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## **I. INTRODUCTION**

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer’s June 19, 2019, Order Scheduling Post-Hearing Submissions, the United States Environmental Protection Agency, Region 9 (“EPA” or “Complainant”) hereby submits this initial post-hearing brief.

This proceeding is a civil administrative enforcement action for penalties initiated under Section 311(b)(6)(B)(ii) of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 1321(b), and the Consolidated Rules of Practice, 40 C.F.R. Part 22. Complainant initiated this action by filing an “Administrative Complaint and Opportunity to Request a Hearing” (“Complaint”) against Respondent, VSS International Incorporated (“VSS” or “Respondent”) on February 13, 2018. The Complaint alleges five counts for violating Section 311 of the CWA, 33 U.S.C. § 1321(b), and the oil pollution prevention (“OPP”) regulations at 40 C.F.R. Part 112. Complainant requests that the Presiding Officer find Respondent liable for violating the CWA and pay a civil penalty in the amount of at least \$230,958 for these violations.

## **II. STATUTORY AND REGULATORY FRAMEWORK**

### **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, OPA amended Section 311 of the CWA, 33 U.S.C. § 1321, to strengthen the provisions of the CWA pertaining to oil pollution. See OPA, Pub. L. No. 101-380, 104 Stat. 484 (1990). Congress enacted OPA 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. This environmental disaster made clear that the United States needed to act because it lacked adequate resources and mechanisms

for addressing oil spills at that time. As amended by OPA, the CWA directed the president to issue regulations “establishing procedures, methods, and equipment . . . to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.” 33 U.S.C. § 1321(j)(1)(C). The CWA further authorizes the Administrator of the EPA to assess civil penalties to any owner, operator, or person in charge of any vessel, onshore facility or offshore facility, who fails to comply with regulations issued pursuant to 33 U.S.C. § 1321(j). 33 U.S.C. § 1321(b)(6)(A).

**B. Oil Pollution Prevention Regulations**

Pursuant to 33 U.S.C. § 1321(j), the EPA promulgated the OPP regulations codified at 40 C.F.R. Part 112. These regulations establish procedures, methods and other requirements to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or upon the navigable waters of the United States or adjoining shorelines. The OPP regulations apply to owners or operators of non-transportation-related onshore facilities that are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products; have oil in any aboveground container; have an aggregate aboveground oil storage capacity greater than 1,320 U.S. gallons; and that due to location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in 40 C.F.R. Part 110, into or upon the navigable waters of the United States or adjoining shorelines. 40 C.F.R. § 112.1(b). For purposes of the OPP regulations, discharges of oil in such quantities that may be harmful include discharges of oil that: (a) violate applicable water quality standards; or (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. 40 C.F.R. § 110.3.

When applicable, the OPP regulations require that the owner or operator of a regulated facility in operation on or before August 16, 2002, prepare in writing and implement a Spill Prevention, Control, and Countermeasure (“SPCC”) Plan for the facility in accordance with 40 C.F.R. § 112.7 and any other applicable section of the OPP regulations no later than November 10, 2011. 40 C.F.R. § 112.3. Additionally, the owner or operator of a facility subject to the OPP regulations must, among other things: (1) prepare an SPCC Plan in accordance with good engineering practices and with the full approval of management at a level of authority to commit necessary resources to fully implement the SPCC Plan (40 C.F.R. § 112.7); (2) describe in the SPCC Plan the physical layout of the facility and include a facility diagram which must mark “the location and contents of each fixed oil storage container and the storage area where mobile or portable containers are located and all transfer stations and connecting pipes (40 C.F.R. § 112.7(a)(3)); (3) address in the SPCC Plan the types of oil in each fixed container and its storage capacity (40 C.F.R. § 112.7(a)(3)(i)), discharge prevention measures (40 C.F.R. § 112.7(a)(3)(ii)), and discharge or drainage controls such as secondary containment around containers and other structures, equipment, and procedures for the control of a discharge (40 C.F.R. § 112.7(a)(3)(iii)); (4) conduct inspections and tests in accordance with written procedures for the facility developed by the facility or the certifying Professional Engineer (“PE”) in accordance with industry standards (40 C.F.R. § 112.7(e)); and (5) maintain with the SPCC Plan a record of the inspections and tests above, signed by the appropriate supervisor or inspector, for a period of three years (40 C.F.R. § 112.7(e)).

The OPP regulations further require that a licensed PE must review and certify the SPCC Plan for it to be effective to satisfy the requirements of 40 C.F.R. Part 112. Within this certification, the PE must attest that: (1) he is familiar with the requirements of Part 112; (2) he

or his agent has visited and examined the facility; (3) the SPCC Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of Part 112; (4) procedures for required testing have been established; and (5) the SPCC Plan is adequate for the facility. 40 C.F.R. § 112.3(d)(1).

Additionally, the OPP regulations require that the owner or operator amend the SPCC Plan for the facility within six months when there is a change in the facility design, construction, operation, or maintenance that materially affects its potential for discharge as described in 40 C.F.R. § 112.1(b) and implement the amendment as soon as possible but not later than six months following preparation of the amendment. 40 C.F.R. § 112.5(a). The owner or operator of a regulated facility must further complete a review and evaluation of the SPCC Plan at least once every five years and amend the SPCC Plan within six months of such review to include more effective prevention and control technology if the technology will significantly reduce the likelihood of a discharge, as described in 40 C.F.R. § 112.1(b), from the facility. 40 C.F.R. § 112.5(b).

Beyond SPCC Plan requirements, the OPP regulations place additional requirements on owners or operators of a non-transportation-related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or upon the navigable waters of the United States or adjoining shorelines. 40 C.F.R. § 112.20(a). Owners or operators of these facilities must prepare and submit a facility response plan (“FRP”) to the EPA Regional Administrator. *Id.* The OPP regulations specify certain criteria under which a facility, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on navigable waters or adjoining shorelines.

The OPP regulations provide that, if a facility meets the threshold criteria for FRP requirements as a result of a planned change in design, construction, operation, or maintenance, the owner or operator then must submit an FRP and response plan cover sheet to the EPA Regional Administrator before operations at the portion of the facility undergoing the change begin. 40 C.F.R. § 112.20(a)(2)(iii). The OPP regulations set forth, in detail, the required content of an FRP. See 40 C.F.R. § 112.20(h). For example, the OPP regulations require that an FRP include provisions regarding self-inspection, drills/exercises and response training. 40 C.F.R. § 112.20(h)(8). If an owner or operator of a facility is required to prepare an FRP, the owner or operator is also required to implement the FRP, which includes implementing the facility response training program and the drill/exercise program described in the facility's FRP. 40 C.F.R. § 112.21.

**C. Enforcement under the Clean Water Act**

The CWA authorizes the Administrator 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 the OPP regulations. 33 U.S.C. § 1321(b)(6)(A). Since OPA is a strict liability statute, intent and good faith of the owner, operator or person in charge is irrelevant to determining liability. See United States v. B.P. Exploration & Prod. Inc. (In re Deepwater Horizon), 753 F.3d 570, 575 (5th Cir. 2014) (stating that “civil-penalty liability under 33 U.S.C. § 1321 arises irrespective of knowledge, intent, or fault”); see also Ward v. Coleman, 598 F.2d 1187, 1191 (10th Cir. 1979) (assessing penalty pursuant to 33 U.S.C. § 1321(b)(6) is “without regard to fault and subject to no defenses”), *rev'd on other grounds*, 448 U.S. 242 (1980).

### **III. FACTUAL BACKGROUND**

Respondent is a corporation that operates a 10.5 acre-facility (the "Facility") located in West Sacramento, California, approximately 200 feet north of the Sacramento River Deep Water Ship Channel ("SRDWSC"). Joint Stipulations, April 12, 2019 ("JS") ¶¶ 1, 9, 20. At the Facility, which includes bulk storage and aggregation of petroleum surfacing materials, including asphaltic cement. JS ¶ 5. Respondent manufactures asphalt emulsions for application on roadways. JS ¶ 6. The Facility has been in operation since the late 1980s and has numerous aboveground storage tanks ("ASTs") that store oil, including several types of oil (e.g., asphaltic cement) that are kept in heated and insulated tanks to lower the viscosity of the oil. JS ¶¶ 8, 14, 17. The Facility has two-approximately 2.3 million-gallon field-constructed insulated ASTs that are used to store oil (Tank # 2001 and Tank # 2002).

The SRDWSC is a direct tributary between the Sacramento River and the Sacramento Delta region, which discharges into the San Francisco Bay. CX 16 at 9. Accordingly, the SRDWSC is a navigable water for the purpose of 33 U.S.C. § 1321 and the OPP regulations. December 26, 2018 Order on Complainant's Motion for Accelerated Decision as to Liability ("December 26, 2018 Order") at 16. The SRDWSC is located within the North Delta Geographic Response Area of the San Francisco Bay and Delta Area Contingency Plan ("ACP2") planning area. CX 2; CX 33. The President designates each Response Area and appoints Area Committee members, which include Federal, State and Local agency personnel, to prepare an area contingency plan ("ACP") for their planning area. 33 U.S.C. § 1321(j)(4). The SRDWSC is identified in ACP2 as one of 265 environmentally sensitive sites in the planning area, noting the presence of sensitive fish, mammals and plants. CX 2, CX 33.

