IN RE VSS INTERNATIONAL, INC.

CWA Appeal No. 20-02

FINAL DECISION AND ORDER

Decided December 16, 2020

Syllabus

VSS International, Inc. ("VSS") appeals from Chief Administrative Law Judge ("ALJ") Susan L. Biro's Initial Decision and Order assessing an administrative civil penalty against VSS for violations of the Oil Pollution Prevention regulations implementing Clean Water Act § 311, as amended by the Oil Pollution Act, 33 U.S.C. § 1321. The violations occurred at VSS's asphalt emulsion storage facility in West Sacramento, California. That facility is situated close to the Sacramento River Deep Water Ship Channel, which flows year-round from the Port of Sacramento to the Sacramento River and into the San Francisco Bay and Pacific Ocean. The Channel is lined with emergent marsh and shrub-scrub habitat that provides important sources of food and shelter for many species of birds, fish, amphibians, and mammals.

Region 9 ("Region") of the U.S. Environmental Protection Agency ("EPA" or "Agency") filed a complaint against VSS alleging five counts of violation of the Oil Pollution Prevention regulations at 40 C.F.R. part 112. The ALJ held VSS liable on all but Count II and assessed the $230,958 penalty sought by the Region.

On appeal to the Environmental Appeals Board ("Board"), VSS seeks a reversal of the ALJ's findings of liability for Counts I and V and appears to seek a reduction in the penalties the ALJ calculated for Counts III and IV.

Held: The Board affirms the ALJ's Initial Decision and Order.

As to liability for Count I, the Board affirms the ALJ's holding that the facility diagram in VSS's Spill Prevention Control and Countermeasure Plan ("SPCC Plan") did not depict certain features required by 40 C.F.R. § 112.7, in violation of 40 C.F.R. § 112.3. Specifically, the Board affirms the ALJ's holding that aboveground storage tanks 817, 818, and 848 are not identifiable in VSS's facility diagram. The Board therefore affirms the ALJ's holding that VSS's 2012 SPCC Plan failed to meet the regulatory requirement of identifying the locations and contents of all fixed aboveground storage tanks at VSS's facility.

As to liability for Count V, the Board notes that the Oil Pollution Prevention regulations provide that a facility response plan is required if a facility, "because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines." This "substantial harm" test is fulfilled when a facility's total oil storage capacity exceeds one million gallons and the facility is located at such a distance that a discharge from the facility "could cause injury to fish and wildlife and sensitive environments." The Board affirms the ALJ's holding that VSS's facility satisfied these criteria but VSS failed to timely prepare and submit a compliant facility response plan. The Board concludes that the ALJ properly applied the distance-related regulatory requirement and that, once facility oil volume and proximity are shown, no proof of actual injury to fish, wildlife, and sensitive environments need be presented to find a reasonable expectation of substantial harm. Accepting VSS's argument would undermine the Oil Pollution Act's intent "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States" or their adjoining shorelines.

As to the penalty for Count III, the ALJ held that VSS failed to amend its SPCC Plan within six months of placing into service two 2.4-million-gallon aboveground storage tanks called Tanks 2001 and 2002. The ALJ determined that VSS's own documents, including its response to an EPA information request, along with various SPCC Plans and facility response plans, established that Tank 2001 was placed into service on March 21, 2012. On appeal VSS claims that it was mistaken and should have reported the Tank 2001 service date as March 21, *2013*, not *2012*. The Board rejects the argument, finding that VSS provided no specific evidence to overcome facts it submitted in written documents in response to formal Agency information requests or in accordance with the Oil Pollution Prevention regulations and governing statute. The Board concludes that, in such circumstances, it is appropriate to hold VSS to the information VSS provided in those documents.

Finally, as to the penalty for Count IV, the ALJ rejected VSS's attempt to reduce the period of violation by nearly two years, based on a claim that the Region had conceded to the shorter period in filings on an accelerated decision motion before the ALJ. The Board agrees with the ALJ that VSS's argument is premised on an incorrect reading of the Region's filings on an accelerated decision. The Board also observes that the ALJ noted in her penalty analysis that VSS's failure to fully comply with SPCC Plan requirements was a "failure of significant magnitude," and she specifically found that the Count IV violation persisted for thirty-six months. VSS failed to offer any rebuttal of that analysis. The Board therefore upholds the ALJ's decision as to Count IV.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Opinion of the Board by Judge Avila:

I. *STATEMENT OF THE CASE*

VSS International, Inc. ("VSS") filed with the Environmental Appeals Board ("Board") an appeal of Chief Administrative Law Judge ("ALJ") Susan L. Biro's September 2020 Initial Decision and Order in *In re VSS International, Inc.*, Docket No. OPA-09-2018-0002. The ALJ assessed a $230,958 administrative civil penalty against VSS for violations of regulations implementing Clean Water Act § 311, as amended by the Oil Pollution Act, 33 U.S.C. § 1321, at VSS's asphalt emulsion storage facility in West Sacramento, California.

Congress enacted the Oil Pollution Act in 1990 to strengthen oil-related Clean Water Act protections in the aftermath of the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska. As amended, section 311 "declares 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 [or] adjoining shorelines." CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1); *see also Gatlin Oil Co. v. United States*, 169 F.3d 207, 209 (4th Cir. 1999) (noting that Congress intended Oil Pollution Act "to provide a prompt, federally-coordinated response to oil spills in navigable waters of the United States"). Implementing regulations, called the Oil Pollution Prevention regulations, establish a variety of "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." CWA § 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C); *see* 40 C.F.R. pt. 112.

