BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re:	)	
	)	
VSS International, Inc.,	)	CWA APPEAL 20-02
	)	
Dkt. No. OPA 09-2018-0002	)	
	)	

RESPONSE BRIEF

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I. INTRODUCTION

Respondent VSS International, Inc. ("Respondent") appeals an Initial Decision and Order ("Initial Decision") that Chief Administrative Law Judge Susan L. Biro ("ALJ") issued in a proceeding initiated by the Director of the Enforcement Division for the United States Environmental Protection Agency, Region 9 ("Complainant," "EPA" or "Agency") against Respondent. The Initial Decision, which the ALJ issued after holding a three-day hearing with live witness testimony, found Respondent liable for violations of Section 311(j) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(j), as amended by the Oil Pollution Act of 1990 ("OPA"), and assessed Respondent a total civil penalty of $230,958.00. For the reasons stated below, the ALJ did not err in her liability determinations or penalty assessment and the Environmental Appeals Board ("Board") should affirm her decision in its entirety.

II. ISSUES PRESENTED FOR REVIEW

Respondent's "Statement of the Issues" in its Appellate Brief Following Initial Decision and Order ("Amended Appeal Brief") fails to identify any issues presented for Board review. *See* Amended Appeal Brief at 2; *see also* 40 C.F.R. § 22.30(a)(1)(iii). It appears that Respondent is raising two issues on appeal:

A. whether the ALJ erred in finding Respondent liable for Count I (failure to prepare a complete SPCC plan as required by 40 C.F.R. § 112.3); and

B. whether the ALJ erred in finding Respondent liable for Count V (failure to prepare and submit a compliant Facility Response Plan ("FRP") as required by 40 C.F.R. § 112.20).

Respondent also argues that the ALJ erred in her determinations regarding the period of violation for Counts III and IV but fails to ask for any associated relief. *See* Amended Appeal

Brief at 6-7. Out of an abundance of caution, Complainant will address all these issues in this Response Brief.

III. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, and in response to the Exxon Valdez spill of over 11 million gallons of crude oil into the pristine waters of Prince William Sound in Alaska in 1989, Congress passed the OPA, thereby amending Section 311 of the CWA, 33 U.S.C. § 1321, to strengthen the CWA's provisions pertaining to oil pollution. *See* OPA, Pub. L. No. 101-380, 104 Stat. 484 (1990). In so doing, Congress declared "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines . . . ." 33 U.S.C. § 1321(b)(1).

Section 311 authorizes the President to issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances . . . from onshore facilities . . . and to contain such discharges." 33 U.S.C. § 1321(j)(1)(C). It further authorizes the President to assess civil penalties against any owner, operator or person in charge of any vessel, onshore facility or offshore facility, who fails to comply with regulations issued pursuant to Section 311(j). 33 U.S.C. § 1321(b)(6)(A).

B. The Oil Pollution Prevention Regulations

Pursuant to Section 311(j) of the CWA, the EPA promulgated the Oil Pollution Prevention ("OPP") regulations codified at 40 C.F.R. Part 112. The OPP regulations apply "to any owner or operator of a non-transportation-related onshore or offshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or

consuming oil and oil products, which, due to its location could reasonably be expected to discharge oil in quantities that may be harmful, as described in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines…." 40 C.F.R. § 112.1(b). One of the primary directives in Part 112 is that facilities covered by Section 311(j)(1) must prepare Spill Prevention Control and Countermeasure ("SPCC") Plans. *Id.* § 112.3.

For a subset of SPCC-regulated facilities, the OPP regulations further require owners or operators to submit to the Agency an FRP for responding to a worst case discharge of oil. *Id.* § 112.20(a). These FRP requirements apply when a facility could "reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines…." *Id*. § 112.20(f)(1). This occurs in a variety of situations including when a facility's total oil storage capacity exceeds one million gallons and "[t]he facility is located at a distance . . . such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments." *Id*. § 112.20(f)(1)(ii). Appendix C to Part 112 provides formulas for calculating the distance within which an oil discharge could cause injury to fish and wildlife and sensitive environments. *Id*. Part 112, Appendix C. Facilities that meet the criteria of Section 112.20(f)(1) "as a result of a planned change in design, construction, operation, or maintenance" must submit an FRP to the Agency "before the portion of the facility undergoing change commences operations." *Id*. § 112.20(a)(2)(iii). Owners and operators who must prepare and submit an FRP must also develop and implement a facility response training program and a drill/exercise program. *Id*. § 112.21(a). FRPs are designed to be implemented in conjunction with the National Contingency Plan ("NCP") for "efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances." 33 U.S.C. § 1321(d). At the national

