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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF **VSS INTERNATIONAL, INC.** 3785 Channel Drive West Sacramento, CA Respondent.	EAB DOCKET NO. CWA 20-02 OALJ DOCKET NO. OPA 09-2018-0002 **RESPONDENT VSS INTERNATIONAL, INC.'S AMENDED APPELLATE BRIEF FOLLOWING INITIAL DECISION AND ORDER** **Original Appellate Brief filed on October 16, 2020** Presiding Officer: Chief Administrative Law Judge Susan L. Biro Date of Initial Decision and Order: September 16, 2020

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I. STATEMENT OF THE CASE

Respondent VSS International, Inc. ("Respondent" or "VSS") respectfully submits this Appellate Brief Following Initial Decision and Order in accordance with Presiding Officer Chief Administrative Law Judge Susan L. Biro's Initial Decision and Order dated September 16, 2020.

VSS operates an asphalt emulsion (and related products) facility serving the roadway construction, maintenance and repair sector. It stores oil and oil-related products in above-ground storage tanks (AST's) and is located in West Sacramento, California on approximately 10 acres. The facility is located approximately 200 feet north of the Sacramento River Deep Water Ship Channel, which has been designated as an environmentally sensitive area.

This proceeding was commenced on February 13, 2018 with the filing of a Complaint by USEPA Region IX against Respondent VSS. The Complaint included five counts alleging violations of the Oil Pollution Prevention Regulations. Four of the counts allege deficiencies in the facility's Spill Prevention Control and Countermeasure Plan ("SPCC"). The fifth count alleges failure to prepare and/or adhere to the facility's Facility Response Plan ("FRP"). The SPCC and FRP regulations are set forth in 40 CFR Part 112.

In brief, the violations alleged by EPA can be summarized as follows:

(1) The Facility Diagram In VSS's SPCC Plan Did Not Depict Certain Features Required By 40 CFR 112.7

(2) VSS's SPCC Plan Did Not Contain A Compliant Professional Engineer's Certification

(3) VSS's SPCC Plan Was Not Amended Within Six Months To Reflect The Addition Of Tanks 2001 And 2002

(4) VSS Did Not Complete All Required External Tank Inspections Or Maintain A Record Of Completed Inspections; and

(5) VSS Failed To Maintain And Adhere To A Compliant Facility Response Plan

This matter was heard before Judge Biro on May 16, 17 and 20, 2019, at the United States Courthouse (Phillip Burton Federal Building) in San Francisco, California.

II. STATEMENT OF THE ISSUES

Judge Biro's Initial Decision and Order found Respondent not liable as to Count II but liable as to the remaining counts. Judge Biro's findings respecting each of these counts is discussed in greater detail below.

Judge Biro assessed a total penalty for the SPCC violations and the FRP violation of $76,050 each, or $152,100. She assessed a penalty enhancement based on culpability in the amount of an additional 30% for the SPCC violations ($22,815) and an additional 40% for the FRP violations ($30,420), totaling $205,335. Judge Biro also assessed an economic benefit penalty of $28,159 for a cumulative total of $233,494, reduced, however, to coincide with EPA's penalty demand of $230,958.

III. COUNTS I THROUGH V

A. Count I (Depiction of AST's in SPCC Plan Figure)

Judge Biro previously granted EPA's motion for accelerated decision as to Count I, while denying EPA's motion for accelerated decision as to the remaining counts, in her Order on Complainant's Motion for Accelerated Decision, December 26, 2018 ("AD Order").

VSS appeals Judge Biro's finding of liability as to Count I in the AD Order in this appeal as the AD Order has been incorporated into the Initial Decision.[1] Judge Biro in the AD Order determined that Respondent's SPCC Plans "failed to have a facility diagram that marked the

[1] *See* Initial Decision, p. 2, n. 1.

location and contents of each fixed oil storage container, as required by 40 CFR Section 112.7(a)(3)." AD Order at 20.