Region 9 ("Region") of the U.S. Environmental Protection Agency ("EPA" or "Agency") initiated this enforcement proceeding by filing a complaint against VSS alleging five counts of violation of the Oil Pollution Prevention regulations at 40 C.F.R. part 112. In Count I, the Region alleged that the facility diagram in VSS's Spill Prevention Control and Countermeasure Plan ("SPCC Plan") did not depict certain features required by 40 C.F.R. § 112.7, in violation of 40 C.F.R. § 112.3. In Count II, the Region alleged that the SPCC Plan did not contain a compliant professional engineer's certification, in violation of 40 C.F.R. § 112.3(d). In Count III, the Region alleged that VSS failed to timely amend its SPCC Plan after placing into service two new large aboveground storage tanks ("ASTs"), in violation of 40 C.F.R. § 112.5(a). In Count IV, the Region alleged that VSS did not maintain records of AST inspections and tests for three years, in violation of 40 C.F.R. § 112.7(e). And in Count V, the Region alleged that VSS failed to prepare and submit a compliant facility response plan ("FRP"), in violation of 40 C.F.R. § 112.20. *See* Compl. ¶¶ 28-78, at 5-12. After an administrative hearing in May 2019, the ALJ held VSS liable on all but Count II and assessed the

$230,958 penalty sought by the Region. Initial Decision & Order 18, 22, 25, 27, 33, 45, 60 (Sept. 16, 2020).

On appeal to the Board, VSS seeks a reversal of the ALJ's findings of liability for Counts I and V. Although not included in relief requested in the concluding section of its appellate brief, VSS also appears to seek a reduction in the penalties the ALJ calculated for Counts III and IV. For the reasons explained below, the Board affirms the ALJ's decision.

II. *ISSUES ON APPEAL*

The liability questions presented in this appeal are:

(1) Did the ALJ err in holding that VSS's SPCC Plan failed to include a facility diagram marking the location and contents of each fixed oil storage container, in violation of 40 C.F.R. § 112.7(a)(3) (Complaint Count I)?

(2) Did the ALJ err in holding that VSS failed to prepare and submit a compliant facility response plan, in violation of 40 C.F.R. § 112.20(a) (Complaint Count V)?

The penalty questions presented in this appeal are:

(1) Did the ALJ err in assessing the periods of violation of 40 C.F.R. § 112.5(a) for VSS's untimely amendment of its SPCC Plan after placing two aboveground storage tanks into service (Complaint Count III)?

(2) Did the ALJ err in assessing the period of violation of the 40 C.F.R. § 112.7(e) AST inspection requirements where the Region stated in its motion for an accelerated decision and supporting briefs before the ALJ that it was not seeking a finding of liability after January 2016 (Complaint Count IV)?

III. *FACTS AND PROCEDURAL HISTORY*

VSS is a California corporation that manufactures petroleum surfacing materials, including asphalt emulsions and related products, for use in roadway construction, maintenance, and repair. Joint Stipulations ¶¶ 1, 6 (Apr. 12, 2019) ("Joint Stips."). Since the late 1980s, VSS has owned and operated a bulk storage and aggregation facility on ten acres of land in West Sacramento, California. *Id*. ¶¶ 3-5, 7-9. The facility contains an office, maintenance shop, product storage and manufacturing area, bulk asphalt containment area, rubberized asphalt plant, rail spur, and truck and equipment wash, as well as parking areas for fleet and employee vehicles and equipment. *Id*. ¶ 10; *see* Respondent's Exhibit ("RX") 40, at 8, 24

fig.3 (Condor Earth Techs., Inc., *Spill Prevention Control and Countermeasures (SPCC) Plan, VSS Emultech* (Apr. 6, 2012)) ("2012 SPCC Plan").

Over two dozen aboveground storage tanks of varying sizes are clustered on the facility grounds around a laboratory building in the product storage and manufacturing area. *See* 2012 SPCC Plan at 23-24 figs.2-3; Complainant's Exhibit ("CX") 17, at 17-18 figs.2-3 (VSS Emultech/VSS Int'l, *Hazardous Materials, Environmental Compliance, and Contingency Business Plans* (Oct. 24, 2014)) ("2014 Consolidated Plan"). Some of these tanks are more than 50,000 or 75,000 gallons in size and some have been in service for decades. Joint Stips. ¶ 15; Administrative Hearing Transcript ("Tr.") at 636. Two more recently constructed 2.4-million-gallon aboveground oil storage tanks, called "Tank 2001" and "Tank 2002," are located inside the bulk asphalt containment area. Joint Stips. ¶ 18; *see* 2014 Consolidated Plan at 17-18 figs.2-3. The facility's total oil storage capacity exceeds five million gallons. Joint Stips. ¶ 19.

The southern boundary fence line of VSS's facility is 200 feet from the Sacramento River Deep Water Ship Channel, which flows year-round from the Port of Sacramento to Cache Slough that connects the Channel with the Sacramento River. The Sacramento River empties into the San Francisco Bay and Pacific Ocean. Joint Stips. ¶¶ 20-22; Tr. at 11. The Channel is lined with emergent marsh and shrub-scrub habitat, which provides important sources of food and shelter for many species of birds, fish, amphibians, and mammals. In an Area Contingency Plan developed to address pollutant releases that may affect coastal areas, the United States Coast Guard identified the Channel habitat, and the fish and wildlife using that habitat, as "resources of primary concern." CX 2, at 1 (U.S. Coast Guard, *Area Contingency Plan (excerpt), Site Summary–Sacramento River Deep Water Ship Channel* (Oct. 1, 2014)); Tr. at 24-25; *see* RX 83 (full Area Contingency Plan).

EPA Region 9 conducted an inspection of the facility in November 2012, at which it found deficiencies in VSS's existing SPCC Plan. *See* Joint Stips ¶ 23; Tr. at 145, 150-51, 209-11; CX 4 (U.S EPA, *SPCC Field Inspection and Plan Review Checklist* (Sept. 23, 2013)). The Region subsequently notified VSS that, if Tank 2001 held asphaltic cement, VSS would be required to prepare an FRP to address a worst case discharge of oil. Tr. at 151.