level, the NCP provides the organizational structure and procedures for preparing for and carrying out such a response, and it applies to discharges of oil into navigable waters of the United States and adjoining shorelines. *Id.*; 40 C.F.R. §§ 300.1 and 300.3(a)(1); *see also* Tr. 17-18.[1] In conjunction with the NCP, Regional Contingency Plans provide a more detailed level of organization and coordination within designated federal regions of the country, and Area Contingency Plans ("ACPs") serve a complementary role for areas within a given region to plan for removing a worst case discharge or mitigating or preventing a substantial threat of such a discharge from a facility operating in or near the area. 40 C.F.R. § 300.210; *see also* Tr. 17-18. ACPs include "a detailed annex containing a Fish and Wildlife and Sensitive Environments Plan that…provide[s] the necessary information and procedures to immediately and effectively respond to discharges that may adversely affect fish and wildlife and their habitat and sensitive environments." 40 C.F.R. § 300.210(c). Accordingly, individual facilities that meet certain criteria are required to prepare FRPs that are consistent with the NCP and applicable ACP. 33 U.S.C. § 1321(j)(5)(D); 40 C.F.R. § 300.211; *see also* Tr. 17-18. When determining FRP applicability, facility owners and operators are instructed to, *inter alia*, consult the applicable ACP to identify any fish and wildlife and sensitive environments that must be accounted for. *See* 40 C.F.R. §§ 112.2 (providing definition for fish and wildlife and sensitive environments) and 112.20(f)(1)(ii)(B).

[1] All citations to the official hearing transcript, dated June 18, 2019, will be in the following format: "Tr. [page number]."

IV. FACTUAL AND PROCEDURAL BACKGROUND

Since the 1980s, Respondent has operated a facility ("Facility") that manufactures asphalt emulsions and other products used principally for application on roadways. Jt. Stips., ¶¶ 1, 6, 7.[2] The Facility is located on approximately 10.5 acres in West Sacramento, California. Jt. Stips., ¶¶ 4, 9. The Facility contains several above-ground storage tanks ("ASTs"), some of which are heated or insulated. Jt. Stips., ¶¶ 14, 17; CX 23 at 3. These ASTs store oil or oil products such as asphaltic cement and asphalt emulsions. Jt. Stips., ¶¶ 14, 17; CX 23 at 3. Some of the ASTs have been in service for decades and are more than 50,000 gallons in size. Jt. Stips., ¶ 15; Tr. 636. Additionally, there are two 2.4 million-gallon field-constructed insulated ASTs that store oil, referred to as Tank 2001 and Tank 2002. Jt. Stips., ¶ 18. Overall, the Facility's oil storage capacity exceeds five million gallons. Jt. Stips., ¶ 19.

Roughly 200 feet south of the Facility's south boundary fence lies the Sacramento River Deep Water Ship Channel ("Channel"), which provides ships access to the Port of Sacramento and extends from the Port to the Channel's mouth on Cache Slough. Jt. Stips., ¶¶ 20, 21-22; Tr. 36; CX 2 at 1. The Facility and the Channel are in Geographic Response Area Eight ("GRA 8") within Area Contingency Plan Two ("ACP 2"), which the United States Coast Guard developed for the San Francisco Bay and Delta. Tr. 18-20, 22-23; CX 33 at 1, 4; RX 83 at 1-2. A site summary in ACP 2 describes the Channel as having emergent marsh along its entire length, with occasional shrub-scrub. Tr. 24-25; CX 2 at 1. The marsh is listed as a "seasonal and special resource concern," and marshy areas are designated as having "high priority at all times." CX 2 at 1; *see also* Tr. 25. The ACP also notes that in the Channel there are a large variety of water

[2] All citations to the Joint Stipulations filed on April 12, 2019, will be in the following format: "Jt. Stips., ¶ [page number]."

birds, suitable habitat for beaver, muskrat, amphibians and other semi-aquatic creatures, and that salmon and other migratory fish concentrate there during migratory periods. Tr. 24-25; CX 2 at 1. The ACP identifies all of these as resources "of primary concern." Tr. 24-25; CX 2 at 1.

EPA inspected the Facility on November 27, 2012 ("2012 inspection") and September 30, 2016 ("2016 inspection"). CX 4; CX 8. EPA also issued an information request to Respondent on June 25, 2013 (CX 10), to which Respondent responded on August 23, 2013 (RX 2). During EPA's investigation of this Facility, Respondent provided, and EPA reviewed, several documents, including an SPCC plan dated April 6, 2012 (RX 2 at 7-51) ("2012 SPCC Plan"); a consolidated plan dated October 24, 2014 (purported to serve as a consolidated SPCC plan, FRP, and documentation for various state requirements) (CX 17) ("2014 Consolidated Plan"); a consolidated plan dated January 15, 2016 (meant to satisfy SPCC and other requirements but with the FRP section removed) (CX 18) ("2016 Consolidated Plan"); a revised SPCC plan dated May 1, 2017 (CX 45) ("May 2017 SPCC Plan"); an FRP dated January 9, 2017 (CX 19) ("January 2017 FRP"); and an FRP dated May 1, 2017 (CX 21) ("May 2017 FRP").