To be more specific, EPA's AD Motion alleged that "… the April 2012 Plan did not include all ASTs listed on Table 3 of the April 2012 SPCC Plan …." (AD Motion, pp. 23 and 24).[2]

However, the April 2012 Condor SPCC Plan did in fact identify the Table 3 tanks, including, particularly, tanks 817, 818 and 848. The Presiding Officer accepted the 2012 Condor Plan as the certified SPCC Plan of record, *see* AD Order at 20; Initial Decision at 19 ("[t]here is no dispute that the Condor Plan from 2012 … was properly certified").

To be sure, spatial and legibility considerations require that both Figure 3 and Table 3 be viewed in tandem in order to measure the contents of the plan in view of the regulatory requirements.[3] For example, in Figure 3, the tanks are shown by location and, in each case, their circumference outlined. While the interior circular area of some tanks on Figure 3 is blacked out, that is necessary in order to distinguish those particular tanks as Exempt Non-Oil Product ASTs, as the legend to Figure 3 clearly explains. (CX 16, page 24 of 45). Furthermore, Table 3 of the Condor report (CX 16, page 29 of 45) lists all the AST's depicted on Figure 3 and, for each, states the tank's number, circumference, diameter, height, volume, area, contents and whether or not the tank is a heated tank. Table 3 specifically references AST's 817, 818 and 848.[4]

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[2] EPA's earlier claimed deficiencies in the 2014 and 2016 draft plans are no longer pertinent inasmuch as, during the proceedings, the Presiding Officer determined that the 2012 Condor Plan was the SPCC Plan of record in 2014 and 2016. *See* Initial Decision at 21 ("[b]ecause the 2014 Consolidated Plan was never certified, it was never effective as an SPCC Plan under Part 112").

[3] *See, e.g.,* WHF's October 24, 2014 Hazardous Materials, Environmental Compliance and Contingency Business Plan, Figures 3 and 5, CX 17 pages 18 and 20 of 131, which show AST's 817, 818 and 848 in their same location as drawn in the April 2012 Condor Plan.

[4] To balance the information required to be included with the realities of what legibly can be depicted on a 8 ½ x 11 sheet of paper, the engineer may be required to include a notation on a figure, such as that referenced in the January 2016 plan (CX, 95: 145: "Note: Some Features And Piping Not Shown For Clarity").

Likewise, the assertion that the January 2016 SPCC Plan did not include detail regarding the rubberized asphalt plant also is not correct. CX 17, 20 depicts the Rubberized Asphalt Plant Area in the southwestern portion of the figure (Figure 5). However, again, due to space constraints, the figure includes a chart detailing the four materials with an arrow showing that they are housed in the rubberized asphalt plant area.

Notably, EPA in its post-hearing briefing did not dispute that the April 2012 Condor report:

(i) identified all AST's on Table 3 of the report (particularly, tanks 817, 818 and 848);

(ii) showed these tanks by location (and outlined their circumference) on Figure 3 of the report; and

(iii) listed the AST's and, for each, the tank's number and contents on Table 3 of the report.[5]

Having acknowledged that the SPCC plans contained the relevant information required by the regulation, EPA argued that a violation of Count I "warrants a substantial penalty" because the required information was contained on two pages, and not solely on one page, in the SPCC plans.[6]

[5] Nor does EPA dispute that substantially the same information was included in the 2014 Plan (RX 92 pages 23 – 27 of 140, page 35 of 140, page 100 of 140, and page 115 of 140) and the 2016 Plan (CX 18 page 19 of 161 and pages 22 – 26 of 161).

[6] EPA in this regard does not ground in the record its claim that the required information was provided in "various figures, tables and pages," Post-Hearing Reply Brief at 2, and that the information contained a "lack of accurate detail" and was "disorganized," Post-Hearing Reply Brief at 3.

In support of the position that a substantial penalty is warranted, EPA cites to two documents, the 2002 SPCC Final Rule Notice (67 Fed. Reg. 47042 (July 17, 2002)) and the EPA SPPC Guidance Document (CX 34).