Over the next few years, VSS took steps to respond to the Agency's concerns. The company hired consultants to develop SPCC Plans and prepared and implemented AST testing and inspection programs. *E.g.*, Tr. at 171-72, 404-05, 444-45, 607-09, 617; 2014 Consolidated Plan app. E, at 96-127 (Fletcher

Consultants, Inc., *Integrity Testing Program for Bulk Storage Containers, VSS Emultech* (Sept. 30, 2014)). VSS concluded, based on consultant advice, that it did not need an FRP. *See* RX 89 § 6, at 21 (Haley & Aldrich, Inc., *Report on Evaluation of Containment Measures for Asphalt-Cement Above-Ground Storage Tanks, Valley Slurry Seal International Facility, West Sacramento, California* (Jan. 10, 2014)); RX 88 § 5.0, at 14 (WHF, Inc. Envtl. & Eng'g Grp., *VSS Emultech/VSS International, Substantial Harm Criteria Determination* (June 23, 2015)). VSS later prepared an FRP, however, after the Region determined that VSS's facility did in fact require such a plan. *See* Tr. at 260-387; CX 14 § 5, at 12 (William R. Michaud, P.E., SRA Int'l, Inc., *Review of FRP Applicability, Valley Slurry Seal International Facility* (Aug. 23, 2016)); RX 94 (Valley Slurry Seal, *Facility Response Plan* (Jan. 9, 2017)); RX 95 (VSS International, Inc., *Facility Response Plan* (May 1, 2017)). For its part, the Region followed up on its original inspection with information requests, show cause letters, and further inspections. *See, e.g.*, Joint Stips. ¶¶ 25, 28; Tr. at 151-52, 195, 403; CX 10 (Letter from Arlene Kabei, Ass't Dir. Enf. Div., Region 9, U.S. EPA, to Jeffrey R. Reed, Pres., VSS Int'l, Inc. (June 25, 2013)); RX 23 (Letter from Thanne Berg, Acting Ass't. Dir. Enf. Div, Region 9, U.S. EPA, to Jeffrey R. Reed, Pres., VSS Int'l, Inc. (Mar. 27, 2017)).

In February 2018, the Region filed an administrative complaint against VSS, alleging five counts of violation of the Oil Pollution Prevention regulations at 40 C.F.R. part 112. The first four counts alleged deficiencies in VSS's SPCC Plan, while the fifth count alleged that VSS failed to timely prepare, submit, and implement a compliant FRP. *See* Compl. ¶¶ 28-78, at 5-12. The Region proposed a penalty of $230,958 for these violations. *Id*. ¶ 79, at 13. VSS filed an answer in March 2018, denying the allegations and asserting defenses to the proposed penalty. *See generally* Answer.

In December 2018, the ALJ issued an order granting the Region's motion for an accelerated decision only as to VSS's liability for Count I from February 13, 2013, to May 1, 2017. *See* Order on Complainant's Motion for Accelerated Decision as to Liability 19-20, 33 (Dec. 26, 2018) ("AD Order"). The ALJ presided over an administrative hearing in May 2019, at which both parties submitted exhibits and introduced expert witness and other testimony. *See generally* Tr. In September 2020, the ALJ issued an Initial Decision and Order finding VSS liable for four of the five counts (all except Count II) and assessing a $230,958 penalty. *See generally* Initial Decision & Order (Sept. 16, 2020) ("Init. Dec").

VSS filed a timely appeal with the Board on October 16, 2020. *See* Respondent VSS Int'l, Inc.'s Appellate Brief Following Initial Decision and Order

(Oct. 16, 2020). VSS submitted a "Notice of Errata" and amended appellate brief on October 19, 2020. *See* Respondent VSS Int'l, Inc.'s Notice of Errata re Appellate Brief & Amended Appellate Brief Following Initial Decision and Order (Oct. 19, 2020) ("Am. Appeal Br."). The Region filed a response to VSS's amended appeal on November 5, 2020. *See* Region 9 Response Brief (Nov. 5, 2020) ("Resp. Br.").

IV. *STANDARD OF REVIEW*

The Board generally reviews an ALJ's factual and legal conclusions on a de novo basis. 40 C.F.R. § 22.30(f) (establishing that Board shall "adopt, modify, or set aside" ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). In so doing, the Board typically will grant deference to an ALJ's determinations regarding witness credibility and the judge's factual findings based thereon. *See, e.g.*, *In re Euclid of Va., Inc.*, 13 E.A.D. 616, 673-75 (EAB), *pet. for review voluntarily dismissed*, No. 08-1088 (D.D.C. Oct. 21, 2008); *In re Cutler*, 11 E.A.D. 622, 640-41 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002) (deferring to ALJ's reasoned analysis of witness credibility). But when an ALJ's credibility determinations do not turn on the ALJ's "observations of witnesses" or are unsupported by the record, the Board generally will not defer to the ALJ and is not bound by any findings of fact derivatively made. *In re Carbon Injection Sys., L.L.C.*, 17 E.A.D. 1, 14 (EAB 2016); *In re Smith Farm Enters., L.L.C.*, 15 EA.D. 222, 229, 255-58 (EAB 2011).

All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *see, e.g.*, *In re Mayes*, 12 E.A.D. 54, 62, 87-88 (EAB 2005), *aff'd*, No. 3:05-cv-478 (E.D. Tenn. Jan. 4, 2008). This standard is achieved when a factfinder determines particular facts to be "more likely true than not." *In re Stevenson*, 16 E.A.D. 151, 158 (EAB 2013) (citing cases). The complainant has the burdens of presentation and persuasion to prove that "the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a). Once the complainant meets those burdens, the respondent has the burdens of presentation and persuasion to prove any affirmative defense(s) that excuse it from liability. *Id.*; *see In re Gen. Motors Auto.–N. Am.*, 14 E.A.D. 1, 54-55 (EAB 2008) (describing burden of proof for affirmative defenses); *see also Pac. Coast Fed'n of Fishermen's Ass'ns. v. Glaser*, 937 F.3d 1191, 1197 (9th Cir. 2019) (holding that once plaintiff establishes its

prima facie case, burden of proving defenses such as statutory exception is on defendant, not on plaintiff).