On February 13, 2018, Complainant filed a Complaint against Respondent under Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii). The Complaint alleges five violations of the OPP regulations:

- Count 1- Respondent failed to prepare a complete SPCC plan in accordance with 40 C.F.R. § 112.7, in violation of 40 C.F.R. §112.3. Specifically, the Facility's 2012 SPCC Plan, 2014 Consolidated Plan, and 2016 Consolidated Plan failed to include: management approval of the SPCC plan in accordance with 40 C.F.R. § 112.7(a); a facility diagram with all regulated fixed containers, storage areas and connecting pipes, and stating the oil type and capacity for containers in accordance with 40 C.F.R. § 112.7(a)(3); and containment or diversionary structures in the facility diagram for tanks not permanently closed in accordance with 40 C.F.R. § 112.7(c);

- Count 2 - Respondent failed to have a Professional Engineer certify the Facility's 2014 Consolidated Plan in accordance with 40 C.F.R. §112.3(d), by omitting any certification that the SPCC plan was prepared in accordance with good engineering practices that

considered applicable industry standards and that the SPCC plan established and described the procedures and frequency for required inspections, maintenance and testing consistent with the applicable regulatory requirements;

- Count 3 - Respondent failed to amend its SPCC plan within six months following a change in the Facility's design, construction, operation or maintenance that materially affected its potential for discharge, as required by 40 C.F.R. § 112.5(a), specifically when Tank 2001 was put into service and again when Tank 2002 was put into service;

- Count 4 - Respondent failed to keep records of external and internal tank inspections and tests at the Facility, as required by 40 C.F.R. § 112.7(e); and

- Count 5 - Respondent failed to prepare an FRP and submit it to the Regional Administrator prior to putting Tank 2001 into service, as required by 40 C.F.R. §§ 112.20(a)(2) and (a)(2)(ii). In addition, the 2014 Consolidated Plan and January 2017 FRP were not based on criteria in 40 C.F.R. §112.20(f)(1) and did not address each element required under 40 C.F.R. § 112.20(h).

For these violations, the Agency proposed a penalty of up to $230,958, which was the statutory maximum for a Class II violation at the time the Complaint was filed.[3]

On August 3, 2018, the Agency moved for accelerated decision as to liability on all five counts in the Complaint. Respondent opposed the motion. On December 26, 2018, the ALJ issued an Order on Complainant's Motion for Accelerated Decision as to Liability ("AD Order") finding Respondent subject to the CWA and OPP regulations because: (1) Respondent is the owner and operator of a non-transportation related onshore facility within the meaning of the OPP regulations; (2) the Facility stores oil and oil related products, including asphaltic cement and asphalt emulsions, in ASTs in quantities that are subject to regulation; (3) based on the

[3] For violations set forth in Section 311(j), the CWA establishes two classes of administrative penalties: Class I, which may not exceed $10,000 per violation, up to a maximum penalty of $25,000, and Class II, which may not exceed $10,000 per day, up to a maximum penalty of $125,000. 33 U.S.C. § 1321(b)(6). These numbers are adjusted upward each year to account for inflation. Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 13, 2020, are set at $19,277/$240,960 for Class II violations and $19,277/$48,192 for Class I violations. See 40 C.F.R. § 19.4 tbl. 1 (list of revised penalties).

Facility's proximity to the Channel, the Facility could reasonably be expected to discharge oil in quantities that may be harmful into the Channel; and (4) the Channel is a navigable water of the United States. AD Order at 14-17. The AD Order also found Respondent liable for the violation alleged in Count I of the Complaint (failure to prepare a complete SPCC plan) with the period of liability beginning February 13, 2013 and ending May 1, 2017. *Id.* at 20.

The ALJ held a hearing on this matter on May 16-17 and May 20, 2019, in San Francisco, California. On September 16, 2020, the ALJ issued her Initial Decision finding Respondent liable for Counts I, III, IV and V, and assessing a $230,958 penalty.

On October 16, 2020, Respondent filed a notice of appeal and a brief supporting its appeal. On October 19, 2020, Respondent filed its Amended Appeal Brief.