However, neither of these documents supports EPA's proposition that having the required information in two pages instead of one page is a violation of the rule and in fact supports the interpretation that, where appropriate, due to the level of detail involved (as was the case here) the 40 CFR Section 112.7(a)(3) information may be contained on more than two pages instead of one page.

In this regard, this Final Rule Notice states:

"You may mark the contents of each container either on the diagram of the facility, or on a separate sheet or log …." *Id.*[7]

Likewise, the EPA SPCC Guidance Document states:

"Additionally, the diagram may be attached to a facility inspection checklist to identify area, containers, or equipment subject to inspection…" (CX 34 page 250 of 921).

Moreover, the SPCC Guidance Document contained at CX 34 actually includes as a template which, as is the case with the VSS SPCC Plans, includes an illustrative facility diagram with storage areas and tank locations on one page (CX 34 page 262 of 921) and a list of tank volume and contents on another page (CX 34 page 263 of 921), as to which the SPCC Guidance Document states:

"The scale and level of detail shown on a facility diagram may vary according to the needs and complexity of the facility … as long as the information is contained in more detailed

[7]This view is further supported by an earlier reference in the same document that notes that larger facilities "are assumed to already have a diagram that may be attached to the SPCC Plan."

diagrams of the systems or is contained in some other form and such information is maintained elsewhere at the facility and this location is referenced in the SPCC Plan."

B. Count II (Professional Engineer's Certification)

The Presiding Officer determined that VSS is not liable for this claimed violation.

C. Count III (Plan Amendment Re Tanks 2001 and 2002)

The Presiding Officer determined that VSS violated 40 CFR 1112.5(a) by not timely amended its SPCC Plan to incorporate the placing into service of new Tanks 2001 and 2002, each having a storage capacity in excess of 2,300,000 gallons.

VSS acknowledges that in its initial response to EPA's request for information dated June 25, 2013, it stated that Tank #2001 was placed in service on or about March 21, 2013. As this matter progressed and VSS reviewed additional records and further interviewed current and former employees, it concluded that its initial response was incorrect and that the tank was placed into service on or about March 21, 2013.

VSS acknowledges that Judge Biro in the Initial Decision determined that "Respondent cannot rest on any argument that relies on the tank's inclusion in the Condor Plan," Initial Decision, page 27. Even with that understanding the period of violation should not be longer than September 21, 2013 (six months after March 21, 2013) and October 30, 2014 because, as noted in the Initial Decision, "the Agency … has [not] amended its Complaint to make [] an allegation [that Respondent is liable beyond October 30, 2014." Initial Decision, page 25. Regarding Tank #2002, any period of violation cannot extend, at most, beyond the period of July 31, 2016 and May 1, 2017.

D. Count IV (AST Inspection Program)

As VSS argued in its Initial Post-Hearing Brief, EPA limited the relevant time period for Count IV in unequivocally stating to the Presiding Officer that it was "'not seeking a finding of liability on this issue after January 2016.'" Respondent's Initial Post-Hearing Brief at 8-9 (emphasis added) (quoting Complainant's Reply to Respondent VSS International, Inc.'s Opposition to Complainant's Motion for Accelerated Decision as to Liability at 17). EPA offers little in rebuttal, noting only that it has not amended its Complaint and its Prehearing Brief stated that it believed it was still entitled to seek penalties for the initial alleged period.

Neither of these points changes the fact that EPA previously represented to the Presiding Officer and to VSS, which relied on that representation, that it was not seeking liability after January 2016. Moreover, EPA alleged in its Complaint a violation commencing no earlier than "January 1, 2015." Compl. ¶ 65.

EPA's recanting of its prior statement in its Prehearing Brief should not overwrite the Presiding Officer's Order that framed this matter for the Administrative Hearing. Consequently, EPA should be bound by its statements to the Tribunal and VSS, and Count IV should be temporally limited to January 1, 2015 through January 30, 2016.