V. *APPLICABLE LAW*

Section 311 of the Clean Water Act ("CWA"), as amended by the Oil Pollution Act, "declares 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 [or] adjoining shorelines." CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1); *see* Oil Pollution Act of 1990, Pub. L. No. 101-380, tit. IV, subtits. B-C, 104 Stat. 484, 523-41 (1990). Congress provided that EPA 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."[1] *See* CWA § 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C). Congress further provided that EPA issue regulations requiring owners and operators "to prepare and submit * * * a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance." *Id*. § 311(j)(5)(A)(i), 33 U.S.C. § 1321(j)(5)(A)(i).

EPA promulgated the Oil Pollution Prevention regulations at 40 C.F.R. part 112 to implement these provisions. As relevant here, those 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, using, or consuming oil and oil products, which due to its location, could reasonably be expected to discharge oil in quantities that may be harmful * * * into or upon the navigable waters of the United States or adjoining shorelines." 40 C.F.R. § 112.1(b); *see also id.* pt. 110 (describing discharge of oil in quantities that may be harmful). An owner or operator of a regulated facility must prepare and implement an SPCC Plan for the facility. *Id.* § 112.3. The purpose of an SPCC Plan is to form a comprehensive federal/state spill prevention program "that minimizes the potential for discharges." *Id.* § 112.1(e). Owners or operators of facilities that could "reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines" are required to prepare and submit to the Agency an FRP for responding to a worst case discharge of oil. *Id.* § 112.20(a), (f)(1). The regulations provide

[1] Congress gave the President authority to issue implementing regulations, CWA § 311(j)(1), 33 U.S.C. § 1321(j)(1), and the President delegated that authority to EPA. *See* Exec. Order No. 12,777 § 2(d)(1), 56 Fed. Reg. 54,757, 54,761 (Oct. 22, 1991).

that a facility could be "reasonably expected to cause substantial harm" when, among other things, a facility's total oil storage capacity exceeds one million gallons and the facility is located at such a distance from navigable waters "that a discharge from the facility could cause injury to fish and wildlife and sensitive environments." *Id.* § 112.20(f)(1)(ii)(B).

The SPCC Plan and FRP play a critical substantive role in ensuring achievement of Congress' policy goal that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines." CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1). They are not unimportant paperwork intended for a filing cabinet but instead are vital planning and management documents that help minimize and prevent oil pollution. And while the "overriding purpose" of the Oil Pollution Prevention regulations is "to *prevent* oil discharges," *In re Pepperell Assocs.*, 9 E.A.D. 83, 95 (EAB 2000), *pet. for review denied*, 246 F.3d 15 (1st Cir. 2001), the regulations also establish procedures to "contain" any oil discharges that are not so prevented, *In re Ashland Oil, Inc.*, 4 E.A.D. 235, 242-43 (EAB 1992). As described next, the SPCC Plan and FRP are designed to ensure prevention of oil discharges and timely, comprehensive containment of any oil discharges that may occur. Further, they are important tools in the context of oil storage, handling, and processing activities.

The SPCC Plan regulations address a number of specific operational details involving the diversion and containment of spilled or leaked oil; periodic integrity testing of bulk storage containers; inspections, tests, and recordkeeping; personnel, training, and discharge prevention procedures; facility security; and loading and unloading operations. 40 C.F.R. § 112.7(c)-(h); *see In re Indus. Chems. Corp.*, 10 E.A.D. 241, 244 (EAB 2002) (discussing operational details). SPCC Plans must describe the physical layout of the facility and include a facility diagram that marks the locations and contents of all fixed oil storage containers. 40 C.F.R. § 112.7(a)(3). In cases where a reasonable potential exists for equipment failure, SPCC Plans must include predictions of the direction, flow rate, and total quantity of oil that could be discharged from the facility. *Id*. § 112.7(b). With regard to ASTs and other oil storage containers, facilities must provide appropriate secondary containment or diversionary structures, such as dikes, berms, retaining walls, weirs, booms, and other barriers, in addition to the primary containment provided by the storage containers themselves. *Id*. § 112.7(c). Together, all these requirements are intended to ensure that the facility can demonstrate that it "has adequate containment structures and equipment to retain any oil spilled at the facility and thus prevent its release to navigable waters." *Indus. Chems.*, 10 E.A.D. at 244.

An FRP must be consistent with the requirements of the National Oil and Hazardous Substance Pollution Contingency Plan in 40 C.F.R. part 300 and applicable Area Contingency Plans prepared under CWA section 311(j)(4). 40 C.F.R. § 112.20(g)(1). An FRP must also be coordinated with the local emergency response plan developed by the local emergency planning committee in accordance with the Superfund Amendments and Reauthorization Act of 1986. *Id*. An FRP must include: (1) an emergency response action plan, identifying parties with authority to implement removal actions and their contact information; (2) facility information; (3) emergency response information, including listings of personnel and equipment needed to remove, mitigate, or prevent worst case discharges of oil; (4) a facility hazard evaluation; (5) response planning levels (by volume of oil discharged); (6) discharge detection systems; (7) plan implementation instructions; (8) self-inspection, drills/exercises, and response training; (9) site plan and drainage plan diagrams; (10) security systems; and (11) an FRP cover sheet. 40 C.F.R. § 112.20(h)(1)-(11) & app. F.

Finally, the Agency has authority to enforce these statutory and regulatory provisions by assessing a civil penalty against any owner or operator of an onshore facility that "fails or refuses to comply" with any applicable Oil Pollution Prevention regulation. CWA § 311(b)(6)(A)(ii), 33 U.S.C. § 1321(b)(6)(A)(ii).