V. ARGUMENT

A. Standard of Review

Appeals from administrative enforcement decisions are controlled primarily by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), codified at 40 C.F.R. Part 22. In enforcement proceedings, the Board generally reviews *de novo* both the factual and legal conclusions of the ALJ. *See* 40 C.F.R. § 22.30(f) (providing that, in an enforcement proceeding, the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed . . ."); *see also In re Smith Farm Enterprises*, LLC, 15 E.A.D. 222, 228 (EAB 2011). "In reviewing *de novo* an initial decision in an administrative penalty proceeding, the Board applies the 'preponderance of the evidence' standard established by 40 C.F.R. § 22.24(b)." *Smith Farm,* 15 E.A.D. at 228 (defining standard). Complainant bears the burden of demonstrating that the alleged violation

occurred. 40 C.F.R. § 22.24(a). "Although findings of fact are reviewed *de novo*, the Board generally defers to the ALJ's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the ALJ's decision making." *Smith Farm*, 15 E.A.D. at 229; *see also In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). "This approach recognizes that the ALJ observes first-hand a witness's demeanor during testimony and therefore is best suited to evaluate his or her credibility." *Smith Farm*, 15 E.A.D. at 229. "When an ALJ's credibility determinations are unsupported by the record, however, the Board will not defer to the ALJ and is not bound by any findings of fact derivatively made." *Id.*; *see also In re Bricks, Inc.*, 11 E.A.D. 224, 233, 236-39 (EAB 2003).

B. Respondent Violated the Consolidated Rules by Failing to State the Issues Presented for Review

The Consolidated Rules require an appellant's brief to contain "a statement of the issues presented for review." 40 C.F.R. § 22.30(a)(1)(iii). The section in the Amended Appeal Brief titled "Statement of the Issues" provides a series of statements summarizing the ALJ's determinations in her Initial Decision but does not provide a statement of the issues presented for review nor is there language elsewhere in the Amended Appeal Brief that provides a clear statement of the issues presented for review. Moreover, the Amended Appeal Brief does not contain "alternative findings of fact" nor "alternative conclusions regarding issues of law or discretion," which are also required by the Consolidated Rules. *See id*. "The requirements of the Consolidated Rules 'are not procedural niceties that parties are free to ignore.'" *In re Polo Development, Inc., AIM Georgia, LLC and Joseph Zdrilich*, 17 E.A.D. 100, 103 (EAB 2016) (citing *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *see also In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005)). This is particularly true when a party is represented by a licensed attorney, as is the case here. *See Four Strong Builders*, 12 E.A.D. at 769-770

("unfamiliarity with administrative process and environmental laws, and confusion over multiple filings, are not legitimate bases for vacating a default order, particularly where the defaulting party is represented by a licensed attorney"). Respondent provides no reason for its failure to comply with the simple requirement in the Consolidated Rules to provide a statement of the issues presented for review.

C. Respondent Acknowledges It Failed to Meet the Requirement to Mark Tank Contents on the Facility Diagram (Count I)

The OPP regulations require that the SPCC plan "include a facility diagram, which *must mark the location and contents of each fixed oil storage container . . . ."* 40 C.F.R. §112.7(a)(3) (emphasis added). The ALJ found that Respondent's 2012 SPCC Plan, 2014 Consolidated Plan and 2016 Consolidated Plan all "failed to include a diagram which marked the location and contents of each fixed oil storage container at the Facility, as required by 40 CFR Section 112.7(a)(3)." AD Order at 20; *see also* Initial Decision at 18.

On appeal, Respondent does not argue that it met this requirement. Instead, Respondent argues it did not have to meet this requirement -- that it was enough to have this information spread out in its 2012 SPCC Plan, with locations shown on the facility diagram (Figure 3) and tank contents shown on a table (Table 3). The ALJ disagreed with this interpretation in her AD Order and after the hearing found "[t]here was no evidence produced at [the] hearing to undermine this prior ruling." Initial Decision at 18; *see also* AD Order at 19 ("…Table 3 identifies ASTs containing oil products at the Facility, including ASTs numbered 817, 818 and 848…However, the diagram of the Facility in the 2012 SPCC Plan does not identify the location of [these] ASTs …As the 2012 SPCC Plan failed to include a facility diagram marking the location and contents of each fixed oil storage container, this plan failed to satisfy the requirements of 40 C.F.R. § 112.7(a)(3)").

Respondent points to the preamble to the final rule promulgating the OPP regulations to support its position that the relevant information can be spread over two or more pages. Amended Appeal Brief at 5. But Respondent fails to note that the preamble distinguishes between fixed containers, such as the ASTs at issue in this matter, and mobile containers. The first sentence of the paragraph it cites states "[t]he facility diagram must include all fixed (i.e., not mobile or portable) containers which store 55 gallons or more of oil *and must include information marking the contents of those containers*." 67 Fed. Reg. 47042, 47097 (July 17, 2002) (emphasis added). This is the requirement that the ALJ determined Respondent failed to meet in its SPCC plans. Respondent also ignores the next sentence in the paragraph, which states: "If you store mobile containers in a certain area, you must mark that area on the diagram," and then misleadingly cites the following to justify the insufficient facility diagrams in its SPCC plans: "You may mark the contents of each container either on the diagram of the facility or on a separate sheet or log …." Amended Appeal Brief at 5 (quoting 67 Fed. Reg. at 47097). The rest of that sentence in the preamble, which Respondent did not quote in its Amended Appeal Brief, reads "… if those contents change on a frequent basis." 67 Fed. Reg. at 47097. In other words, for fixed containers such as the ASTs at issue in this matter, the facility diagram must mark the container contents. The record supports, and the ALJ found, that Respondent failed to mark the container contents on the Facility diagrams in its SPCC plans. In contrast, mobile containers that have a storage capacity of 55 gallons or more of oil may be listed on a separate sheet. Such mobile containers are not at issue here.

