or penalty by alleging that it was waiting for input from EPA on how to comply and that EPA told the Facility that it was in compliance. Fundamentally, Respondent seems to misapprehend its responsibility for ensuring that it complies with the law. Respondent bears the ultimate responsibility for its compliance.

First, Respondent's self-serving claims that EPA found its Facility in compliance are unsupported. As has been previously established, EPA followed its standard inspection process and provided clear written notices that Respondent was in violation. See RX 6 and RX 23.

Second, the OPP regulations do not establish a permit program, are written to be self-executing and do not rely on submissions to EPA for approval. Even if EPA provides guidance to Respondent, this does not relieve Respondent of the obligation to comply expeditiously or negate EPA's ability to seek a penalty for noncompliance. A finding that EPA must offer compliance assistance to owners or operators that are subject to FRP requirements before they must comply with those requirements is not supported by the regulations or literature, would create an absurd result and could seriously undermine compliance with the regulations among the regulated community.

Furthermore, liability for violations of the Oil Pollution Act is strict. See United States v. B.P. Exploration & Prod. Inc. (In re Deepwater Horizon), 753 F.3d 570, 575 (5th Cir. 2014) (stating that "civil-penalty liability under 33 U.S.C. § 1321 arises irrespective of knowledge, intent, or fault"); see also Ward v. Coleman, 598 F.2d 1187, 1191 (10th Cir. 1979) (assessing

---

that an owner or operator of a facility that meets the substantial harm criteria is relieved of the requirement to submit an FRP.

penalty pursuant to 33 U.S.C. § 1321(b)(6) is "without regard to fault and subject to no defenses"), *rev'd on other grounds*, 448 U.S. 242 (1980). Respondent, not EPA, was responsible to ensure that it had complied with the FRP requirements when it first put the 2.38-million-gallon Tank # 2001 into service in 2012 and is strictly liable for its non-compliance.

In sum, Complainant has established, and Respondent has failed to rebut, that Respondent's FRP for the Facility was neither timely nor complete.

III. RESPONDENT'S ARGUMENTS ABOUT THE PENALTY

A. The Clean Water Act expressly authorizes penalties for failure to comply with the Oil Pollution Prevention regulations

EPA need not establish that a release occurred or that there was actual harm to the environment to justify a significant administrative penalty of up to $18,943 per day, per violation. 33 U.S.C. § 1321(b)(6)(B).[22] The OPA provides two separate categories of violations for which owners or operators may be assessed administrative penalties: (1) a discharge of oil or a hazardous substance in violation of paragraph (3), 33 U.S.C. § 1321(b)(6)(A)(i); *or* (2) "fail[ing] or refus[ing] to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject." 33 U.S.C. § 1321(b)(6)(A)(ii).[23] This language makes clear that penalties are appropriate for situations in which a release does not occur because otherwise the language in 33 U.S.C. § 1321(b)(6)(A)(ii) would have no meaning. See TRW Inc. v. Andrews, 534 U.S. 19, 21 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be

[22] The penalty amount provided in the statute has been adjusted for inflation pursuant to 40 C.F.R. § 19.4. The current inflation amounts are provided at 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019).

[23] The OPP regulations are promulgated pursuant to subsection (j) of Section 311 of the CWA. 33 U.S.C. § 1321.

prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotations omitted citing to Duncan v. Walker, 533 U.S. 167, 174 (2001))); see also In Re: Industrial Chemicals Corp.,10 E.A.D. 241 (2002) ("The fact that ICC may not have experienced an oil spill into a navigable water provides no grounds for reversal of any of the Presiding Officer's liability findings. The SPCC regulations are by definition preventive in nature. Thus, the company's supposedly good environmental performance has no bearing on whether it complied with SPCC guidelines designed to ensure that appropriate spill prevention and containment measures are in place.")