VI. *ANALYSIS*

As noted above, VSS raises two challenges to the ALJ's liability findings and two challenges to her calculation of penalties. We address those issues in turn.[2]

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[2] The Region also makes a procedural argument that VSS violated the Consolidated Rules of Practice ("CROP"), 40 C.F.R. part 22, that govern enforcement appeals by failing, in its appeal brief, to state the issues presented for review and provide alternative findings of fact and alternative conclusions of law or discretion, as required by 40 C.F.R. § 22.30(a)(1)(iii). Resp. Br. at 9-10. The Region argues that CROP requirements "'are not procedural niceties that parties are free to ignore,'" particularly in cases where parties are represented by licensed attorneys. *Id*. (citing *In re Polo Dev., Inc.*, 17 E.A.D. 100, 103 (EAB 2016); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005)). The Region does not specify what remedy it seeks for its procedural argument that VSS violated CROP requirements.

The Region is correct that VSS's appeal brief does not strictly adhere to all the requirements of 40 C.F.R. § 22.30(a)(1)(iii). Nonetheless, VSS filed a fourteen-page appeal brief with legal and factual arguments and citations to the record that are readily discernable. (The Region filed a twenty-two-page response brief responding to these

A. *Liability*

1. *Count I*

The Oil Pollution Prevention regulations provide that an SPCC plan must "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). The ALJ held that VSS's 2012 SPCC Plan failed to comply with this provision. AD Order at 19; *accord* Init. Dec. at 18. Relevant to VSS's appeal, the ALJ noted that Table 3 in the 2012 SPCC Plan identified ASTs numbered 817, 818, and 848 as containing oil products. AD Order at 19. The diagram of the facility (Figure 3) in the 2012 SPCC Plan did not, however, identify the location of those three ASTs. *Id.* Thus, the ALJ held that the 2012 SPCC Plan failed to include a facility diagram marking the location and contents of each fixed oil storage container, in violation of 40 C.F.R. § 112.7(a)(3). AD Order at 19.[3]

On appeal, VSS contends that its 2012 SPCC Plan did, in fact, include the requisite information, in two different graphics on two different pages. Am. Appeal. Br. at 3. VSS asserts that, in Figure 3 on page 24 of the SPCC Plan, ASTs 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," VSS asserts "that is necessary in order to distinguish those particular tanks as Exempt Non-Oil Product ASTs, as the legend to Figure 3 clearly explains." *Id.* (citing 2012 SPCC Plan at 24 fig.3). VSS states further that, in Table 3 on page 29, all ASTs depicted in Figure 3 are listed and their tank contents and other information (numbers, circumferences, diameters, heights, volumes, areas, and heated status) are provided. *Id.* (citing 2012 SPCC Plan at 29 tbl.3). VSS asserts that "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." *Id.* VSS concludes by contending that it is error to interpret the SPCC regulations as

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specific arguments.) In these circumstances, the Board will resolve VSS's appeal on the merits. *See, e.g.*, 40 C.F.R. §§ 22.1(c) (granting Board discretionary authority to resolve any questions not addressed in CROP that arise at any stage of enforcement proceedings before it), 22.4(a)(2) ("[i]n exercising its duties and responsibilities" under CROP, Board "may do all acts and take all measures as are necessary for the efficient, fair, and impartial adjudication of issues arising in a proceeding").

[3] The ALJ also held that VSS's 2014 and 2016 Combined Plans failed to meet regulatory requirements for SPCC Plans. AD Order at 19-20. VSS takes the position on appeal that those deficiencies "are no longer pertinent." Am. Appeal. Br. at 3 n.2.

requiring that all requisite information be presented on one page rather than on two or more pages. *See id.* at 4-5.

In response, the Region maintains that a single-page presentation of all facility diagram information is required by the Oil Pollution Prevention regulations, the regulatory preamble, and Agency guidance. Resp. Br. at 10-13.

We do not need to resolve whether the Oil Pollution Prevention regulations require that an SPCC Plan's facility diagram, marking the location and contents of each fixed storage container, be presented on a single page or instead may be presented on multiple pages as VSS contends because VSS's argument does not address the basis of its liability—that the facility diagram in the 2012 SPCC Plan did not identify the location of ASTs numbered 817, 818, and 848. And the ALJ's conclusion in that regard is reasonable and well grounded in the record.[4]

Table 3 in the 2012 SPCC Plan lists the contents of AST 817 as asphalt, AST 818 as petroleum asphalt, and AST 848 as bitumen, all of which are oil products. *See* 2012 SPCC Plan at 29 tbl.3. Figure 3 in the 2012 SPCC Plan does not, however, identify any of those tanks' locations. *See id*. at 24 fig.3. Fifteen of the tanks in Figure 3 are blacked out, wholly obscuring any tank numbers that might otherwise have been displayed there to provide tank locations. *See id.*

A site map in VSS's two-years-later 2014 Consolidated Plan does identify locations for ASTs 817 and 818. It is far from clear, however, how a 2014 document could render the 2012 SPCC Plan adequate. Moreover, if anything, the 2014 Consolidated Plan adds a level of confusion to, rather than clarifies, the location and contents of ASTs 817, 818, and 848. The tanks that the 2014 Consolidated Plan depicts as ASTs 817 and 818 are impossible to identify in Figure 3 of the 2012 SPPC Plan, because they are blacked out. *Compare* 2014 Consolidated Plan at 18 fig.3, *with* 2012 SPCC Plan at 24 fig.3. And according to

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[4] We generally do not consider arguments raised for the first time on appeal. *See In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998), *aff'd*, 114 F. Supp. 2d 775 (N.D. Ind. 1999); *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994). Here, the ALJ noted that "the *only* defense offered by" VSS in support of its contention that the 2012 SPCC Plan met the requirements of 40 C.F.R. § 112.7 was that the Region had acknowledged the sufficiency of its plan in its Accelerated Decision Memorandum (a defense the ALJ rejected). AD Order at 20 (emphasis added). It is therefore questionable whether VSS has preserved for appeal its argument that an SPCC Plan's facility diagram may be presented on multiple pages. We need not resolve whether VSS has preserved that argument for appeal given our basis for affirming the ALJ's decision.