Similarly, Respondent plucks other language out of context from EPA's *SPCC Guidance for Regional Inspectors*, dated December 16, 2013 ("SPCC Guidance").[4] Respondent cites language from the section of the SPCC Guidance titled "Preparing a Facility Diagram" but ignores the majority of the paragraph it quotes from, which clearly states "the rule requires that the diagram identify the location *and contents* of each fixed oil storage container …", and skips straight to a sentence that it wrongly views as supportive of its position: "Additionally, the diagram may be attached to a facility inspection checklist to identify areas, containers, or equipment subject to inspection." CX 34 at 250 (emphasis added); Amended Appeal Brief at 5. But this quotation from the SPCC Guidance does not contradict or expand on the regulatory requirement. Rather, it offers one of several additional uses for the facility diagram – that it can be added to inspection reports and inspection checklists to aid such inspections.

Respondent's reliance on illustrative facility diagrams in the SPCC Guidance is also misplaced. In the section that introduces "Facility Diagram Examples," the text clearly states, "Section 112.7(a)(3) requires the facility diagram to show, at a minimum, the location and contents of fixed oil containers…." CX 34 at 257. Notably, Respondent omits reference to the paragraph that precedes the diagram that Respondent refers to in its Amended Appeal Brief, which states, "*In addition to listing the contents directly on the diagram*, [the diagram] includes a reference to a crosswalk that contains the volume and content of the storage containers shown on the diagram…." CX 34 at 261 (emphasis added).

[4] The SPCC Guidance is issued by EPA's Office of Emergency Management and is intended to assist regional inspectors in reviewing a facility's implementation of the SPCC rule, and to provide consistent national policy on several SPCC-related issues. The guidance is available to the general public to assist owners and operators subject to the SPCC rule.

In short, the regulatory requirement is clear that the facility diagram in an SPCC plan must mark the location *and* contents of each fixed oil storage container, and EPA's preambles and SPCC Guidance affirm this requirement. The ALJ held, and Respondent acknowledges, that Respondent failed to meet this requirement. AD Order at 19-20; Initial Decision at 17-18; Amended Appeal Brief at 3 ("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"). The Board should uphold the ALJ's decision.

D. A Preponderance of the Evidence Supports that a Discharge from the Facility Could Cause Substantial Harm to the Environment (Count V)

The OPP regulations provide that an FRP is required if a facility could, "because of its location, … reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shoreline." 40 C.F.R. § 112.20(a). The OPP regulations provide criteria for meeting this threshold, including when a facility's total oil storage capacity is greater than or equal to one million gallons (*Id.* § 112.20(f)(1)(ii)) and one of several circumstances exist, including that "[t]he facility is located at a distance (as calculated using the appropriate formula in Appendix C of this part or a comparable formula) such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments" (*Id.* § 112.20(f)(1)(ii)(B)). The record supports, and the ALJ found, that the FRP requirements apply to Respondent's Facility because the Facility has storage capacity greater than one million gallons and is located close enough to the Channel that a discharge could cause injury to fish and wildlife and sensitive environments. *See* Initial Decision at 36-37. Respondent disputes the ALJ's and EPA's application of § 112.20(f)(1)(ii)(B) here. *See* Amended Appeal Brief at 7-14.

The facts to determine and apply the appropriate formula in Appendix C are not in dispute. Respondent admits that the Facility is within approximately 200 feet of the Channel,

which is not only a navigable water but also a fish and wildlife and sensitive environment. *See* Amended Appeal Brief at 1 (the Facility "is located approximately 200 feet north of the Channel, which has been designated as an environmentally sensitive area.") *and* 10 ("EPA at least presented evidence that the Channel qualifies as a fish and wildlife and sensitive environment"); *see also* CX 2 (portion of ACP 2 identifying the Channel as a fish and wildlife and sensitive environment).

Respondent argues, however, that (1) overland flow must be considered for facilities within 0.5 mile of a navigable water, and (2) the Agency did not prove a discharge from the Facility would cause an "injury." Amended Appeal Brief at 13-14. As explained below, neither argument is correct nor provides reason to overturn the ALJ's findings.