E. Count V (Facility Response Plan)

In view of the scope of the Presiding Officer's analysis of this count as set forth in the Initial Decision, VSS respectfully submits that the Presiding Officer erred in adopting EPA's expert evaluation that an FRP was applicable on the three grounds set forth below.

1. The Fact That VSS Is Within One-Half Mile Of The Channel Is Insufficient To Require Preparation Of An FRP

EPA has consistently relied on the fact that VSS is within on-half mile of the Channel as its basis for concluding that VSS must prepare an FRP.

However, there is no support in the regulations for this conclusion.

Likewise, although its experts Messrs. Swackhammer and Michaud also testified that an FRP is required where a facility is within 0.5 miles of a navigable water, they were unable to cite to any case law or guidance document or other basis for this conclusion.

Although the Presiding Officer qualified Messrs. Swackhammer and Michaud as experts in this field, their testimony demonstrated that they are not qualified to interpret regulations presenting this level of complexity.

Importantly, EPA's experts cite to Section 5.5 of Attachment C-III (Calculation of the Planning Distance), which states: "A facility owner or operator whose nearest opportunity for discharge is within 0.5 mile of a navigable water must complete the planning distance calculation (D3) for the type of navigable water near the facility or use a comparable formula."

However, Section 5.5 does not state that if the nearest opportunity for discharge is within 0.5 miles of a navigable water, the facility must prepare an FRP. Instead, it only provides that in such case the facility must complete the D3 planning distance calculation.

The Presiding Officer, citing to testimony of EPA's experts, concluded that "[o]nce the point of discharge is located within on half mile of a navigable water, the question is not *whether* a discharge will reach the water but rather how far the spill will travel *when* it reaches the water. Initial Decision, page 38.

The Presiding Officer reasoned that "[i]f the regulations contemplated a scenario in which an oil spill would not reach the water from this distance, then they would not mandate a D3 calculation, which by its very definition assumes that oil has entered the water" (citing to

Messrs. Swackhammer and Michaud's testimony as to this regulatory presumption)." Initial Decision, page 38.

EPA's argument that evaluating oil transport over land is impermissible where a facility is within 0.5 miles of a navigable water is contradicted both by the language of the regulation and the analysis undertaken and presented by their expert (which analyzed flow over land despite the fact that VSS is within 0.5 miles of the SRDWSC). Section 5.5 does not say or even suggest that the mandatory evaluation of oil transport over land provided for in Section 5.1 is not applicable when a facility is within 0.5 miles of a navigable water; rather, it simply states that when a facility is within 0.5 miles of a navigable water it must complete the planning distance D3 for the type of navigable water near the facility, a calculation that VSS performed and submitted to EPA. This interpretation is consistent with the description of D3, which is the "[d]istance downstream from the outfall within which fish and wildlife and sensitive environments could be injured or a public drinking water intake would be shut down as determined by the planning distance formula." In this case, it is undisputed that the VSS facility does not have an outfall directly into the SRDWSC. Thus, Section 5.4 (containing the definition of D3) must be read in conjunction with Section 5.1 (containing a mandatory requirement of a calculation of the transport of oil over land – *unless,* the facility is within a wetland (which, for the reasons stated above, is clearly not the case here).

2. EPA Did Not Establish Substantial Harm With Respect To The VSS Facility

The Presiding Officer erred in accepting EPA's argument that VSS is located at a distance such that a discharge from the facility could cause injury to fish and wildlife and

sensitive environments (including but not limited to by calculating a planning distance, Attachment C-III, Section 1.1.).

As discussed in greater detail in Section 3 below, EPA presented no evidence of injury, as that term is defined in 40 CFR 112.2.[8]

Nor did EPA present any evidence that the necessary substantial harm factors outlined in in 40 CFR 112.20(f)(1)(ii)(B) and Appendix C (Substantial Harm Criteria) had been met.