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). As a result of the inspections, the response to the information request and subsequent enforcement action, Respondent provided, and EPA reviewed, several documents subject to the OPP regulations, including an SPCC Plan dated April 6, 2012 (RX 2 at 7-51) (“2012 SPCC Plan”); a combined plan dated October 24, 2014 (meant to satisfy both SPCC and FRP and other requirements,<sup>1</sup> and including both an SPCC Plan and an FRP) (CX 17) (“2014 Combined Plan”); a combined plan dated January 15, 2016 (meant to satisfy SPCC and other requirements but with the FRP section removed) (CX 18) (“2016 Combined Plan”), a combined plan dated May 1, 2017 (meant to satisfy SPCC and other requirements but with the FRP Section removed) (CX 45) (“May 2017 Combined Plan”), an FRP dated January 9, 2017 (CX 19) (“January 2017 FRP”), and an FRP dated May 1, 2017 (CX 21) (“May 2017 FRP”).

#### **IV. PROCEDURAL BACKGROUND**

On February 13, 2018, Complainant filed a Complaint against Respondent, in which Complainant alleges five counts of violating the OPP regulations. In Count I, Complainant alleges that Respondent failed to prepare a complete SPCC Plan in accordance with 40 C.F.R. § 112.7 from 2012 to 2017 in violation of 40 C.F.R. § 112.3. Specifically, the Facility’s 2012 SPCC Plan, 2014 Combined Plan, and 2016 Combined Plan failed to include management approval of the Plan (40 C.F.R. § 112.7, a facility diagram with all regulated fixed containers,

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<sup>1</sup> The 2014 Combined Plan “is intended to consolidate all response and contingency plans ... into one report,” including: Hazardous Materials Business Plan; Emergency Response/Contingency Plan; Spill/Discharge Response Plan; Spill Prevention, Control, and Countermeasure Plan, Facilities Response Plan. CX 17 at 1, 9.

storage areas and connecting pipes, and stating the oil type and capacity for containers (40 C.F.R. § 112.7(a)(3)), and containment or diversionary structures in the facility diagram for tanks not permanently closed (40 C.F.R. § 112.7(c)). In Count II, Complainant alleges that from October 24, 2014, to January 15, 2016, Respondent failed to have a PE certify the Facility's 2014 Combined Plan in accordance with 40 C.F.R. § 112.3(d), by omitting PE certification that the Plan was prepared in accordance with good engineering practices that considered applicable industry standards, and that the Plan established and described the procedures for required inspections and testing consistent with the applicable regulatory requirements, and that the Plan is adequate for the facility. In Count III, Complainant alleges that Respondent failed to amend the applicable SPCC Plan within six months following a change in the Facility's design, construction, operation or maintenance that materially affected its potential for discharge, specifically when Tank # 2001 was put into service and when Tank # 2002 was put into service. In Count IV, Complainant alleges that Respondent failed to keep records of external and internal tank inspections and tests at the Facility for a period of three years, as required by 40 C.F.R. § 112.7(e). Finally, in Count V, Complainant alleges that Respondent failed to prepare a timely and complete FRP and submit it to the Regional Administrator prior to the start of certain operations at the Facility, as required by 40 C.F.R. §§ 112.20(a)(2) and (a)(2)(ii). Specifically, the 2014 Combined Plan and the 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) and Appendix F.

Respondent filed an Answer to the Complaint on March 20, 2018 denying the allegations. On August 3, 2018, Complainant filed a Motion for Accelerated Decision, which the Presiding Officer partially granted in the December 26, 2018 Order. In the December 26, 2018 Order, the

Presiding Officer determined that, as a matter of law, Respondent is subject to the OPP regulations at 40 C.F.R. Part 112 and liable for any violations thereof. Specifically, the Presiding Officer determined for the purposes of 33 U.S.C. § 1321 and 40 C.F.R. Part 112 that: (1) Respondent is the owner and operator of the Facility; (2) the Facility is an on-shore, non-transportation related facility; (3) the Facility is engaged in the storing of oil or oil products, including asphaltic cement; (4) oil and oil products are stored at the Facility in ASTs; (5) the SRDWSC is a navigable water of the United States; and (6) due to the location of the Facility, it could be reasonably expected to discharge oil into or upon a navigable water of the United States in quantities that may be harmful. See December 26, 2018 Order at 15-16. In addition, the Presiding Officer found that Respondent is liable for Count I, because Complainant had established that Respondent's 2012 SPCC Plan, 2014 Combined Plan, and 2016 Combined Plan each failed to have a facility diagram that marked the location and contents of each fixed oil storage container, as required by 40 C.F.R. § 112.7(a)(3), for the period of February 13, 2013, through May 1, 2017. December 26, 2018 Order at 20.

The Presiding Officer held a hearing in this matter from May 16 to May 20, 2019, in San Francisco, California, in which both parties presented evidence and testimony regarding Respondent's liability for the remaining violations alleged in the Complaint as well as the appropriate penalty for all the violations. At the hearing, the Complainant's Exhibits CX 1-48, 50 and 52-55 were entered into the record either by joint stipulation or by oral motion. Similarly, Respondent's Exhibits RX 1-24, 29, 32, 37-43, 45 and 104-106 were entered into the record. On July 24, 2019, the parties submitted a Joint Motion to Conform the Transcript of the Hearing to the Actual Testimony ("Joint Motion"), which the Presiding Officer granted on July 31,

2019. Consequently, all references herein to the transcript are referring to the transcript as corrected by the Presiding Officer's July 31, 2019 Order.

## V. STANDARD OF PROOF

Under the Consolidated Rules of Practice, 40 C.F.R. Part 22, the complainant bears “the burdens of presentation and persuasion 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 establishes its *prima facie* case, the burdens shift to respondent to present “any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. 40 C.F.R. § 22.24(a). The respondent has the burdens of presentation and persuasion for any affirmative defenses.” *Id.* In carrying their respective burdens of proof, the parties are subject to a “preponderance of the evidence” standard. 40 C.F.R. § 22.24(b), meaning that “a fact finder should believe that his factual conclusion is more likely than not.” *In re City of Marshall*, 10 E.A.D. 173, 180 (EAB, 2001) (internal citations and quotations omitted).

## VI. ARGUMENT ON LIABILITY

### A. Count I – The Presiding Officer's December 26, 2018 Order Found Respondent Liable for Count I

As noted above, pursuant to the December 26, 2018 Order, the Presiding Officer found that Respondent is liable for Count I. Specifically, the Presiding Officer found that Respondent's 2012 SPCC Plan, 2014 Combined Plan, and 2016 Combined Plan each failed to have a facility diagram that marked the location and contents of each fixed oil storage container, as required by 40 C.F.R. § 112.7(a)(3). The Presiding Officer found liability for the period from February 13, 2013 to May 1, 2017, which totals 1,538 days. *See* December 26, 2018 Order at 20.

**B. Count II – Respondent's 2014 Combined Plan Lacked an Adequate Professional Engineer Certification**

The OPP regulations state that a licensed PE must review and certify a facility's SPCC Plan for it to be effective to satisfy the requirements of 40 C.F.R. Part 112. See 40 C.F.R. § 112.3(d). By means of the certification, the PE attests that procedures for required inspections and testing have been established and that the plan is adequate for the facility, among other requirements. Id. Count II alleges that Respondent's 2014 Combined Plan lacked a PE certification that met the requirement of the OPP regulations.

The 2014 Combined Plan includes a form of a certification by A. Lee Delano, dated October 30, 2014, which states, "I hereby certify that I have examined the facility, and being familiar with the provisions of 40 C.F.R. Part 112, attest that this SPCC plan has been prepared in accordance with good engineering practices." CX 17 at 29. This language fails to satisfy the requirements at 40 C.F.R. § 112.3(d), specifically in omitting attestation that the plans are in accordance with regulatory requirements and that the procedures for required inspections and testing have been established and described in the plans.

Leading up to the hearing, Respondent made several arguments to evade liability for this count. Respondent contended that the 2014 Combined Plan was not final and that the 2012 SPCC Plan remained in effect. See Respondent's Opposition to Motion for Accelerated Judgment ("AD Opp.") at 17; see also Respondent's Pre-Hearing Brief at 5. Yet, there is no evidence in the record that Respondent ever implicitly nor explicitly communicated to EPA prior to the filing of the Complaint that the 2014 Combined Plan was intended to be a draft or an interim plan. For example, the 2014 Combined Plan that was provided to EPA had no markings, such as a watermark or notation, to indicate it was a draft. See generally CX 17. If, as

Respondent seems to argue, only the 2012 SPCC Plan and the May 2017 Combined Plan were final, then this 2014 Combined Plan may not have needed to comply with the PE certification requirements, but it begs the question why it was certified by a PE on October 30, 2014, and provided to EPA after the initiation of the administrative enforcement process in 2013. See RX 6.<sup>2</sup>

Notably, at hearing, Randy Tilford, the corporate environmental health and safety manager for Respondent since 2011 and the company-designated representative of VSS for the proceedings, Tr. 390: 16-19; 391: 1-2, testified that VSS intended for plans to be final once submitted to the various agencies and that, if an issue came up related to spill prevention on October 24, 2014, the Facility would turn to the SPCC portion of the 2014 Combined Plan for guidance Tr. 425: 4-25; 426: 1-21.