Figure 3's legend, any blacked-out tank is an "exempt non-oil product AST." 2012 SPCC Plan at 24 fig.3. Thus, even if ASTs 817 and 818 were among the blacked-out tanks in Figure 3 of the 2012 SPPC Plan, the blacked-out identification in *Figure 3* contradicts the contents listing in *Table 3* of the 2012 SPPC Plan, which states that AST 817 contained asphalt and AST 818 contained petroleum asphalt rather than non-oil products. In addition, the 2014 Consolidated Plan contradicts the 2012 SPCC Plan on the location of AST 848. In the 2012 SPCC Plan, that tank is labeled "840" and there is no tank labeled "848." *Compare* 2014 Consolidated Plan at 18 fig.3, *with* 2012 SPCC Plan at 24 fig.3.

Having an accurate facility diagram is an important part of the Oil Pollution Act's program. As the Agency has explained, an SPCC Plan facility diagram "is used for effective prevention, planning, management (for example, inspections), and response considerations." Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 67 Fed. Reg. 47,042, 47,097 (July 17, 2002). The facility diagram "help[s] the facility and emergency response personnel to plan for emergencies." *Id.* In particular, having the facility diagram identify the type of oil in each container "may help [facility and emergency] personnel determine the risks when conducting a response action," as some oils "present a higher risk of fire and explosion than other less flammable oils." *Id.*

In sum, the facility diagram in the 2012 SPCC Plan failed to meet the important regulatory requirement of identifying the locations and contents of all fixed ASTs at VSS's facility. We therefore affirm the ALJ's well-documented finding of liability on Count I.

2. *Count V*

The Oil Pollution Prevention regulations provide that an FRP is required if a facility, "because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines." 40 C.F.R. § 112.20(a). Under the regulations, a facility could reasonably be expected to cause such substantial harm when, among other things, a facility's total oil storage capacity exceeds one million gallons and the facility is located at such a distance from navigable waters "that a discharge from the facility could cause injury to fish and wildlife and sensitive environments." *Id.* § 112.20(f)(1)(ii)(B). The ALJ held that, given the VSS facility's oil storage capacity and location, VSS was required by these criteria to submit an FRP, but VSS failed to timely prepare and submit a compliant FRP in violation of 40 C.F.R. § 112.20(a). Init. Dec. at 33-45.

VSS appeals the ALJ's finding of liability, raising two arguments. *See* Am. Appeal. Br. at 7-14. First, VSS argues that the ALJ erred by adopting a regulatory presumption that an oil discharge will reach navigable waters if it originates less than one-half mile from such waters. *See id.* at 8-9. Second, VSS argues that the ALJ erred in finding that the substantial harm criteria were met because EPA presented no evidence of a causal connection between a hypothetical oil discharge at VSS and injury to fish, wildlife, and sensitive environments. *See id*. at 9-14. Neither of these grounds has merit.

a. *One-Half Mile*

The Oil Pollution Prevention regulations include an Appendix C and associated attachments that establish detailed requirements for analyzing the question of "substantial harm." *See generally* 40 C.F.R. pt. 112, app. C & attachs. Under the regulations, facility owners/operators must evaluate the potential for oil product spills or leaks from ASTs on their property to flow "over land" to navigable waters, using various distance-to-target modeling calculations. *Id*. app. C, attach. C-III §§ 5.1, 5.4. For facilities "whose nearest opportunity for discharge" is located within one-half mile of a navigable water, owners or operators are required to complete a water-based "planning distance calculation" called "D3." *Id*. app. C, attach. C-III § 5.5. D3 is defined as the distance "downstream from the outfall within which fish and wildlife and sensitive environments could be injured." *Id*. § 5.4.

The ALJ wrote at length about these appendix C regulations. The ALJ explained that in cases where the nearest opportunity for a discharge is located within a half-mile of a navigable water, "there is no need to calculate the overland distances * * * because the only relevant calculation is the water-based distance, D3." Init. Dec. at 38. She explained:

> Once the point of discharge is located within one 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. If 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.

Id.

Before the ALJ, VSS objected to this construction of the regulation, contending that assuming a spill will enter the water under section 5.5 "renders meaningless" section 5.1's requirement that facilities calculate overland flow. *See*

id. (citing VSS's post-hearing briefs). The ALJ rejected that argument, reasoning as follows:

> [T]hese two provisions are not in conflict. 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.

Id. at 38-39 (emphasis added).

On appeal, VSS argues that no support exists in the regulations, case law, or guidance for the proposition that all facilities within one-half mile of navigable waters must prepare an FRP. Am. Appeal Br. at 8. But the ALJ did not reach such a holding. Instead, the ALJ concluded that the Oil Pollution Prevention regulations do *not* contain an "automatic FRP requirement" for facilities within one-half mile of navigable waters, as VSS contends, but rather merely an "automatic" D3 modeling distance requirement. Init. Dec. at 38 (citation omitted). As the ALJ pointed out, the latter is a step in the determination of whether a "reasonable expectation of substantial harm" exists such that an FRP needs to be prepared, and not the ultimate decision as to FRP preparation itself. *See id*. That is, a D3 calculation might show that the distance downstream within which injury could occur is such that that no reasonable expectation of substantial harm would arise. Such a result could potentially unfold in cases where, for example, no evidence of fish, wildlife, or sensitive environment presence is available for the portion of the navigable water in question, or where the oil products in question travel only a short distance among few sensitive receptors. In such cases, a determination of "no substantial harm" could theoretically be made and thus no FRP would be required. Accordingly, we find, as the ALJ did, that VSS conflates the D3 step with the final FRP preparation decision and as such mischaracterizes the regulatory requirement. *See id*.