To be sure, VSS has oil storage capacity of 1 million gallons or more and EPA at least presented evidence that the Channel qualifies as a fish and wildlife and sensitive environment.

However, EPA did not establish that "[t]he facility is located at a distance (as calculated using the appropriate formula in appendix C) such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments…."

In order to do that in this case, EPA, following "the flowchart provided in Attachment C-1,"[9] EPA would have had to have calculated the planning distance pursuant to Attachment C-III.

However, EPA's experts were unable to reconcile their one-half mile standard with other provisions in Attachment C-III that clearly require additional and/or different analysis, for example, Section 1.1 ("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 …."), which does not presuppose that the only determinative factor is distance.

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[8] "Injury" is defined in Section 112.2 as follows: "Injury means a measurable adverse change, either long-term 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."

[9] *See also* Appendix C, Section 2.3 ("facility owners or operators must determine the distance at which an oil discharge could cause injury to fish and wildlife and sensitive environments using the appropriate formula presented in Attachment C-III").

Nor were EPA's experts able to distinguish applicability from spill response, as noted above. *See also* Section 5.5 ("a facility owner or operator whose nearest opportunity for discharge is within 0.5 mile of a navigable water must complete the planning distance calculation (D3) for the type of navigable water near the facility ….")

The Presiding Officer concluded that, based on the testimony of EPA's experts, "[t]here is no need to model whether a discharge would in fact reach the water or be hindered by any manmade depressions or containment structures 'because it's assumed that given that location that oil will, indeed, reach the navigable water.'" (Citing Tr. 101-02, 104, 370-71; CX 14 at 9, 12.) Accordingly, the Initial Decision concluded that "the regulations presume that a discharge will reach a navigable water if the discharge occurs less the one-half mile away." Initial Decision, pages 37-38.

The Initial Decision concludes that "[o]nce the point of discharge is located within on half mile of a navigable water, the question is not *whether* a discharge will reach the water but rather how far the spill will travel *when* it reaches the water. Page 38.

The Initial Decision reasons that "[i]f the regulations contemplated a scenario in which an oil spill would not reach the water from this distance, then they would not mandate a D3 calculation,[10] which by its very definition assumes that oil has entered the water" (citing to Swackhammer and Michaud as to this regulatory presumption). Initial Decision, page 38.

EPA's witness Joseph Swackhammer, who is with EPA's Washington, D.C. Office of Emergency Management, Regulations and Implementation Division and is national lead on Facility Response plan coordination with the regions and the regulated community, likewise

[10] "D3 is the distance downstream from the outfall within which fish and wildlife and sensitive environments could be injured …."

equated FRP applicability with the calculation of FRP planning distance. Tr. 49:9-60:12. *See also* Tr. 63:10 – 14 (Q: So could you explain – you explained D-1, D-2 and D-3. Could you explain for us D-4, what it is on the illustration? A: Sure. D-4 is also part of the applicability evaluation." Indeed, although on redirect Mr. Swackhammer attempted to shoehorn into the regulations EPA's position that a FRP is "automatically" required for every facility within a half-mile of a navigable water, notwithstanding his multiple efforts to do so, Mr. Swackhammer was completely and utterly unable to identify or explain the basis for this assertion in the regulations, despite trying to do so several times and in several different ways. Tr. 109:2 – 118:23. Indeed, he at the same testified (contrariwise, but supporting VSS's position) that "overland transport of oil" is required to be evaluated along with the D1 through D4 planning scenarios. Tr. 66:9 – 18. *See also* Tr. 70:13 – 18 ("Yes, you typically use the planning distance for applicability evaluations, and then you re-use that planning distance for planning development. It's an important component of what's called the vulnerability analysis that's part of the plan development"). *See also* Tr. 9:19 – 20:13 ("Q: Right. In other words, if you're within a half a mile, you're required to do the planning distance, and doing the planning distance is part of answering the ultimate question of whether an FRP is required. A: That's correct. Q: Okay. One last question. Have you ever seen a situation where a facility might be doing both a 5.0 overland transport analysis and a D3 navigable water analysis as part of answering the ultimate question of an FRP. A: Certainly, that's part of the reason for including section 5.0 in consideration of oil transport over land. So that's definitely envisioned. Even though it's not depicted here in Figure C-1, certainly the nearest opportunity, if there is no storm drain within that particular flowpath, then it would be a oil transport over land flow path to the navigable water, be it a sheet flow or via open channel congruent flow, something along those lines."