Accordingly, the evidence in the record establishes that Respondent intended that the 2014 Combined Plan was final and effective, at least in regard to the SPCC portion of the document. The evidence further shows that the PE certification for that SPCC portion of the 2014 Combined Plan did not comply with the requirements of 40 C.F.R. § 112.3(d).

Consequently, the evidence for this violation supports finding Respondent liable for the period from October 24, 2014 to at least January 15, 2016, a total of at least 448 days.<sup>3</sup>

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<sup>2</sup> If the 2012 SPCC Plan was in effect until May 2017, then Respondent must concede the allegations of Count III, discussed below, that Respondent failed to amend its SPCC Plan within six months of adding Tank # 2001, and the duration of the violation discussed in Count V for failing to develop an FRP would be extended.

<sup>3</sup> The language of the PE certification in the 2016 Combined Plan is identical to the language in the 2014 Combined Plan. The certification in the 2016 Combined Plan is also dated October 30, 2014, which also raises a question of the timing of the certification in the 2016 Combined Plan and whether a PE even reviewed the 2016 Combined Plan. CX 18 at 39. However, since the Complaint mistakenly stated that Respondent obtained an adequate PE certification of the

**C. Count III – Respondent Failed to Amend its Spill Prevention, Control, and Countermeasures Plan within Six Months of Installing Tank # 2001 and Tank # 2002**

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 which materially affects its potential for a discharge, and to have a PE certify any technical amendments to the SPCC Plan in accordance with 40 C.F.R. § 112.3(d). See 40 C.F.R. § 112.5(a) and (c). The record establishes that Respondent did not amend its 2012 SPCC Plan within six months of putting Tank # 2001 into service nor did Respondent amend its 2016 Combined Plan within six months of putting Tank # 2002 into service. These tanks each added approximately 2.3 million gallons of oil storage capacity, which is undeniably a substantial amount of storage capacity that materially affected the potential for a discharge. Respondent does not contest that adding a 2.3 million-gallon tank that stores oil qualifies as a change "which materially affects its potential for discharge" but rather argues about dates the tanks were put into service and the status of multiple SPCC Plans. See AD Opp. at 23. As the evidence shows, and as explained in further detail below, Respondent is liable for failing to amend its 2012 SPCC Plan within six months after putting Tank # 2001 into service and for failing to amend its 2016 Combined Plan within six months after putting Tank # 2002 into service for a period of 898 days (624 days for Tank # 2001 and 274 days for Tank # 2002).

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Facility's SPCC Plan on January 15, 2016, EPA is only seeking a finding of violation for the period from October 24, 2014 to January 15, 2016.

**1. Tank # 2001**

Respondent's April 2012 Plan not only did not show that Tank # 2001 was in service but did not account for this tank at all. See CX 16 at 9-10, 15-16, 24, 29. The record establishes that Tank # 2001 was in service on March 21, 2012 and that Respondent should have amended its 2012 SPCC Plan by September 21, 2012 to account for the addition of this tank. At the hearing, EPA inspector Janice Witul testified that at the time of her November 2012 inspection, Tank # 2001 appeared to be in service because she could see that Tank # 2001 was insulated and that its piping was connected. Tr. 148: 21-25; 149: 1-2. In addition, Ms. Witul testified that personnel at the Facility told her during the November 2012 inspection that Tank # 2001 was in service. Tr. 149: 3-20. Ms. Witul's observations from the inspection are consistent with multiple statements in the record that Tank # 2001 was put into service on March 21, 2012, specifically Respondent's August 23, 2013 response to EPA's information request and Respondent's numerous SPCC and FRP Plans, which were presumably reviewed and edited by multiple personnel and management at the Facility and/or contractors of Respondent. See CX 11 at 4; CX 17 at 106; CX 18 at 98; CX 19 at 14; and CX 21 at 20.

The record is also clear that the 2012 SPCC Plan was not amended to account for the material change of adding Tank # 2001 by September 21, 2012, within six months of March 21, 2012. In fact, it was not until October 30, 2014 (the date the 2014 Combined Plan was certified by a PE), more than two years later, that Respondent amended its 2012 SPCC Plan to account for the material change of adding Tank # 2001.

Since, pursuant to 28 U.S.C. § 2462, the applicable statute of limitations for this action is five years, EPA is seeking a finding of liability and penalties for the period from February 13,

2013, five years prior to the filing of the Complaint,<sup>4</sup> to October 30, 2014, the date of the PE certification of the 2014 Combined Plan, for a total of 624 days.<sup>5</sup>

## **2. Tank # 2002**

The record is inconsistent as to the exact date that Tank # 2002 was put in service. July 15, 2015 is the date provided in Respondent's January 2017 FRP (CX 19 at 14), May 2017 FRP (CX 21 at 20) and May 2017 SPCC (RX 96 at 12) Plans. Yet, January 2016 is the date that Mr. Tilford offered in his declaration to support Respondent's AD Opp. and 2016 is the year included in a table in the tank inspections and tests section of the May 2017 Combined Plan. See RX 96 at 57; see also Tr. 632:16-25; 633: 1-6.

Despite this uncertainty in the record on the exact day that Tank # 2002 was put in service, the record is clear that, whether Tank # 2002 was put into service on July 15, 2015 or sometime in January 2016, Respondent did not amend its SPCC plan within the six-month time period required by the regulation. Although Respondent did amend its SPCC Plan in January 2016, that 2016 Combined Plan did not address the addition of putting Tank # 2002 into service; rather, the Site map shows Tank # 2002 but has it labeled "Out of Service," and another figure has it labeled as "Empty". See CX 18 at 17 and 19. It was not until its May 2017 Combined Plan that Respondent finally accounted for this material change.

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<sup>4</sup> In previous filings, Respondent argued that Tank # 2001 was put into service on March 21, 2013, but even if the Presiding Officer finds that this claim is compelling, it is undisputed that the 2012 SPCC Plan was not amended within six months of March 21, 2013, warranting a finding of violation for a total of at least 404 days.

<sup>5</sup> As noted in Section VI.B. above, in previous filings, Respondent asserted that the only final SPCC Plans that it had in place were the 2012 SPCC Plan and the May 2017 Combined Plan, and any other versions are merely "drafts." Because the 2012 SPCC Plan did not provide for the two massive tanks, if the Presiding Officer finds that the 2012 and 2017 plans are the only applicable plans, then the duration of the violation spanned years.

In acknowledgment of the uncertainty in the record regarding the exact date when Tank # 2002 was brought into service, EPA only seeks a finding of liability and penalty for the period from July 31, 2016, six months after the last day in January 2016, the month and year that Mr. Tilford offered in his declaration for when Tank # 2002 was brought into service, to May 1, 2017, the date of the May 2017 Combined Plan, for a total of 274 days.

D. **Count IV – Respondent Failed to Document Compliance with Tank Inspection and Testing Requirements**

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). An SPCC-regulated facility is required to base its inspection procedures on the applicable industry standards. 40 C.F.R. § 112.8(c)(6). Count IV alleges, and evidence in the record demonstrates, that Respondent failed to meet the requirement to keep records of external and internal tank inspections and tests in accordance with the OPP regulations.

The record supports, and Respondent's expert confirmed at hearing, that STI SP001 and API 653 are the appropriate industry standards for tank inspections and testing at the Facility. See RX 9 at 4, 8 (Fletcher Proposal); Tr. 606-611; 643: 3-7; RX 2 at 57 (SPCC Fact Sheet); see also 67 Fed. Reg. 47042 (July 17, 2002). Applying those standards, VSS was required to have its ASTs formally inspected both internally and externally by experienced Certified Inspectors at certain intervals: Certified External Tank Inspection every five years, and Certified Internal Tank Inspections every ten years.<sup>6</sup> RX 9 at 5; see CX 25 at 31-32, 98. The record indicates that many

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<sup>6</sup> As the Fletcher proposal notes, API 653 provides that once corrosion rates are established for tanks the Certified Internal Tank Inspection schedule might be changed (generally not to exceed

tanks at the Facility were constructed in the 1940s or 1950s. Respondent does not contest that it had not performed any of these required Certified External and Certified Internal Tank inspections prior to 2015. Tr. 643: 8-24. As such, prior to its first Certified External and Certified Internal inspections, Respondent had never collected information on the baseline condition of its aboveground containers.

In October 2014, following EPA's 2012 inspection (documented at CX 4), 2013 information request letter (CX 10), and EPA's May 22, 2014 letter commencing enforcement discussions (RX 6), Respondent sent EPA an Integrity Testing Program for Bulk Storage Containers (dated September 2014), "to conform with the bulk storage container requirements in the SPCC regulations ... (40CFR112.8(c)(6))[sic]." RX 9 at 2 ("the Fletcher Proposal"). The Fletcher Proposal, which is incorporated into Respondent's 2014 Combined Plan, is the first indication that Respondent might begin to comply with the tank inspection and recordkeeping requirements.<sup>7</sup> CX 17 at 44, 100. The 2016 Combined Plan and the May 2017 Combined Plan also expressly incorporate the Fletcher Proposal. CX 18 at 53, 56, 92-119; CX 45 at 56-57, 93-122.

The Fletcher Proposal recommends a phased approach to inspecting Respondent's approximately 25 ASTs: Certified External Inspections of all tanks not considered to be permanently closed in the 2014-2015 winter season and then the first Certified Internal

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20 years). However, since VSS had not established corrosion rates, it was required to meet the five- and ten-year requirements.