1. Consideration of overland flow is not necessary because the Facility is within 0.5 mile of a navigable water

Respondent is incorrect that overland flow must be considered for facilities such as its Facility within 0.5 mile of a navigable water. A plain meaning reading of the regulations in Section 5 of Appendix C to Part 112 requires Respondent to complete the D3 calculation for determining movement of oil along the navigable water, regardless of overland flow. 40 C.F.R. Part 112, Appendix C, § 5. Section 5.5 requires: "A facility owner or operator whose nearest opportunity for discharge is located within 0.5 mile of a navigable water must complete the planning distance calculation (D3) …." *Id*. § 5.5. Section 5.4 defines "D3" as "the [d]istance downstream from the outfall within which fish and wildlife and sensitive environments could be injured ...." *Id*. § 5.4. Read together, these sections mandate that facilities within 0.5 mile of a navigable water must calculate whether oil that reaches that navigable water will also reach fish and wildlife and sensitive environments. *Id*. § 5.

Respondent misrepresents the ALJ's holding and the Agency's position when it claims that 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" to argue that the ALJ erred in concluding that Respondent must prepare an FRP. Amended Appeal Brief at 8. Respondent fails to note the next step in the FRP applicability analysis: consideration of whether oil that reaches the navigable water will ultimately reach fish and wildlife and sensitive environments. *See* 40 C.F.R. § 112.20(f)(1)(ii)(B); 40 C.F.R. Part 112, Appendix C, § 5.5.

As noted above, the record supports, and Respondent does not deny, that the navigable water that is 200 feet from the Facility -- the Channel -- is itself a fish and wildlife and sensitive environment. As the ALJ held, "it is apparent even without a D3 calculation that a discharge could cause immediate injury when it reaches the Channel, because according to the applicable ACP, *the Channel itself* is a fish and wildlife and sensitive environment." Initial Decision at 43 (emphasis in original). Because the Channel is a fish and wildlife and sensitive environment, and because that environment is a navigable water within 0.5 mile of the Facility, any D3 calculation will require Respondent to prepare an FRP. Therefore, the ALJ correctly held that the Facility must prepare an FRP.

Respondent points to Section 5.1 of Appendix C to Part 112 in support of its argument that calculating overland flow is required. Amended Appeal Brief at 13; *see also* 40 C.F.R. Part 112, Appendix C, § 5.1. The ALJ correctly clarified the distinction between Section 5.1 (which states that "[f]acility owners or operators must evaluate the potential for oil to be transported over land to navigable waters of the United States") and Section 5.5 as follows:

> Section 5.1 sets forth a broad requirement for facilities evaluating "the potential" or "the likelihood that portions of a worst case discharge would reach navigable waters[.]" On the other hand, Section 5.5 speaks to a subset of facilities that are located within one half mile of a navigable water. Those facilities do not necessarily need to undertake the

> exercise of calculating overland flow because the regulation assumes that any discharge will reach the water based on proximity. *Therefore, the potentiality or likelihood of a certain outcome that is to be evaluated under Section 5.1 – that a spill will reach the water – is a certainty under Section 5.5. In this scenario, the regulations do not require or provide for any further analysis of overland flow.*

Initial Decision at 38-39 (emphasis added); *see also* 40 C.F.R. Part 112, Appendix C, §§ 5.1, 5.5. Respondent's construction of Section 5.1 effectively reads Section 5.5 out of the regulations, thereby conflicting with a common cannon of statutory and regulatory construction to give effect to every clause and word. *See In re Beckman Prod. Servs.*, 5 E.A.D. 10, 10-11 (EAB 1999) ("Under well accepted canons of construction, a rule should be read in a manner that gives effect to all of its parts rather than in a way that renders some of its terms meaningless or redundant"); *see also* 40 C.F.R. Part 112, Appendix C, §§ 5.1, 5.5.

Although overland flow is not relevant here, even if it were, the relevant threshold is the "likelihood that *portions* of a worst case discharge would reach navigable waters." *Id.* § 5.1 (emphasis added). The ALJ found, and a preponderance of the evidence supports, that "there is sufficient modeling evidence in the record to demonstrate that portions of a worst-case discharge from the Facility would in fact reach the Channel." Initial Decision at 42. Respondent does not raise any issues in its Amended Appeal Brief with the ALJ's finding that the modeling shows that oil would reach the Channel.