Further, the ALJ noted that facilities within one-half mile of navigable waters "do not *necessarily* need to undertake the exercise of calculating overland flow," leaving open the possibility that in some instances, they *may* do so. *See id*.

at 39 (emphasis added). In that regard, the issue here appears to be VSS's belief, based on a section 5.1 overland flow analysis conducted by its consultants, that a worst case spill or leak of asphalt from VSS's Tanks 2001 or 2002 will cool quickly and reach a semisolid, immobilized state before it is able to enter the Ship Channel, rendering no "substantial harm" possible and an FRP unnecessary. *See id*. at 39-40. Though not directly challenged by VSS on appeal, the fact is that the ALJ considered VSS's overland flow analysis, compared it to a similar analysis prepared by the Region's consultant, and found the Region's expert to be more qualified and more experienced, and his modeling more reliable, than the VSS expert and modeling. *Id*. at 40-42. The ALJ concluded, reasonably, that even if the regulations did not presume that a discharge within one-half mile of navigable waters would automatically enter the water, the record in this case contained sufficient modeling evidence to demonstrate that a worst case discharge *would* reach the Ship Channel and could cause injury there. *Id.* at 42. The ALJ's reasoning in this regard is thorough, careful, and persuasive.

In sum, the Board rejects VSS's claim that the ALJ erred in adopting a regulatory presumption that the D3 calculation regulations assume oil has entered navigable waters. The ALJ's construction of the regulations is reasonable and persuasive, and VSS has failed to present a plausible countervailing interpretation. The Board affirms the ALJ's decision on these points.

b. *Cause of Injury*

Next, VSS argues that the Region presented no evidence that an oil spill from VSS's facility would "injure" fish, wildlife, or sensitive environments by causing 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 Ship Channel. Am. Appeal Br. at 13 (quoting definition of "injury" in 40 C.F.R. § 112.2). According to VSS, absent such evidence and showing, it was incorrect to conclude that VSS was in violation of the requirement to have an FRP.

The Region maintains that it had no obligation to provide evidence of the degree or extent of possible injury to protected resources; instead, it was only necessary to establish that VSS's facility met the substantial harm criteria. Resp. Br. at 16-17. Those criteria were met, the Region argues, because (1) VSS's facility stores over one million gallons of oil; (2) the facility's proximity to navigable water falls within the one-half mile regulatory distance set out in appendix C; and (3) fish, wildlife, and sensitive environments considered "resources of primary concern" are present in the Ship Channel within the calculated D3 planning distance. *See id*. at 15, 17. These factors together mean that VSS's facility *could* reasonably be

expected to cause substantial harm to these resources, and thus, in the Region's view, no evidence of injury need be proffered. *Id*. at 16-17; *see* 40 C.F.R. § 112.20(a) (requiring FRP where facility "could reasonably be expected to cause substantial harm"); 40 C.F.R. § 112.20(f)(1)(ii)(B) (finding of "substantial harm" appropriate where facility discharge "could cause injury" to sensitive receptors).

The ALJ addressed this issue in her Initial Decision and held that VSS "misstate[d] or misunderst[ood] the law." Init. Dec. at 44. The ALJ explained that, under 40 C.F.R. § 112.20(f)(1)(ii)(B):

> [A] discharge from a facility "*could* cause injury to fish and wildlife and sensitive environments" based solely on the facility's oil storage capacity and location relative to those environments as established under Appendix C to Part 112. 40 C.F.R. § 112.20(f)(1)(ii)(B) (emphasis added). Once [40 C.F.R. § 112.20(f)(1)(ii)(B)] is satisfied, then as a matter of law the "facility could, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters." [*Id*. § 112.20(a), (f)(1).] That is, after oil encounters fish and wildlife and sensitive environments, the regulations presume there *could* be an injury and therefore it *could* reasonably be expected that substantial harm to the environment would result. The Agency does not need to further prove the extent of the injury for purposes of FRP applicability or establishing liability in this proceeding. In any event, the record shows that the catastrophic failure of one of [VSS's] 2.4-million-gallon tanks would discharge oil more than 22 miles into the Channel. Even without evidence to specifically quantify the degree of injury in this scenario, there is no doubt such a spill 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. *See id*. § 112.2 (defining "injury").

Init. Dec. at 44.

We agree with the ALJ. It is undisputed that VSS's total oil storage capacity exceeds one million gallons. Am. Appeal Br. at 10; *see* Joint Stips. ¶ 19 (stipulating that current total oil storage capacity of facility exceeds approximately five million gallons). It is also undisputed that the Region presented evidence that the Ship Channel "qualifies as a fish and wildlife and sensitive environment." Am. Appeal Br. at 10. Finally, it is undisputed that VSS's facility is very close to the Ship Channel, with its southern boundary only 200 feet away, well within the regulatory one-half mile distance (i.e., 2640 feet) set out in section 5.5, *id*. at 1, which means that the proximity of the facility to the sensitive resources *could*, in the event of an

oil spill or leak, cause injury to them. It is therefore clear that VSS's facility meets all components of the substantial harm criteria. *See* 40 C.F.R. § 112.20(f)(1)(ii)(B). Such facilities must prepare and submit to EPA an FRP for responding to a worst case discharge of oil. *Id*. § 112.20(a), (h)(5)(i). Contrary to VSS's argument on appeal, the Region was not obligated to submit evidence and prove actual injury to fish and wildlife and sensitive environments.

We agree with the ALJ that accepting VSS's argument would undermine the Oil Pollution Act's intent "that there should be *no* discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines." CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1) (emphasis added); Init. Dec. at 44; *see also* Init. Dec. at 56 (noting in penalty calculus that FRPs "are critical to successfully executing the national response system that Congress called for in the [Oil Pollution Act]" and holding that "serious risk of harm" exists due to VSS's failure to prepare and submit FRP). It would turn the regulations on their head to require proof of an actual injury as a condition for determining whether an FRP is needed. The Board affirms the ALJ's holding in this respect.

B. *Penalty (Penalty Duration)*

We now turn to VSS's arguments challenging the ALJ's calculation of penalties for Counts III and IV. In essence, VSS disputes the duration of each liability timeframe. VSS does not request relief for its assertions, but presumably it is seeking a reduction in the assessed penalties.