<sup>7</sup> The 2014 Combined Plan provided that "[m]onthly and annual inspections will be performed in a more detailed manor [sic] by personnel knowledgeable of the tanks and their components. All monthly and annual inspections will be documented (Appendix E), and will be maintained for a minimum of three years with the SPCC plan." CX 17 at 44.

Inspections starting in the 2015-2016 winter season and concluding in the 2018–2019 winter season. RX 9 at 6. There is no evidence in the record that Respondent had completed even one Certified External Inspection in the 2014-2015 or 2015-2016 winter season. In addition, Respondent still has not provided evidence that all tanks have been adequately inspected. At hearing, Respondent's witness testified that he believed that all *external* tank inspections had been completed but there is no documentary evidence that Respondent has completed the required Certified Internal inspections. See Tr. 628: 9-14 (indicating all of the Certified *External* inspections have been completed, but not addressing the Certified Internal inspections).

Yet, even if Respondent had met the schedule in the Fletcher Proposal, it still would have been out of compliance with the SPCC requirement to conduct inspections and maintain records until it completed all of the inspections. Respondent should have established a baseline condition of its ASTs when it first became subject to the tank inspection and testing requirements in the OPP regulations, long before the schedule outlined in the Fletcher Proposal.<sup>8</sup>

Accordingly, the evidence in the record shows that Respondent violated the inspection requirements by failing to keep written procedures developed for inspections and tests for the Facility until the 2014 Combined Plan,<sup>9</sup> failed to maintain documentation of implementation of

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<sup>8</sup> At hearing, Respondent relied on an EPA fact sheet to justify its continued non-compliance. The Fact Sheet provides guidance for facilities that don't have baseline information such as "a facility ... recently purchased." In that instance an owner/operator may use the five-year interval between SPCC Plan reviews to determine baseline conditions for ASTs. RX 50 at 4. Even if this guidance applied to VSS, which it does not since VSS has owned this facility since 1989, RX 2 at 3, VSS still failed to complete all of the required inspections within that five-year time frame established in the Fletcher Proposal.

<sup>9</sup> Here again, if the 2014 Combined Plan and 2016 Combined Plan are drafts as Respondent has previously alleged, then Respondent would be liable for failing to have an adequate written procedure for inspections at the Facility from April 2012 until May 2017 and therefore, taking

inspections on the schedule established by its own consultant in 2014 and incorporated into the 2014 Combined Plan, the 2016 Combined Plan, and the May 2017 Combined Plan; and, at the time the Complaint was filed had failed to demonstrate compliance with the required inspections and tests for all ASTs at its Facility. The evidence in the record supports that, at least until the filing of the Complaint, some tanks had not been inspected in accordance with applicable industry standards and, therefore, the required records were not generated and maintained, in violation of 40 C.F.R. § 112.7(e). In the Complaint, EPA seeks penalties for at least 1,095 days, from January 1, 2015, until approximately the date of the Complaint (which subsumes the three years requirement in the OPP regulations for maintaining records), and EPA has not amended the Complaint.<sup>10</sup>

**E. Count V – Respondent Failed to Comply with Applicable Facility Response Plan Requirements**

The FRP requirements of 40 C.F.R. § 112.20 apply when a facility may cause substantial harm by discharging oil into or onto navigable water or adjoining shorelines. See 40 C.F.R. § 112.20(a). The OPP regulations provide that a facility could, because of its location, reasonably be expected to cause “substantial harm” to the environment by discharging oil into or on the navigable waters or adjoining shoreline if it meets certain criteria, including when the facility’s

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into account the applicable five-year statute of limitations, Respondent would be liable for penalties from February 2013 to May 2017.

<sup>10</sup> The December 26, 2018 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 Memorandum in Support of its Motion for Accelerated Decision (“AD Mem.”), sought a ruling “through *at least* January 2016.” AD Mem., at 30 (emphasis added). Pursuant to the unamended Complaint, Complainant is seeking a finding of liability for the full duration of the violation alleged in the Complaint.

total oil storage capacity is greater than or equal to one million gallons (40 C.F.R.

§ 112.20(f)(1)(ii)) and (A) “[t]he facility does not have secondary containment for each aboveground storage area sufficiently large to contain the capacity of the largest aboveground oil storage tank within each storage area plus sufficient freeboard to allow for precipitation” (40 C.F.R. § 112.20(f)(1)(ii)(A)); or (B) “[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” (“FWSE”) (40 C.F.R. § 112.20(f)(1)(ii)(B)).

As set forth below, the record is clear that Respondent meets these criteria. Therefore a discharge from the Facility could cause substantial harm to the environment, and the Respondent is subject to the FRP requirements at 40 C.F.R. § 112.20. There is no dispute that the Facility's total oil storage capacity has been greater than one million gallons since the addition of Tank # 2001. See, e.g., CX 11 at 3-4; CX 18 at 98. The record establishes that there is insufficient secondary containment at the Facility in the Bulk Asphalt Containment Storage Area and, from at least May 19, 2012 until sometime between October 25, 2015 and February 1, 2018, there was no secondary containment around Tank # 865. The record further establishes that a discharge from the Facility could cause injury to FWSE. Count V of the Complaint alleges, and the record shows, that Respondent violated the requirement to develop a complete FRP from the time Tank # 2001 was put into service until at least the filing of the Complaint and is liable for penalties for five years or 1,825 days.

**1. Respondent is subject to the requirement to develop and implement a Facility Response Plan**

**i. The secondary containment at the Facility is insufficient**

The evidence in the record shows that secondary containment at the Facility is not sufficient because there was not enough containment surrounding the Bulk Asphalt Containment Storage Area and there was no containment surrounding Tank # 865 during the period it was located outside the Bulk Asphalt Containment Storage Area.

**a. The secondary containment in the Bulk Asphalt Containment Storage Area is inadequate**

Secondary containment for an aboveground storage area is considered “sufficiently large” if it can “contain the capacity of the largest aboveground oil storage tank within each storage area plus sufficient freeboard to allow for precipitation.” 40 C.F.R. § 112.20(f)(1)(ii)(A).

Although there is no definition in 40 C.F.R. § 112.2 for the term “sufficient freeboard” and EPA does not prescribe a method for determining sufficient freeboard because it believes “the proper method of secondary containment is a matter of engineering practice,” EPA has provided guidance on methods that can be used by owners or operators to estimate sufficient freeboard. 67 Fed. Reg. 47042, 47101 (July 17, 2002). In the 1991 proposed amendment to the SPCC rule, EPA recommended the use of industry standards and data on 25-year storm events to determine the appropriate freeboard capacity. 56 Fed. Reg. 54612, 54622-23 (Oct. 22, 1991). In the preamble to the 2002 amendments to the SPCC rule, EPA stated that it believed that

the proper standard of “sufficient freeboard” to contain precipitation is that amount necessary to contain precipitation from a 25-year, 24-hour storm event. That standard allows flexibility for varying climatic conditions. It is also the standard for certain tank systems storing or treating hazardous waste.

67 Fed. Reg. 47042, 47117. An alternative method for determining sufficient freeboard is to calculate 110 percent of storage tank capacity. EPA's inspection guidance provides that this rule of thumb "may be an acceptable design criterion in many situations . . . However, in some situations, 110 percent of storage tank capacity may not provide enough volume to contain precipitation from storm events." CX 34 at 166-167.

To analyze whether secondary containment in the Bulk Asphalt Containment Storage Area was sufficient, EPA expert William Michaud relied on the above guidance and information provided in Respondent's 2014 Combined Plan (CX 17) and Respondent's Haley & Aldrich Report (CX 15). One key piece of information that Mr. Michaud relied upon for his analysis was a cross-sectional diagram of the containment area dike wall (Figure 3) in the Haley & Aldrich Report showing the maximum fluid height of the containment wall to be three feet and two inches. CX 15 at 13 ("3'-2" MAX FLUID HT"). As Mr. Michaud testified during hearing, the maximum fluid height of 3'2" is the most reasonable value to use because this appears to be the value signed off on by the structural engineer who designed the wall. Tr. 287: 8-13. Moreover, even if there are areas of the containment wall surrounding the Bulk Asphalt Containment Storage Area that are higher than 3'2" (the diagram suggests that there may be areas of the wall that are as high as 4'2"), the minimum height of a containment wall is the most relevant number to use for the analysis because, once liquid reaches the minimum height of a containment wall, it will flow over the wall. Tr. 288: 19-25; 289: 1-6. There is no evidence in the record to explain why the maximum fluid height provided in Figure 3 of the Haley & Aldrich Report should not be used.

Using the maximum fluid height presented in Respondent's own report, Mr. Michaud found that the secondary containment in the Bulk Asphalt Containment Storage Area was not

sufficiently large to contain the capacity of the largest aboveground oil storage tank within the Bulk Asphalt Containment Storage Area, without accounting for sufficient freeboard to allow for precipitation. Tr. 287: 21-25; 288: 1; see also CX 14 at 7-8, 14. Mr. Michaud calculated that the if the full capacity of the largest AST (2,348,000 gallons) was released into the containment area, the height of the material would be approximately 3'5", or higher than the maximum fluid height of 3'2" for the containment wall. Id. at 7. Consequently, since March 21, 2012, the date when Tank # 2001 was put into service, secondary containment in the Bulk Asphalt Containment Storage Area was inadequate and the Facility met the substantial harm criterion for FRP regarding secondary containment.