2. A discharge from the Facility *could* cause injury to fish and wildlife and sensitive environments

It is well established that oil spills harm the environment in many ways. *See, e.g.*, 67 Fed. Reg. at 47076 (providing examples of how oil can harm the environment, including "oil can coat the feathers of birds, the fur of mammals and cause drowning and hypothermia and increased vulnerability to starvation and predators from lack of mobility…"). But contrary to Respondent's contention, Complainant is not required to offer evidence of the degree or extent of injury that

would occur from a spill. Rather, it is only necessary to determine that Respondent's Facility meets the criteria set out in Appendix C to Part 112 ("Substantial Harm Criteria"). The Agency, in promulgating the OPP regulations, determined that (1) facilities of a certain size (e.g., storing over one million gallons of oil (40 C.F.R. § 112.20(f)(1)(ii))), (2) with an opportunity for discharge of oil within a certain proximity to navigable water (e.g., within 0.5 mile (*Id.* Part 112, Appendix C, § 5.5)), and (3) with fish and wildlife and sensitive environments within the calculated planning distance (*Id.* § 5.4), "*could* reasonably be expected to cause substantial harm to the environment" (40 C.F.R. § 112.20(f)(1)) (emphasis added). In other words, the regulations presume that injury occurs when the Substantial Harm Criteria is met. As explained above, the record supports, and the ALJ found, that Respondent's Facility meets the Substantial Harm Criteria.

E. The ALJ Correctly Determined the Liability Timeframe for Counts III and IV

Buried in its discussion of Counts III and IV, Respondent disputes the duration of liability timeframe. As shown below, this dispute has no basis. Although Respondent does not request relief for its assertions, it presumably is seeking a reduction in the ALJ's assessed penalty amount. For completeness, the Agency addresses this argument below, showing that this dispute is, if anything, *de minimis*, and does not warrant a reduction in the penalty assessed by the ALJ.

1. A preponderance of the evidence supports that Tank 2001 was placed into service on March 21, 2012 (Count III)

The OPP regulations require a regulated entity to amend its SPCC plan in accordance with the general requirements at 40 C.F.R. § 112.7 no later than six months following a change in the facility's design, construction, operation or maintenance that materially affects its potential for a discharge, and to have a Professional Engineer certify any technical amendments to the SPCC plan in accordance with 40 C.F.R. § 112.3(d). 40 C.F.R. §§ 112.5(a) and (c). Respondent

does not dispute the ALJ's finding that it failed to amend its SPCC plan within six months after bringing into service Tank 2001, an approximately 2.4 million-gallon field-constructed insulated AST, and later Tank 2002, a second 2.4 million-gallon field-constructed insulated AST. The ALJ found that Tank 2001 was brought into service on March 21, 2012, and that the period of liability is for the period beginning February 13, 2013 to October 30, 2014, a total of 625 days. Initial Decision at 25. The ALJ found that Tank 2002 was brought into service on January 31, 2016 and that Respondent is liable for the period beginning July 31, 2016 to May 1, 2017, a total of 275 days. In its Amended Appeal Brief, Respondent states that Tank 2001 was placed into service in March 2013 but offers no compelling evidence to support this statement. *See* Amended Appeal Brief at 6.

Respondent's own documents, including many versions of its FRP and SPCC plans, state that Tank 2001 was in service in March 2012. *See* CX 11 at 4 (Respondent's Response to EPA's June 25, 2013 Information Request); *see also* CX 17 at 106 (Respondent's 2014 Consolidated Plan); CX 18 at 98 (Respondent's 2016 Consolidated Plan); CX 19 at 14 (Respondent's January 2017 FRP); CX 21 at 20 (Respondent's May 2017 FRP); RX 96 at 12 (Respondent's May 2017 SPCC Plan); Initial Decision at 24-25. Moreover, at hearing, EPA inspector Janice Witul testified to why she believed that Tank 2001 was in service during her 2012 inspection of the Facility, including that Facility personnel told her during the inspection that Tank 2001 had already been operating for several months. Tr. 148-49, 222; CX 4 at 3; CX 5 at 1. The ALJ found Witul's testimony to be credible. Initial Decision at 24. In contrast, Respondent provides no explanation of why it provided the March 2012 date in its response to EPA's June 25, 2013

information request.[5] Nor does Respondent explain how it determined that Tank 2001 was brought into service in March 2013. Accordingly, the Board should uphold the ALJ's factual finding and decision that the March 21, 2012 date of service for Tank 2001 is supported by a preponderance of the evidence.

2. The Agency did not narrow the liability timeframe alleged in its Complaint because it did not amend the Complaint (Count IV)

The OPP regulations require regulated entities to keep written procedures developed for inspections and tests for the facility, as well as records of such inspection and tests for a period of three years. 40 C.F.R. § 112.7(e). The Complaint alleges that Respondent violated § 112.7(e) "for each day during the period from January 1, 2015, for a total of at least 1,095 days," i.e., for at least three years from the beginning of 2015. Complaint ¶ 65. Based on the evidence in the record, the ALJ found that Respondent "did not conduct inspections or tests in accordance with the written procedures that it developed, nor did it keep a sufficient record of the inspections and tests, signed by the appropriate supervisor or inspector, with its applicable SPCC Plan." Initial Decision at 31-33. In its Initial Post-Hearing Brief ("RB") filed September 13, 2019, Respondent concedes that it had not completed the formal, certified internal inspections and that inspections were still overdue for several tanks. RB at 14-16. The ALJ found the period of violation to be January 1, 2015 through January 1, 2018. Initial Decision at 33.