As is noted in Section 1.3, unless the facility is located, for example, in a wetland, the regulation is clear that a regulated facility must perform a planning distance calculation and that calculation is also the applicability formulation for 40 CFR (f)(i)(ii)(B): S*ee* Section 5.1: "Facility owners and operators *must* evaluate the potential for oil to be transported over land to navigable waters of the United States. The owner or operator must evaluate the likelihood that portions of a worst case would reach navigable waters via open channel flow or from sheet flow across the land, or be prevented from reaching navigable waters when trapped in natural or man-made depressions excluding secondary containment structures."

3. Lack of Evidence Of Injury

EPA failed to offer ***any*** evidence that that a spill from the VSS facility would cause some "measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of fish and wildlife and sensitive environments in the Channel." (40 CFR 112.2 (defining "injury")).

In any event, EPA was unable to present any evidence, or even argument, that would explain EPA's now contends that this Tribunal should overlook its omission in the presentation of its case for the reason that "EPA purposefully did not limit the definition of 'injury' to a discharge that would have the potential to cause substantial harm,'" citing to 59 Fed. Reg. 34070, 34079-34080 (July 1, 1994 (OPP Final Rule)). This is a non-sequitur but in any event it is unavailing.

As before, the cited reference actually supports VSS's position because the reference explains that the definition of "injury" was modeled on the definition in the Natural Resource Damage Assessments (NRDA) rule at 43 CFR Section 11.14, and noted that, "in the preamble to the NRDA final rule (51 FR 27706) DOI indicates that the injury definition does not

measure insignificant changes and that the definition relies on changes that have been demonstrated to adversely impact the resources in question ….” Id. (emphasis supplied).

Here, as noted in VSS’s Initial Post-Hearing Brief, at p. 20 n. 19, there is no basis for concluding that EPA’s expert Mr. Michaud’s hypothetical “one inch” formula (“if it move[s] into that, that body of water … by one inch, it will – it will have impact to that body of water, according to the regulations ….”)—even it were have to have been established in this case—would constitute an impact that was not “insignificant” or one that has been “demonstrated to adversely impact the resources in question.” Certainly, EPA presented no evidence that this was the case, or why that should be so.

IV. CONCLUSION

VSS respectfully requests that the Initial Decision and Order be remanded to the Presiding Officer to enter an order finding no violation of Count I (112.7) and Count V (FRP).

Dated: October 19, 2020

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CERTIFICATE OF SERVICE

I, Cynthia Dahl, hereby certify that on October 19, 2020, I caused to be filed electronically, the foregoing **AMENDED RESPONDENT VSS INTERNATIONAL, INC.'S APPELLATE BRIEF FOLLOWING INITIAL DECISION AND ORDER** in the Matter of VSS International, Inc., Docket No. CWA 20-02, using the EAB efiling system and on the Headquarters Hearing Clerk and Presiding Officer using the EAB efiling System.

Additionally, I, Cynthia Dahl, herby certify that on October 19, 2020, I served a true and correct copy of the foregoing **AMENDED RESPONDENT VSS INTERNATIONAL, INC.'S APPELLATE BRIEF FOLLOWING INITIAL DECISION AND ORDER** in the Matter of VSS International, Inc via electronic mail to the following attorneys for the EPA:

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Dated: October 19, 2020

Respectfully Submitted,

Cynthia Dahl