**b. No secondary containment around Tank # 865**

Google Earth aerial images of the Facility show that between at least May 19, 2012 until sometime between October 25, 2015 and February 1, 2018, Tank # 865 was located by itself in an area with no secondary containment. CX 52 at 1-4; Tr. 242-244; CX 8 at 8; CX 55 at 8. According to the Google Earth aerial images, it was not until sometime between October 25, 2015 and February 1, 2018 that Tank # 865 was relocated into the Bulk Asphalt Containment Storage Area. One finding in EPA's 2016 inspection was that Tank # 865 was not permanently closed pursuant to the regulatory definition of 112.2. CX 8 at 8; see also Tr. 188: 4-25; 189: 1-11. If a tank is not permanently closed, it remains an active tank and must still have secondary containment, even if the tank is empty. 40 C.F.R. § 112.2 (defining permanently closed as "any container or facility for which (1) all liquid and sludge has been removed from each container and connecting line; and (2) all connecting lines and piping have been disconnected from the container and blanked off, all valves (except for ventilation valves) have been closed and locked, and conspicuous signs have been posted on each container stating that it is a permanently closed

container and noting the date of closure”). Secondary containment remains necessary because if the tank is still available to store oil it could easily be put back into use. Tr. 243: 14-19; 244: 16-17. Since Tank # 865 could not be considered permanently closed during the period in which Tank # 865 was located outside of the Bulk Asphalt Containment Storage Area and had no secondary containment, the Facility met the substantial harm criterion for FRP. See CX 55 at 8 (Mr. Michaud stating that “[i]f AST #865 was available for oil storage, the facility would have met the substantial harm criterion for FRP applicability by having storage capacity equal to or greater than 1 million gallons and inadequate secondary containment (from the date that total oil storage capacity equaled or exceeded 1 million gallons)”).

**ii. A Discharge from the Facility Could Cause Injury to Fish and Wildlife and Sensitive Environments**

**a. The Oil Pollution Prevention regulations assume that oil from a worst-case discharge at the Facility will enter the Sacramento River Deep Water Ship Channel**

Appendix C to 40 C.F.R. Part 112 provides a formula for determining how far oil may migrate from a facility and generally considers four distinct distances: D1, the distance from the nearest opportunity for discharge to a storm drain or open channel leading to navigable water; D2, the distance through the storm drain or open concrete channel to the navigable water; D3, the distance downstream from the outfall within which FWSE could be injured; and D4, the distance from the nearest opportunity for discharge to FWSE not bordering navigable water. The regulations make clear that if the nearest opportunity for discharge is within 0.5 mile of any navigable water, it is assumed that a potential discharge will reach that navigable water, and therefore it is not necessary to calculate the potential overland distances (D1 or D2). Compare 40 C.F.R. Pt. 112, App. C, para. 5.5 (“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) for the type of navigable water near the facility or use a comparable formula”) with id. para 5.6 (“A facility that is located at a distance greater than 0.5 mile from a navigable water must also calculate a planning distance (D3) if it is in close proximity (i.e., D1 is less than 0.5 and other factors are conducive to oil travel over land) to storm drains that flow to navigable water”).

It is undisputed that Respondent’s Facility is approximately 200 feet from the SRDWSC, which is a navigable water. December 26, 2018 Order, at 16. As such, because the Facility is within less than 0.5 mile from the navigable water, Respondent must assume that a worst-case discharge will enter the SRDWSC. Accordingly, the planning distance turns entirely on the distance along the navigable water to any water that requires additional protection as a FWSE (the “D3” distance). See 40 C.F.R. Pt. 112, App. C, para. 5.4 (providing the definition of D3 as the “[d]istance downstream from the outfall within which fish and wildlife and sensitive environments could be injured...”); see also id. at Figure C-1. Therefore, in order to calculate the D3 distance, it is necessary to first determine what is the relevant FWSE.

**b. The Sacramento River Deep Water Ship Channel is a Fish and Wildlife and Sensitive Environment**

The regulations at 40 C.F.R. § 112.2 define “fish and wildlife and sensitive environments” as, *inter alia*, “areas that may be identified by their legal designation or by evaluations of Area Committees (for planning) ....” 40 C.F.R. § 112.2. Area committees are established for each area designated by the President and their members are appointed by the President and include qualified personnel of Federal, State, and local agencies. Each Area Committee is responsible for preparing an Area Contingency Plan (“ACP”) for its area. 33

U.S.C. § 1321(j)(4)(C). The ACP shall, among other things, “describe the area covered by the plan, including the areas of special . . . environmental importance that might be damaged by a discharge . . . .” 33 U.S.C. § 1321(j)(4)(C)(ii). Area Committees “incorporate into each ACP a detailed annex containing a Fish and Wildlife and Sensitive Environments Plan . . . and shall include other areas considered sensitive environments in a separate section of the annex . . . .” 40 C.F.R. § 300.210(c)(4)(i). As Mr. Swackhammer testified during hearing, ACPs are used to determine FRP applicability.

ACP2 identifies the SRDWSC as an environmentally sensitive site. RX 83.<sup>11</sup> The site summary in ACP2 of the SRDWSC provides the following description of the area covered by the Site: “Site extends from the Port of Sacramento to its mouth on Cache Slough.” CX 2 at 1. Respondent’s Facility is 200 feet from the SRDWSC in an area of the SRDWSC that is located between the Port of Sacramento and the Cache Slough. Since the SRDWSC is identified in ACP2, it is by definition a FWSE.

**c. Respondent must plan that oil from a worst-case discharge will travel at least 22.4 miles downstream from the Facility**

The OPP regulations provide that for purposes of determining FRP applicability, a formal calculation of the planning distance can be avoided where the potential impact to a FWSE is “clear without performing the calculation,” citing an example of a facility located within a wetland. See 40 C.F.R. Pt. 112 App. C, para. 1.3. In this case too, the potential impact to FWSE

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<sup>11</sup> See RX 83 at 56-57 (“Although relatively narrow and artificial, the margin is emergent marsh along its entire length with occasional shrub-scrub;” “Seasonal and Special Resource Concern Marshy areas are high priority at all times;” “Anadromous fish use this slough for upstream migration . . . Salmon and other migratory species concentrate in this channel during migratory periods.”).

is clear without performing the calculation. As noted above, the regulations assume if the closest opportunity for discharge from a facility is within 0.5 miles of a navigable water, the discharge will reach that water. Since the SRDWSC is both the navigable water and the FWSE, any discharge to the SRDWSC is necessarily a discharge to FWSE. Therefore, the potential impact to the FWSE is "clear without performing the calculation." See also CX 55 at 2-3 (Mr. Michaud stating that he "did not generate a written calculation of the D3 planning distance in [his] review of FRP applicability to the Respondent's facility because it was unnecessary").

While calculating the planning distance is not necessary for determining FRP applicability in this case, it is necessary to determine the geographic scope of the substance of response planning in an FRP. Tr. 62: 8-16. As discussed in Section VI.E.1.ii.a, above, the OPP regulations require the Facility to complete the planning distance calculation (D3) for the type of navigable water near the facility. 40 C.F.R. Pt. 112 App. C. para. 5.5. Since the SRDWSC is a moving navigable water, the applicable formula is  $d = v \times t \times c$ . See 40 C.F.R. Pt. 112 App. C. para. 2.1.

In his declaration and during testimony at the hearing, Complainant's expert, Mr. Michaud, showed that the D3 planning distance calculation is at least 22.4 miles and may be as much 40.4 miles. CX 55 at 2-7; Tr. 268-284. At hearing, Mr. Michaud walked through the inputs he used to complete the planning distance calculation. Mr. Michaud also explained that the inputs he used were inputs that Respondent provided in its SPCC Plan. See Tr. 282: 7-25; 283: 1-10; see also CX 18 at 83 (a table showing Respondent's inputs for its planning distance calculation). He further explained that the difference in the outcome of Respondent's calculation is due to Respondent making a simple mathematical error stemming from misapplying the standard order of operations. Tr. 283: 19-25 (Mr. Michaud explaining that Respondent's

“calculation of velocity didn’t use the order of operations correctly”). Accordingly, since the record establishes that Respondent stores more than one million gallons of oil at its Facility, the Facility is located just 200 feet from the SRDWSC, and the SRDWSC is both a navigable water and a FWSE, Respondent is required to maintain a complete FRP in accordance with 40 C.F.R. § 112.20(a) and plan for a worst case discharge of at least 22.4 miles.

**d. Respondent’s arguments regarding asphalt viscosity are neither appropriate under the Oil Pollution Prevention regulations nor compelling**

At hearing, Respondent’s consultant, Kari Casey, testified that, due to the viscosity of the asphaltic cement, a worst-case discharge would not reach the SRDWSC. It is unclear whether Respondent offered this testimony because it wants to offer an alternative formula that is comparable to one contained in Appendix C of part 112 to evaluate the substantial harm criterion (40 C.F.R. § 112.20(a)(3)) or it wants to minimize the seriousness of the violation, a statutory factor for calculating a penalty under OPA. It is clear that Respondent did not follow the process prescribed in the regulations for offering an alternative formula to EPA for consideration. See 40 C.F.R. § 112.20(e).<sup>12</sup> Neither possible reason is compelling.