As with Count III, Respondent only appears to dispute the period of violation, which Respondent argues should be limited to the period of January 1, 2015 through January 30, 2016, on the basis that EPA limited the period of violation in its memorandum in support of its motion

[5] Contrary to Respondent's assertions in its Amended Appeal Brief, in its response to EPA's request for information dated June 25, 2013, Respondent stated that Tank 2001 "was placed in service in late March, 2012." CX 11 at 4.

for accelerated decision ("AD Motion"). Amended Appeal Brief at 7. Here, Respondent is repeating a mischaracterization that the ALJ correctly rejected.

In her Initial Decision, the ALJ addressed this issue and correctly found that "the Agency has never amended its Complaint to reflect such a limitation," "the Agency's statements in briefs supporting its AD Motion were made in the context of seeking accelerated decision" and "even if taken out of the context of accelerated decision, the Agency refers to liability extending through 'at least' January 2016." Initial Decision at 30-31.

Furthermore, EPA made clear in its Prehearing Brief, filed on April 26, 2019, that it would be seeking to establish at the hearing that Respondent was in violation of 40 C.F.R. § 112.7(e) for the full 1,095-day period of liability for this violation alleged in the Complaint, stating that:

> The [AD] Order states that Complainant appeared to acknowledge that Respondent ceased the violation of 40 C.F.R. § 112.7(e) alleged in Count IV following January 2016. EPA has not amended its complaint, and notes that, in the context of seeking to establish facts beyond dispute in its August 3, 2018 Motion for Accelerated Decision, Complainant noted "through *at least* January 2016." Motion for Accelerated Decision, at 30 (emphasis added). Complainant believes that pursuant to the unamended Complaint it may seek penalties for [the] full duration that facts are established at the hearing.

Complainant's Prehearing Brief at 17, n.4. This language put Respondent on notice that Complainant intended to establish the full 1,095-day period of liability at hearing. Accordingly, the Board should uphold the ALJ's finding that the period in which Respondent was in violation of Section 112.7(e) was "between January 1, 2015, and January 1, 2018." Initial Decision at 33.

3. Respondent's dispute is *de minimis* and does not warrant a reduction in the assessed penalty

To the extent there remains any doubt regarding the date of service of Tank 2001, or whether EPA amended the period of liability in its brief supporting its AD Motion, the disagreement is *de minimis* and should have no impact on the ALJ's assessment of penalty. The

ALJ found it would be "appropriate to assess a total penalty against Respondent of $233,494. This includes an economic benefit penalty of $28,159; a penalty assessment of $152,100 for the seriousness of Respondent's violations; and a penalty of $53,235 for Respondent's culpability in committing the violations." Initial Decision at 60. Of the $152,100 assessed for seriousness, $76,050 was based on the seriousness of the three SPCC counts (Counts I, III, and IV) combined. Thirty percent of the $76,050, or $17,550, was based on the cumulative duration of these three counts. EPA recommended that the penalty amount be increased by this amount because "there have been at least some deficiencies in Respondent's SPCC plan or plan implementation for at least five years, or sixty months." *Id.* at 55 (citing AB at 38; CX 48 at 15). The ALJ found that collectively the SPCC violations persisted for at least 115 months, which is significantly more than the 60 months focused on by the Agency ("more than 50 months under Count I; more than 29 months under Count III; and 36 months under Count IV"). Initial Decision at 55. As the ALJ pointed out "[e]ach violation presents its own risk of harm, and each *could* be penalized accordingly." *Id.* Moreover, as the EAB has observed, "[a] general rule of thumb is that 'the longer a violation continues uncorrected, the greater is the risk of harm.'" *In re San Pedro Forklift*, *Inc.,* 15 E.A.D. 838, 881 (EAB 2013) (quoting *EPA General Enforcement Policy #GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 15 (Feb. 16, 1984); CX 39 at 27. Thus, even if the Board were persuaded by Respondent's arguments that the period of liability for Counts III and IV should be reduced, the period of liability for all three SPCC counts would still far exceed 60 months and assessing a thirty percent increase for duration on the cumulative duration of the three counts would still be appropriate. As such, the Board should uphold the ALJ's assessment of $76,050 for the seriousness of Respondent's SPCC violations.

VI. CONCLUSION

For the foregoing reasons, Complainant respectfully requests that the Board affirm the ALJ's "Initial Decision".

This Response Brief complies with the Board's word limitation of 14,000 words.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response Brief in the matter of VSS International, Inc., Appeal No. CWA 20-02, was served on the following persons, this fifth day of November 2020 in the manner indicated below.

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