Complainant has shown that Respondent failed to meet several requirements of the OPP regulations, promulgated under subsection (j) of Section 311 of the Clean Water Act. Therefore, Respondent is liable for penalties for these violations.

B. The potential for harm of storing large quantities of oil in aboveground storage tanks is well established

To achieve the statutory directive that "there be no discharges of oil … into or upon the navigable waters of the United States, [or] adjoining shorelines …" (33 U.S.C. § 1321(b)), Congress directed the President to, *inter alia*, establish "procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil…." 33 U.S.C. § 1321(j)(1)(C). To satisfy this directive, EPA promulgated the OPP regulations to address spill prevention, control and countermeasures. In developing these rules, EPA recognized the risk inherent in storing large amounts of oil in aboveground storage tanks. "[T]he SPCC rule is designed to protect public health, public welfare, and the environment from potential harmful effects of oil discharges to navigable water and adjoining shorelines." CX 34 at 23. As noted in the 1993 proposed rule, "the larger the quantity of oil present, the larger the potential spill and the resulting environmental impact. Large discharges are also more likely to escape secondary

containment and may damage nearby tanks …. Weakened tank integrity is of greater concern for tanks with large storage capacities where the resulting forces on the tank (created by large fluid volumes) are greater." 58 Fed. Reg. 8824, 8830 (Feb. 17, 1993). Documented harm from spills includes fish kills, wildlife damage, fire, off-site soil pollution and property damage. 59 Fed. Reg. 34070, 34077 (Jul. 1, 1994). "Small discharges of oil that reach the environment can cause significant harm. Sensitive environments, such as areas with diverse and/or protected flora and fauna, are vulnerable to small spills." 67 Fed. Reg. 47042 (Jul. 17, 2002). The potential for harm from storing large quantities of oil near navigable waters is the basis for this entire risk prevention program, and the reason Congress authorized significant administrative penalties of up to $18,943 per day per violation.

C. EPA's General Enforcement Policy provides an appropriate framework to analyze the statutory Penalty Criteria of "seriousness"

As described in EPA's General Enforcement Policy, GM-21, the statutory Penalty Criteria of "seriousness" is broader than actual harm from discharges. See 33 U.S.C. § 1321(b)(8); CX 39 at 15. Seriousness includes actual or possible harm, importance to the regulatory scheme and availability of data from other sources. CX 39 at 15. In evaluating actual or possible harm, the following facts are relevant: amount of pollutant, toxicity of pollutant, sensitivity of the environment, length of time of a violation and the size of the violator. Id. Historically, courts have relied on evidence of potential harm in setting penalties.[24] EPA's Civil

[24] See, e.g., United States v. Dico, Inc., 4 F. Supp. 3d 1047, 1064 n.38 (S.D. Iowa 2014) ("in the context of assessing civil penalties under the Clean Air Act ('CAA') and the Clean Water Act ('CWA'), several courts have concluded that statutory violations that could potentially result in environmental harm were serious even absent proof of such harm"); United States v. Smithfield Foods, 972 F. Supp. 338, 344 (E.D. Va. Aug. 8, 1997) ("The court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect."), *aff'd in*

Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act ("CWA § 311 Penalty Policy") appropriately considers these factors to provide guidance for placing a value on the violations at issue.

D. The penalty calculated and proposed by EPA is squarely within EPA's penalty policy

EPA's CWA § 311 Penalty Policy provides that the litigation team may adapt the settlement methodology in the CWA § 311 Penalty Policy to establish a definitive penalty request in its administrative complaint. CX 40 at 5. Complainant has done so in this matter. See Complainant's Brief at 32-44 (citing to EPA's Penalty Assessment (CX 48 at 10-23)); see generally Tr. 202-208, 229-240.