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<sup>12</sup> 40 C.F.R. § 112.20(e) provides that “in the event an alternative formula that is comparable to one contained in appendix C to this part is used to evaluate the criterion in paragraph (f)(1)(ii)(B) or (f)(1)(ii)(C) of this section, the owner or operator shall attach documentation to the certification form that demonstrates the reliability and analytical soundness of the comparable formula and shall notify the Regional Administrator in writing that an alternative formula was used.”. Respondent never provided any such documentation demonstrating the reliability and analytical soundness of the comparable formula to EPA. See, e.g., CX 18 at 81 (substantial harm criteria in 2016 Combined Plan); CX 45 at 90 (substantial harm criteria in May 2017 Combined Plan). Nor has Respondent notified the Regional Administrator that it would be proposing an alternative formula.

Respondent cannot avoid FRP applicability by offering an alternative analysis for calculating overland flow. While the OPP regulations provide owners and operators the ability to use a comparable formula to calculate the *distance oil will travel over navigable water*, the OPP regulations do not provide owners and operators whose nearest opportunity for discharge is located within 0.5 miles of a navigable water with the ability to use a comparable formula to calculate the *distance oil will travel over land*. See 40 C.F.R. Pt. 112, App. C, para. 5.5. Rather, the OPP regulations assume that a worst-case discharge of a facility within 0.5 miles will reach navigable waters. See id. There is no distinction in the regulations for asphaltic cement. See 73 Fed. Reg. 74236, 74240 (Dec. 5, 2008) (making clear that asphaltic cement is regulated as an oil). In sum, if it is Respondent's intent to submit an alternative analysis, it is not comparable to the applicable D3 formula in Appendix C because Respondent's formula is for overland flow and the D3 formula is for movement of oil once it reaches a navigable water.

Although not relevant for FRP applicability, the question of how oil from the Facility may flow in a tank collapse scenario is relevant to the seriousness or harm presented by Respondent's failure to develop and implement a timely and complete FRP for the purpose of calculating a penalty. During the hearing, Mr. Michaud testified as to how he used existing models of liquid column collapse and overland flow of asphalt discharge to assess the possibility of a release of asphaltic cement from the Facility into the SRDWSC. See generally Tr. 295-303. He spent considerable time detailing his inputs and the range of variables he analyzed to reach his conclusion that it is possible that a sudden failure of the tank walls of one of the 2.3 million-gallon tanks could result in a direct discharge to the SRDWSC and the site drainage system and that oil discharges from the product storage and manufacturing and hazardous material storage areas could also reach the SRDWSC through the storm drain system. See id.; see also CX 14 at

9-12, 16-20. He explained why, from an engineering perspective, it is reasonable and foreseeable that a total tank collapse could occur. See Tr. 372: 9-22 (earthquakes and tank design defects are foreseeable).

Since it is generally accepted that one gallon of oil can contaminate a million gallons of water, it does not take a large release of oil to result in harm to sensitive environments. The evidence shows that there would be an impact to the SRDWSC, a FWSE, from several discharge scenarios at the Facility. Therefore, Respondent's failure to comply with FRP requirements after putting each approximately 2.3 million-gallon tank into service is serious.

**2. Respondent failed to submit a timely and complete Facility Response Plan**

For facilities subject to the FRP regulations, owners or operators are required to prepare and submit an FRP to the Regional Administrator. 40 C.F.R. § 112.20(a). An owner or operator who is required to prepare and submit an FRP "as a result of a planned change in design, construction, operation, or maintenance" that renders the facility subject to FRP requirements must submit the FRP before the portion of the facility undergoing the change commences operations. 40 C.F.R. § 112.20(a)(2)(ii). An owner or operator who is required to prepare and submit an FRP must satisfy the requirements of 40 C.F.R. § 112.20(a). 40 C.F.R. § 112.20(a)(2). This obligation includes the requirement in 40 C.F.R. § 112.20(h) that an owner or operator follow the format of the model facility-specific response plan included in Appendix F to 40 C.F.R. Part 112, unless an owner or operator has prepared an equivalent response plan acceptable to the Regional Administrator to meet State or other Federal requirements. In this case, Respondent's FRP was neither timely nor complete.

Respondent should have had an FRP in place on March 21, 2012, the date that Tank # 2001 was put into service. Respondent did not prepare an FRP until October 2014, after Complainant sent a letter initiating enforcement discussions (RX 6). As such, Respondent's FRP was not timely.

Respondent's first attempt to develop an FRP, which is included in the 2014 Combined Plan, was grossly deficient. The FRP in the 2014 Combined Plan did not follow the format of the model facility-specific response plan included in Appendix F to 40 C.F.R Part 112 and missed several requirements for an FRP in the OPP regulations. CX 17. For example, the FRP in the 2014 Combined Plan did not include the "self-inspection, drills/exercises, and response training section that is required by 40 C.F.R. § 112.20(h)(8)." Id.; see also AD Mem., Janice Decl. Ex. B (summarizing the FRP deficiencies Ms. Witul identified in the 2014 Combined Plan, January 2017 FRP and May 2017 FRP). Without proper training and experience through exercises and drills, response personnel may not understand how to work with other responders and response agencies under the Incident Command System or be prepared to act quickly in their assigned response roles in various response situations. Tr. 193-194. Another example is that the FRP in the 2014 Combined Plan did not have a log form for equipment testing and deployment and had no schedule for testing and deployment as required by 40 C.F.R. Part 112, Appendix F, Section 1.3.3. CX 17; see also AD Mem., Janice Decl. Ex. B. If equipment is not properly tested and deployed, it is not possible for facility personnel to effectively respond to a discharge, because personnel would not have a chance to become familiar with how the equipment works and ensure it is working properly. Tr. 193-194.

Respondent eventually revised its FRP in January 2017. CX 19. Although the January 2017 FRP was an improvement over the FRP in the 2014 Combined Plan, it was still deficient.

See CX 12; Tr. 193: 3-25; 194: 1-21; AD Mem., Janice Decl. Ex. B. Respondent revised its FRP again in May 2017. CX 20. While the May 2017 FRP addressed some of the concerns identified in the January 2017 FRP, issues remained including failing to provide documentation that Facility personnel had performed the required drills and exercises and had acquired the required training. CX 24; Tr. 199: 17-25; 200: 1-15. At the time the Complaint was filed, Respondent had not provided records to Complainant that it had fully implemented the May 2017 FRP, including providing the necessary training.

## **VII. ARGUMENT ON PENALTY**

Pursuant to 40 C.F.R. § 22.27(b), the Presiding Officer determines the amount of the penalty and may increase or decrease any amount Complainant proposes. In assessing a penalty, the Presiding Officer is required by the applicable rules of procedure to consider EPA's penalty guidance. In re Biewer Co. of Toledo, Inc., 15 E.A.D. 772, 780 (EAB, 2013) (quoting 40 C.F.R. § 22.27(b)). However, the Presiding Officer is not obligated to follow the penalty guidance or to impose the Agency's recommended penalty calculated thereunder. Id. Rather, the Presiding Officer is only ultimately constrained by the statutory penalty factors and any statutory cap limiting the size of the assessible penalty. In re US. Army, 11 E.A.D. 126, 137, 170 (EAB 2003); In re M.A. Bruder & Sons, Inc., 10 E.A.D. 598, 610 (EAB 2002).

Complainant proposes that the Presiding Officer assess a penalty of at least \$230,958 against Respondent in this matter based upon appropriate consideration of the applicable statutory penalty factors in 33 U.S.C. § 1321(b)(8) for the five violations in the Complaint and at least 5,804 days of OPA violations. This proposed penalty is equal to the statutory maximum for Class II penalties under OPA, as adjusted for inflation, at the time the Complaint was filed.

Worth noting, however, is that there is support for the Presiding Officer to determine penalties

for each individual violation up to the statutory maximum. See Crown Central Petroleum Corp., CWA 08-2000-06, at 17 (Presiding Officer determined penalty for two respective counts each at the statutory maximum).

**A. Complainant Properly Applied the Statutory Criteria and Guidance in its Penalty Calculation**

The OPA statutory penalty criteria are set forth in Section 311(b)(8), which provides that the Administrator or the court, in determining the amount of any penalty assessed under OPA, is to consider:

the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

33 U.S.C. § 1321(b)(8) (“Penalty Criteria”).

The POLICY ON CIVIL PENALTIES (GM-21), and its companion document, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS (GM-22), were written to help EPA develop program-specific penalty guidance by providing an approach for evaluating the statutory Penalty Criteria. CX 39. Based on these documents, EPA developed a guidance for calculating penalties in Section 311 cases under the CWA, EPA’s CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT, dated August 21, 1998 (“CWA § 311 Penalty Policy”).<sup>13</sup> CX 40.

Consistent with the statutory Penalty Criteria, these guidance documents provide that penalties should, at a bare minimum, be sufficient to recover the economic benefit of violations.

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<sup>13</sup> In administrative litigation, “[t]he Agency litigation team may elect to adapt the settlement methodology in Part III of this policy (“Minimum Settlement Penalty Calculation”) to establish a definitive penalty request in an administrative complaint.” CX 40 at 5.

CX 39 at 4-5 (GM-21), 14-15 (GM-22). The penalty must also include a component to account for the gravity of the violation:

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation.