1. *Count III*

The Oil Pollution Prevention regulations direct owners/operators of regulated facilities to amend their SPCC plans within six months of "a change in the facility design, construction, operation, or maintenance that materially affects" the facility's potential for discharge. 40 C.F.R. § 112.5(a). The ALJ held that VSS violated this provision by failing to timely amend its SPCC Plan within six months of placing Tanks 2001 and 2002 into service. Init. Dec. at 24-25. The ALJ determined that VSS's own documents established that Tank 2001 was placed into service on March 21, 2012. *Id*. at 24 (citing VSS's response to EPA's June 2013 information request and VSS's 2014 and 2016 Consolidated Plans, 2017 FRPs, and 2017 SPCC Plan). As for Tank 2002, the ALJ found that the best evidence established that the tank was placed into service on January 31, 2016. *Id*. at 25-26.

On appeal, VSS states, without providing any support or documentation, that after further review, it determined that its initial response to the Region's information request was "incorrect" and Tank 2001 was actually placed into service

"on or about March 21, *2013*," not 2012. Am. Appeal Br. at 6 (emphasis added). VSS does not similarly disavow various statements made in its Consolidated Plans, FRPs, and SPPC Plans, which were prepared to fulfill regulatory requirements and relied on as evidentiarily significant by the ALJ in her factual findings and analysis. *See* Init. Dec. at 24 (observing that VSS's 2014 and 2016 Consolidated Plans "record March 21, 2012 as the 'reported service date' for Tank 2001" and that VSS's January 2017 and May 2017 FRPs and May 2017 SPCC Plan similarly note "a 'reported date of initial service' for Tank 2001 of March 21, 2012"). With respect to Tank 2002, VSS asserts, without any support, that any period of violation cannot extend beyond July 31, 2016, to May 1, 2017. Am. Appeal Br. at 6.

The Board rejects these claims. For Tank 2001, VSS provides no specific evidence to overcome facts it submitted in written documents in response to formal Agency information requests or in accordance with the Oil Pollution Prevention regulations and governing statute. In such circumstances, it is appropriate to hold VSS to the information VSS provided in those documents. *See, e.g.*, RX 96 at 2, 12, 40 (VSS Int'l, Inc., *Hazardous Materials, Environmental Compliance, and Contingency Business Plans* (May 1, 2017)) (certifying under penalty of law to truth, accuracy, and completeness of document contents, including March 21, 2012 date of initial service for Tank 2001). And for Tank 2002, VSS presents no argument, so no further discussion is required. The Board upholds the ALJ's periods of violation and penalty calculations for Count III.

2. *Count IV*

The Oil Pollution Prevention regulations require regulated facilities to develop written procedures for AST inspections and tests and to maintain records of such inspections and tests, as part of their SPCC plans, for three years. 40 C.F.R. § 112.7(e). The ALJ held that VSS failed to comply with this provision from January 1, 2015, to January 1, 2018. Init. Dec. at 33.

On appeal, VSS argues that the period of violation should be reduced by nearly two years, to run only from January 1, 2015, to January 30, 2016, on the basis that the Region stated in filings before the ALJ that the Region was not seeking liability for this particular violation after January 2016. Am. Appeal Br. at 7. The ALJ explicitly rejected this argument in her Initial Decision, noting that the Region never amended its complaint, which alleged at least three years of violation, to reflect such a limitation. Init. Dec. at 30; *see* Compl. ¶ 65, at 11. Further, the ALJ observed that the statement VSS references was made in a reply brief supporting the Region's motion for accelerated decision. In that context, the ALJ explained, the focus necessarily was limited to whether, at that point in the proceeding, genuine issues of material fact existed, and the Region argued that they

did not for Count IV "'through *at least* January 2016.'" Init. Dec. at 30 (quoting Motion for Accelerated Decision at 30). The ALJ elaborated as follows:

> Importantly, this is not the same as stating that [VSS's] liability in this proceeding ended in January 2016. Rather, this was an argument that the evidence was so overwhelming at the time of the Agency's motion that no hearing was necessary for me to find [VSS] in violation of § 112.7(e) at all times prior to January 2016. The Agency apparently believed a factual dispute remained regarding the time period after January 2016 that could not be resolved without a hearing. Otherwise, it would have sought accelerated decision on liability after that date.

Id.

In her penalty analysis, the ALJ noted that VSS's failure to fully comply with SPCC Plan requirements was a "failure of significant magnitude," and specifically found that the Count IV violation persisted for thirty-six months. *Id*. at 52, 55. In support, the ALJ cited the Board's decision in *In re Industrial Chemicals Corp.*, which emphasizes that SPCC Plans "play a key role in ensuring a disciplined and well-considered approach to spill prevention, containment, and preparedness." *Id*. at 52 (citing *In re Indus. Chems. Corp.*, 10 E.A.D. 241, 259 (EAB 2002)). The ALJ concluded that "[b]y coming up short in its various SPCC obligations," including those alleged in Count IV, VSS "failed to meet a requirement that is central to the regulatory scheme, because an incomplete plan defeats the very purpose of having a plan in the first place." *Id*.

We agree with the ALJ's reasoning and analysis pertaining to Count IV. VSS fails to offer any rebuttal of that analysis, which is thorough and well supported. The Board therefore upholds the ALJ's decision.

VII. *CONCLUSION AND ORDER*

For the foregoing reasons, the Board affirms the ALJ's findings of liability and penalty. Accordingly, VSS is ordered to pay the full amount of the civil penalty assessed by the ALJ, $230,958.00, within thirty (30) days of receipt of this Final Order. Payment should be made by any method or combination of methods specified on EPA's payment website at https://www.epa.gov/financial/makepayment. Payment must be identified with "Docket No. OPA-09-2018-0002." If VSS fails to pay the penalty within the prescribed statutory period after

entry of this decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

So ordered.