The Consolidated Rules of Practice state that the Presiding Officer shall consider any civil penalty guidelines issued under the act (40 C.F.R. § 22.27(b)), but it is well understood that "one cannot apply the penalty policy unquestionably as if the policy were a rule with binding effect, because such policy has not been issued in accordance with the Administrative Procedures Act … procedures for rulemaking." In the Matter of Crown Central Petroleum Corp., Respondent, 2002 WL 56519, citing In re Employer's Insurance of Wausau and Group Eight Technology, Inc., 6 E.A.D. 735, 761 (EAB, Feb. 11, 1997).

Complainant's application of the CWA § 311 Penalty Policy is described in further detail below to support the proposed penalty amount.

---

relevant part, 191 F.3d 516; Sierra Club v. Mas Tec N. Am., 2009 WL 426205, at *4 (D. Or. Feb. 19, 2009) ("actual environmental harm is often difficult to quantify and lack of environmental harm does not necessarily mitigate seriousness").

1. SPCC Penalty

a) Step 1: Seriousness

The CWA § 311 Penalty Policy states that "[t]he seriousness of a 311(j) violation depends, in part on the risk posed to the environment as a result of the violation. Risk can encompass the extent of the violation, the likelihood of a spill, the sensitivity of the environment around the facility, and the duration of the violation." CX 40 at 9.

(1) Respondent's violations represent moderate noncompliance at a facility that stores over one million gallons of oil (Step 1.a)

Contrary to Respondent's statements that the alleged violations do not match up with the CWA § 311 Penalty Policy, which provides the following as instances of "moderate noncompliance" for the "seriousness" step of the gravity calculation: "inadequate or incomplete plan," "failure to amend or implement amended plan after … any major facility change," and "failure to certify plan." CX 40 at 10. EPA has alleged each of these violations here. Therefore, following the CWA § 311 Penalty Policy, Respondent's violations should be considered at least "moderate noncompliance."

The relevant penalty matrix provides a range of $20,000 to $50,000 for facilities with "more than 1 million" gallon storage capacity. CX 40 at 9. Complainant could have assessed this same range for any single violation alleged here. Because four SPCC violations are grouped into one count for penalty purposes, Complainant seeks a penalty from the higher end of the matrix cell, $45,000.

Respondent questions the characterization of its facility as "large" and states that EPA followed no authority in this determination, but again EPA followed the CWA § 311 Penalty Policy. CX 40 at 11. The table under "Step 1.a" has four columns for "Storage Capacity of the

Facility in gallons," with the largest option being "More than 1 million" gallons. CX 40 at 9. Respondent fits squarely in the fourth column.

(2) Respondent's violations represent "major impact" (Step 1.b)

Respondent states that EPA made no attempt to demonstrate that the Facility is one where there could be a "major environmental impact from a worst-case discharge." Respondent's Brief at 39. This determination is directly from the CWA § 311 Penalty Policy. Step 1.b of assessing an FRP penalty pursuant to the CWA § 311 Penalty Policy is to "adjust the amount determined from the matrix to reflect the potential environmental impact of a worst case discharge." CX 40 at 11. Of the three options provided, only a "major impact" accounts for the possibility that a discharge would likely have a significant effect on a sensitive ecosystem. The ACP recognizes the sensitive nature of impacts to the SRDWSC and its downstream watersheds (RX 83 at 56-57), and Respondent states it "does not dispute the sensitivity of the environment" (Respondent's Brief at 40). The adjustment range provided in the CWA § 311 Penalty Policy is 20% to 50%. Complainant selected a 30% upward adjustment because the Facility stores over four million gallons of oil and is located only 200 feet from the SRDWSC.

(3) Respondent was out of compliance for at least sixty months (Step 1.c)

The CWA § 311 Penalty Policy states that for each month of violation, the penalty should add one half of one percent to the amount from Step 1.b, up to a 30% maximum. As alleged in the Complaint, and documented through evidence and testimony, at least a portion of Respondent's SPCC deficiencies existed throughout each day of the five-year statute of limitations period at 28 U.S.C. § 2462, or 60 months. Therefore, Complainant increased the penalty an additional 30%.

b) Step 2: Culpability

Regarding culpability, the CWA § 311 Penalty Policy states:

> Consider the degree to which the respondent should have been able to prevent the violation, considering the sophistication of the respondent and the resources and information available to it, and any history of regulatory staff explaining to the respondent its legal obligations or notifying the respondent of violations. Depending upon the degree of culpability, the litigation team may increase the amount from STEP 1 by as much as 75%.