CX 39 at 4.

The gravity component of the penalty assessment addresses the seriousness of a violation by considering the actual or possible harm, importance to the regulatory scheme, the size of the violator, the sensitivity of the environment, and length of time a violation continues. See CX 39 at 25-28 (GM 22). The seriousness of the environmental impact is “whether (and to what extent) the activity of the [violator] actually resulted or was likely to result in an unpermitted discharge or exposure.” GM-21 and GM-22 also identify a number of case-specific considerations, including the violator’s degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, and any other unique factors. See CX 39 at 5-6 (GM-21), 29-36 (GM-22). These considerations closely follow the Penalty Criteria.

Therefore, in applying the GM-21 and GM-22 framework to the statutory Penalty Criteria, EPA should: (1) determine the preliminary gravity as the seriousness of the violations; (2) adjust the preliminary gravity using the other statutory factors, then (3) determine economic benefit. The CWA § 311 Penalty Policy states a similarly reasoned methodology for applying the statutory factors in a penalty calculation, and follows the statutory factors by considering the gravity of the violation (collectively based on the statutory considerations of seriousness, culpability, mitigation efforts and history of violations), adjustment factors (including the statutory considerations of the economic impact on the violator and other factors as justice may

require), and any economic benefit incurred by the violations. Complainant appropriately used the Penalty Criteria and the framework presented in the relevant guidances to calculate a proposed penalty. See Tr. 205: 15-25; 206: 1-9.

**B. Complainant Proposes a Penalty Consistent with the Statutory Maximum**

Section 311(b)(6)(B) of the CWA, 33 U.S.C. § 1321(b)(6)(B), provides, in relevant part, that "[t]he amount of a class II civil penalty under [paragraph 311(b)(6)(A)] may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000."

As stated in the CIVIL MONETARY PENALTY INFLATION ADJUSTMENT RULE, 40 C.F.R. Part 19, which implements the Federal Civil Penalties Inflation Adjustment Acts of 1990 and 2015, 28 U.S.C. § 2461, as amended, the maximum penalties authorized by statute have been adjusted to account for inflation. At the time the Complaint was filed, for violations that occurred after November 2, 2015, with penalties assessed on or after January 15, 2018, the daily maximum penalty was \$18,477 and the maximum total penalty was \$230,958. 83 Fed. Reg 1190, 1193 (Jan. 10, 2018).<sup>14</sup>

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<sup>14</sup> Since the filing of the Complaint, the penalty inflation adjustment amount has again increased. As of this filing, for violations that occurred after November 2, 2015, and assessed on or after January 15, 2019, the daily maximum penalty is \$18,943, and the maximum total penalty is \$236,783. 84 Fed. Reg. 2059 (Feb. 6, 2019). While a portion of some of the violations occurred before November 2, 2015, when the statutory maximum was lower, the actual penalty will be assessed after January 1, 2019, when the statutory maximum is even higher than that used to calculate the penalty here. In addition, EPA's calculated penalty exceeds the \$230,958 statutory maximum in place at the time of the Complaint. Therefore, there is no need to scale the penalty to account for penalties for violations that occurred before November 2, 2015.

**C. Complainant's Penalty Calculation**

As explained by Ms. Witul during hearing, Complainant's Explanation of the Proposed Penalty Assessment ("Penalty Assessment") discusses how EPA developed its penalty recommendation in this case. CX 48 at 10-23; Tr. 206. As discussed above and outlined in the Penalty Assessment, in calculating a penalty in this case EPA (1) determined the preliminary gravity as the seriousness of the violations; (2) adjusted the preliminary gravity using the other statutory factors, then (3) determined economic benefit. *Id.* at 13. To account for the cumulative nature of multiple SPCC violations, Complainant suggests consideration of a single penalty calculation for the multiple violations of the SPCC requirements, Counts 1-4 in the Complaint. At the same time, Complainant suggests consideration of the violations of the FRP requirements, Count 5 in the Complaint, as a separate penalty calculation.

**1. Gravity of Respondent's Spill Prevention, Control, and Countermeasures Plan Violations**

As discussed below and in the Penalty Assessment, Complainant calculated, the total gravity penalty component for Respondent's SPCC-related violations to be \$98,865.

**i. Seriousness of Respondent's Spill Prevention, Control, and Countermeasures Plan Violations**

As stated above, the seriousness component of a penalty consideration considers the actual or possible harm, importance to the regulatory scheme, the size of the violator, the sensitivity of the environment, and the length of time a violation continues. CX 39 at 25-28 (GM-22). These factors encompass the extent of the violation, the likelihood of a spill, the sensitivity of the environment and the duration of the violation. Additionally, the extent of the violation may depend on the storage capacity of the violator's facility, the existence and

adequacy of secondary containment, the degree and nature of the violations of the relevant requirements, and the duration of the violation.

For the alleged violations of the SPCC requirements, Complaint first considers the risk posed by the Facility noting its size and the extent of deviation from the OPP requirements. The storage capacity of the Facility exceeds 4.6 million gallons. Respondent has had an inadequate or incomplete SPCC plan since at least 2012, twice failed to timely amend its SPCC plan to account for the addition of two massive 2.3 million-gallon tanks, failed to have a PE properly certify its SPCC plan, and significantly, did not maintain records of required testing and inspection of its tanks. Although no major releases have occurred at the Facility, there have been minor spills over the past few years. Tr. 429: 16-25: 430: 1. These facts are consistent with the CWA § 311 Penalty Policy examples for “moderate” non-compliance (e.g., “inadequate or incomplete implementation” and “failure to certify plan”). The failure to demonstrate testing and inspections is more significant, certainly leading to the conclusion that the cumulative violations would have a significant impact on the ability of Respondent to respond to or prevent a discharge at the Facility. Given the several alleged violations at issue and the large size of the Facility, Complainant proposes an initial penalty of \$45,000, which is consistent with the matrix provided in the CWA § 311 Penalty Policy for “moderate” noncompliance at facilities of over 1 million gallons. See CX 40 at 9.

Next Complainant considers the sensitivity of the environment. Although the area is industrialized, the SRDWSC has been designated as a sensitive environment in ACP2 because it contains resources of primary concern including anadromous fish, a large variety of water birds, “habitat suitable for semiaquatic species including beavers, muskrat, amphibians, etc,” and “salmon and other migratory species that concentrate in the channel during migratory periods.”

CX 2. Accordingly, Complainant proposes an increase of 30% to account for the sensitivity of the environment, which brings the total penalty to \$58,500, which is consistent with the direction in the CWA § 311 Penalty Policy to increase the penalty between 25% and 50% for facilities where there could be a major environmental impact from a worst-case discharge. See CX 40 at 11.

To account for duration, Complainant notes that there have been at least some deficiencies in Respondent's SPCC plan or plan implementation for at least five years, or sixty months. Accordingly, Complainant proposes another increase of 30%, which brings the total penalty to \$76,050, which is consistent with the direction in the CWA § 311 Penalty Policy to increase the penalty by one half of one percent for each month the violation continued. See CX 40 at 12.

In consideration of Respondent's level of culpability, Complainant notes the degree to which Respondent should have been able to prevent the violation, considering the resources and information available to it. Respondent's witness, Randy Tilford, testified that VSS is owned by Basic Resources, Inc. which in turn owns several other corporations. Tr. 427-428. Mr. Tilford further testified that Respondent employs approximately 60 individuals at the Facility. Tr. 432: 4-6. Respondent has operated the Facility for nearly three decades and Respondent's website confirms that Respondent has been in business for many years and boasts to be a leader in the pavement preservation and emulsion manufacturing industries throughout the Western United States. See RX 2 at 3; see also <http://www.slurry.com/about-us/>. With this, it is reasonable to conclude some significant level of Respondent's means, sophistication and awareness. Yet Respondent's gains towards compliance since EPA first alerted it to the deficiencies in 2014 have been slow. Respondent has failed to achieve full compliance despite EPA and CUPA

compliance assistance over many years. Complainant proposes a penalty increase of 30% to reflect the degree of negligent culpability. This 30% increase brings the total penalty to \$98,865, which is consistent with the direction in the CWA § 311 Penalty Policy to increase the penalty by as much as 75% depending on the degree of culpability. See CX 40 at 12.

**ii. Adjustments Based on Other Statutory Penalty Criteria**

The other statutory Penalty Criteria not considered above include other penalties paid for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require. As discussed below, Complainant proposes no further adjustments to the gravity component of the penalty suggested for Respondent's SPCC violations based on these other statutory Penalty Criteria.

In this case, Respondent has never submitted any documentation to support a claim that it is unable to pay the proposed penalty. Tr. 208: 3-7. Ms. Witul testified that she looked at Respondent's website and that the website showed Respondent to be a large company with adequate means to pay the proposed penalty. Tr. 208: 8-17; see also Tr. 239: 18-22 ("I looked at the company website. I also looked at information, publicly available information, through Reference USA that shows particulars for VSS and also Basic Resources. All those seemed healthy, viable companies."). As noted above, Respondent's witness, Mr. Tilford testified that VSS is owned by Basic Resources, Inc. which in turn owns several other corporations. Tr. 427-428. Mr. Tilford further testified that staffing at the Facility is starting to increase as business is getting better. Tr. 432: 7-10. As such, it is reasonable to conclude that Respondent can pay the

proposed penalty and the Penalty Criteria does not require any reduction in the proposed penalty based on an inability to pay.

Complainant is not aware of other penalties paid or previous violations by Respondent. Similarly, Complainant is not aware of any facts suggesting that Respondent was self-auditing or correcting the violations before EPA advised it of the deficiencies. Finally, Complainant is aware of no circumstances in which justice requires adjusting the penalty.

## **2. Gravity of Respondent's Facility Response Plan Violation**

As discussed below and in the Penalty Assessment, Complainant calculated the total gravity penalty component for Respondent's FRP-related violations to be \$130,130.

### **i. Seriousness of Respondent's Facility Response Plan Violation**

As stated above, the seriousness component for penalty consideration is based on the cumulative risk posed by a facility as a result of a violation, encompassing the extent of the violation, the likelihood of a spill, the sensitivity of the environment and the duration of the violation. In turn, the extent of the violation may depend on the storage capacity of the violator's facility, the existence and adequacy of secondary containment, the degree and nature of the violations of the relevant requirements, and the duration of the violation. The cumulative risk is based on Respondent's failure to comply with the FRP requirements of 40 C.F.R. § 112.20; specifically, Respondent's failure to obtain and implement an FRP after putting its first approximately 2.3-million-gallon tank into service in March 2012, and then its failure to obtain and implement a complete FRP after notice from EPA of the need for an FRP in May 2014 (RX 6), and its failure again to update and implement a complete FRP after it put its second approximately 2.3 million-gallon tank into service in January 2016. Without an FRP or an adequate FRP, Respondent lacked the additional spill prevention planning, improvements,

implementation of drills/exercises and personnel training required for facilities subject to FRP requirements. Complainant proposes a penalty based on characterizing the cumulative risk based on the noncompliance as “moderate,” where the cumulative violations may have a significant impact on the ability to prevent or respond to a worst-case spill. Given the size of the Facility, Complainant proposes \$55,000 as the appropriate initial gravity penalty.

In the same manner as calculated for the SPCC violations, Complainant proposes increasing the penalty by 30% to account for the potential environmental harm of a worst-case discharge into the SRDWSC, bringing the total to \$71,500, and 30% to account for the long duration of the violations, bringing the total to \$92,950. In addition, considering the size and market share of Respondent, that significant facility modification should bear a reasonable level of diligence, and that EPA had informed Respondent of the need for an FRP after the 2012 inspection, before it put the second approximately 2.3 million-gallon tank in to service, Complainant proposes increasing the penalty by 40% to reflect an appropriate level of negligence and culpability, bringing the total penalty to \$130,130.

**ii. Adjustments Based on Other Statutory Penalty Criteria**

In the same manner as calculated for the SPCC violations, and considering the same facts discussed above, Complainant proposes no adjustment to the FRP penalty based on other statutory Penalty Criteria.

**3. Assessing an Economic Benefit is Appropriate**

The remaining factor among the statutory penalty considerations is the economic benefit that a violator derives through either delaying or avoiding compliance costs, obtaining illegal profits, profiting from a competitive advantage or by any combination of these factors.

Complainant believes that Respondent's failure to develop a complete FRP is its most significant

violation. As such, in its Penalty Assessment, and discussed below, EPA focused its analysis on the economic benefit of developing a timely and complete FRP (Count V). However, as explained below, there is also economic benefit associated with Respondent's SPCC related violations (Counts I-IV).

When calculating an economic benefit, the EPA utilizes actual costs when available, and best professional judgment when actual costs are not available. As discussed in EPA's Penalty Assessment, and as Ms. Witul testified during hearing, EPA did not have information from Respondent regarding its costs to develop a complete FRP. Tr. 207: 13-19. In the absence of actual costs of compliance, Ms. Witul testified that she used values developed by EPA headquarters and input such values into the BEN model to calculate the delayed costs of developing a complete FRP. Tr. 207: 17-19.

EPA periodically compiles estimated costs of compliance with its regulations. In the RENEWAL OF INFORMATION COLLECTION REQUEST FOR THE IMPLEMENTATION OF THE OIL POLLUTION ACT FACILITY RESPONSE PLAN REQUIREMENTS (40 C.F.R. PART 112) (the "ICR"), EPA provides the estimated costs for regulated entities to comply with FRP requirements. EPA used the following values from the February 2018 proposed ICR: an average large distribution facility (greater than 1 million gallons, such as Respondent's facility) would incur approximately \$463 in capital expenses and \$18,009 in one-time expenses to prepare an FRP, and year-to-year recurring costs of \$7,193. CX 46 at 23-24.<sup>15</sup> These figures

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<sup>15</sup> During most of 2018, EPA was in the process of updating the estimated costs of compliance presented in the 2011 ICR to issue a new ICR. In December 2018 EPA finalized a new ICR, which replaced the 2011 ICR. EPA's Penalty Assessment relies on cost estimates from the proposed 2018 ICR update to the 2011 ICR for consideration of potential economic benefit. The cost estimates that are included in the 2018 proposed ICR are lower than the estimates in the final

provide conservative estimates that do not take into account, for example local labor rates, which could be higher in higher cost areas such as California. See generally Tr. 85-88.

EPA then used the BEN financial model to calculate the delayed costs to Respondent of preparing and implementing a complete FRP. BEN is a publicly available economic modeling program and can be found at: <https://www.epa.gov/enforcement/penalty-and-financial-models>. This model incorporates cost values for capital improvements, one-time expenses, and annualized costs of compliance, considering the dates that the costs should have been incurred, were incurred and when any penalty was paid, and includes inflation adjustments based on recent data.

In addition to the numbers in the Headquarters ICR, and recognizing that Respondent had incurred most of the costs necessary for it to obtain an appropriate FRP by the time it submitted an FRP in May 2017, Complainant used the dates of noncompliance from EPA's November 2012 inspection report to the May 2017 FRP.

With the inputs described above for costs, the date of the cost estimate, and the time period that the costs were delayed, the BEN financial model calculates that Respondent gained an economic advantage of \$28,159.<sup>16</sup> A copy of the BEN input/output is provided in Appendix A of EPA's Penalty Assessment. CX 48 at 18-23.

EPA's economic benefit proposal represents just a subset of the economic benefit that Respondent enjoyed as a result of the violations. See, e.g., Tr. 246: 2-20. EPA could have also calculated an economic benefit associated with the delayed and avoided costs for the SPCC

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2011 ICR and the 2018 ICR and are therefore least prejudicial to Respondent. Compare CX 46 with CX 47 and CX 22.

<sup>16</sup> This figure assumes a final penalty date of June 1, 2018. However, any final penalty will be paid over a year after June 1, 2018. If a later final penalty date is entered into BEN, the economic advantage would be greater.

violations. In fact, these delayed or avoided costs related to the SPCC violations may have been quite significant. For example, Respondent's witness, Randy Tilford, testified that he estimated tank testing to cost around \$20,000 in 2016. Tr. 432: 22-25; 433: 1-3. In addition, there were delayed costs associated with developing procedures for tank testing and inspections. When VSS finally hired Craig Fletcher to develop the Fletcher Proposal, VSS spent money, likely something on the order of \$10,000 or \$15,000. Tr. 644: 8-16. Respondent's witness, Craig Fletcher, testified that Certified External Tank testing generally costs around \$2,000 per tank and an internal inspection generally costs around \$3,000 to \$4,000 per tank. Tr. 644: 17-25; 645: 1-4. The record shows that there are numerous tanks at the Facility where certified external and internal testing and inspections occurred years after the testing and inspections were due or are completely absent. EPA's economic benefit calculation for Respondent's FRP violations puts the proposed penalty at the statutory maximum as adjusted for inflation.

EPA proposes that the calculated economic benefit, \$28,159, be added to the balance of the penalty proposed in this matter (\$98,865 for the SPCC violations and \$130,130 for the FRP violations). Accordingly, Complainant calculates a total penalty of \$257,154. This amount exceeds the maximum authorized in an administrative adjudication, so Complainant reduces its proposal to \$230,958, the statutory maximum at the time the Complaint was filed. Although, EPA did not factor an economic benefit for Respondent's SPCC violations into its Penalty Assessment because it was already at the statutory maximum, this consideration is within the Presiding Officer's discretion.

## **VIII. CONCLUSION**

For the reasons set forth above, Complainant respectfully requests that the Presiding Officer issue an Initial Decision that (1) finds Respondent liable for at least 5,804 days of

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

Dated: August 16, 2019

Respectfully submitted,

*Rebekah Reynolds*

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

**CERTIFICATE OF SERVICE**

I, Rebekah Reynolds, hereby certify that on August 16, 2019, I caused to be filed electronically the foregoing Complainant's Initial Post-Hearing Brief in Support of its Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalties with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Rebekah Reynolds, hereby certify that on August 16, 2019, I served a true and correct copy of the foregoing Complainant's Initial Post-Hearing Brief in Support of its Proposed Findings of Fact, Conclusions of Law, and Order Assessing Administrative Penalties via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: August 16, 2019

Respectfully Submitted,

A handwritten signature in cursive script that reads "Rebekah Reynolds". The signature is written in black ink and is positioned above a horizontal line. To the right of the signature, there is a faint, light blue watermark that says "type text here".

Rebekah Reynolds  
Assistant Regional Counsel,  
U.S. EPA, Region IX