CX 40 at 12.

Complainant's Prehearing Exchange and Complainant's Brief both describe the facts that supported the determination to apply an upward adjustment of 30%. CX 48 at 15. The record demonstrates that Respondent is a sophisticated company. CX 35, CX 36. It hired sophisticated consultants, though it appears to pick and choose from the advice provided. See, e.g., RX 9 (report from Craig Fletcher, Respondent's AST consultant, recommending AST inspection schedule that Respondent did not follow). There is a history of regulatory staff explaining Respondent's legal obligation. See, e.g., RX 6 (which enclosed CX 4 to provide "[a]dditional details of the specific violations that EPA alleges"); see also RX 23 (which again provides "[a]dditional details of the specific violations that EPA alleges" in the SPCC Compliance Inspection Report and the FRP Plan Review Checklist). Given that the CWA § 311 Penalty Policy allows an upward adjustment of 75%, Complainant believes that a 30% adjustment reflects Respondent's degree of culpability.

2. FRP penalty

As described in Complainant's Prehearing Exchange and Complainant's Brief, Complainant seeks a penalty of $130,130 for the FRP violation. CX 48 at 16. Respondent's argument regarding this penalty demonstrates its overall approach to regulatory compliance: since it disagrees with the regulatory agency, it does not need to comply, and is not liable for the violation. See, e.g., Respondent's Brief at 40 ("VSSI maintains that a FRP plan [*sic*] is not required, and has attempted to negotiate with EPA in good faith…in the event the Presiding Officer … decides [an FRP is required, VSS requests] that no penalty be assessed.") This violation meets the statutory Penalty Criteria of "seriousness." Moreover, as discussed in Complainant's Brief (Complainant's Brief at 28-30), which relied on Mr. Michaud's testimony at hearing (Tr. 299 - 303), and as discussed in Section II.E.2 above, it is reasonable and foreseeable to presume that asphaltic cement could reach the SRDWSC in the event of a worst-case discharge at the Facility.

E. EPA's proposed penalty is a fraction of the per day penalty allowed under the Clean Water Act

For the 3,979 days of SPCC related violations, EPA proposes a penalty of $98,865, which averages to just $24.85 per day of violation. Similarly, for the 1,825 days FRP related violations, EPA proposes a penalty of $130,130, which averages to just $71.30 per day. Both the proposed SPCC and FRP per day penalty averages are far under the per day penalty of $18,943. EPA's proposed penalties are reasonable for the violations at issue.

IV. CONCLUSION

Based on Complainant's Brief, this Reply, and all other pleadings, admissions, documents, testimony, and decisions in this matter, Complainant respectfully requests that the Presiding Officer issue an Initial Decision that (1) finds Respondent liable for at least 5,804 days

of violation of the CWA, (2) orders Respondent to pay a penalty of at least $230,958, and (3) grants Complainant such other and further relief as the Presiding Officer deems lawful and proper.

Dated: September 26, 2019

Respectfully submitted,

Rebecca Sugerman

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

CERTIFICATE OF SERVICE

I, Rebecca Sugerman, hereby certify that on September 26, 2019, I caused to be filed electronically the foregoing Post-Hearing Reply Brief in Opposition to Respondent's Initial Post-Hearing Brief with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Rebecca Sugerman, hereby certify that on September 26, 2019, I served a true and correct copy of the foregoing Post-Hearing Reply Brief in Opposition to Respondent's Initial Post-Hearing Brief via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: September 26, 2019

Respectfully Submitted,

Rebecca Sugerman

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