UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
VSS International, Inc.,	)	**Docket No. OPA-09-2018-0002**
	)	
Respondent.	)	

INITIAL DECISION AND ORDER

DATED: September 16, 2020

PRESIDING OFFICER: Chief Administrative Law Judge Susan L. Biro

APPEARANCES:

For Complainant:

Rebekah Reynolds, Esq., Assistant Regional Counsel
Rebecca Sugerman, Esq., Assistant Regional Counsel
J. Andrew Helmlinger, Esq., Assistant Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

For Respondent:

Richard J. McNeil, Esq.
Crowell & Moring LLP
3 Park Plaza, Suite 2000
Irvine, CA 92614

Jordan L. Ludwig, Esq.
Crowell & Moring LLP
515 S. Flower Street, 40th floor
Los Angeles, CA 90071

I. PROCEDURAL HISTORY

This proceeding was commenced on February 13, 2018, when Complainant, Director of the Enforcement Division for the U.S. Environmental Protection Agency, Region 9 ("EPA" or "the Agency"), filed a Complaint against Respondent VSS International, Inc., under Section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA"), codified as amended by the Oil Pollution Act of 1990 ("OPA") at 33 U.S.C. § 1321(b)(6)(B)(ii). The Complaint alleges five violations of the Oil Pollution Prevention Regulations, which were promulgated under the OPA to establish procedures, methods, equipment, and other requirements to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into navigable waters of the United States. *See* 40 C.F.R. pt. 112. For these violations, the Agency proposes a penalty of $230,958.

Respondent filed an Answer to the Complaint on March 21, 2018, denying the allegations and asserting defenses against the proposed penalty.

The Agency filed its initial prehearing exchange materials on May 31, 2018. Respondent submitted its prehearing exchange on June 22, 2018. On July 5, 2018, the Agency filed its rebuttal prehearing exchange.

On August 3, 2018, the Agency moved for accelerated decision as to liability on all five counts in the Complaint. Respondent opposed the motion. After the parties briefed their positions on accelerated decision, on December 26, 2018, I issued an Order on Complainant's Motion for Accelerated Decision as to Liability ("AD Order") that granted accelerated decision as to liability on Count I and denied accelerated decision as to liability for Counts II to V.[1]

The Agency amended and supplemented its prehearing exchange on March 14, 2019. Thereafter, the parties filed several additional prehearing motions, including Respondent's Motion for Default, which was denied. *See* Order on Resp't's Mot. for Default (April 30, 2019). On May 3, 2019, I permitted Respondent to supplement its prehearing exchange by joint stipulation with the Agency. *See* Order on Resp't's Mot. to Suppl. and Joint Stipulation to Suppl.

The hearing in this matter took place May 16-17 and May 20 in San Francisco, California. At hearing, 53 of the Agency's exhibits ("CX") were admitted into evidence. *See* CX 1-48; 50; 52-55. Respondent offered 93 exhibits ("RX") that were admitted into evidence. *See* RX 1-24; 29; 32; 37-43; 45-101; 104-106. Additionally, the Agency provided testimony from four witnesses: Daniel Meer, Joseph Swackhammer, Janice Witul, and William Michaud.

---

[1] I subsequently denied Respondent's request for reconsideration or interlocutory review. *See* Order on Resp't's Mot. for Recons. and Appeal and Resp't's Am. Mot. for Recons. and Appeal (Feb. 21, 2019). Consequently, the AD Order's ruling on liability, findings of fact, and conclusions of law are incorporated into this Initial Decision.

Five witnesses testified on Respondent's behalf: Randall Tilford,[2] Kari Casey, Art Lee DeLano, Michael Sears, and Craig Fletcher.

Following the hearing, this Tribunal received the official hearing transcript and transmitted copies of the transcript to the parties by email on June 18, 2019.[3] By joint motion, the parties proposed various corrections to the transcript to conform it to the testimony actually given at the hearing. *See* Joint Mot. to Conform the Tr. of the Hr'g to the Actual Test. (July 24, 2019). I adopted those corrections. *See* Order Granting Joint Mot. to Conform Tr. to Actual Test. (July 31, 2019).

On August 16, 2019, the Agency filed its Initial Post-Hearing Brief ("AB"). Respondent filed its Initial Post-Hearing Brief ("RB") on September 13, 2019.[4] The Agency filed a Reply Post-Hearing Brief ("ARB") on September 26, 2019. Respondent's Reply Post-Hearing Brief ("RRB") was filed on October 11, 2019. With that filing, the record closed.

II. LEGAL BACKGROUND

In 1990, Congress passed the Oil Pollution Act ("OPA"), amending Section 311 of the Clean Water Act ("CWA")[5] and declaring "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines . . . ." *See* Pub. L. No. 101-380, 104 Stat.484; 33 U.S.C. § 1321(b)(1). The OPA authorizes the Agency to issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances . . . from onshore facilities . . . and to contain such discharges."[6] 33 U.S.C. § 1321(j)(1)(C). The OPA further mandates that the Agency issue regulations requiring owners and operators of certain onshore facilities "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.* §

[2] Mr. Tilford is Respondent's environmental, health, and safety manager and testified as the corporation's designated representative. Tr. 390-91.

[3] All citations to the transcript will be in the following format: "Tr. [page number]."

[4] On September 16, 2019, Respondent submitted a Notice of Errata to remove an inadvertently included handwritten note from page 34 of its brief.

[5] Congress enacted the Clean Water Act in 1972 with the stated objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

[6] This authority is granted to the President, who has delegated his authority to the Agency. *See* Exec. Order No. 11548, 35 Fed. Reg. 11,677 (July 22, 1970); Exec. Order No. 12777, 56 Fed. Reg. 54,757 (Oct. 18, 1991).

1321(j)(5)(A)(i). Facilities subject to these regulations include any "onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters [or] adjoining shorelines . . . ." *Id.* § 1321(j)(5)(C)(4).

Under the authority of Section 1321, the Agency issued the Oil Pollution Prevention ("OPP") regulations at 40 C.F.R. pt. 112. Part 112 establishes a framework for both the prevention of, and response to, oil spills. The regulations set forth "procedures, methods, equipment, and other requirements to prevent the discharge of oil" from onshore facilities into navigable waters and adjoining shorelines. 40 C.F.R. § 112.1(a)(1).

The prevention component of the regulations requires owners and operators of regulated facilities to prepare in writing and implement Spill Prevention Control and Countermeasure Plans ("SPCC Plans"). 40 C.F.R. § 112.3. "SPCC Plans are designed to complement existing laws, regulations, rules, standards, policies, and procedures pertaining to safety standards, fire prevention, and pollution prevention rules. 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). The SPCC regulations apply to "to any owner or operator of a non-transportation-related onshore . . . facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products" that stores its oil in aboveground tanks and that, because of the facility's 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." *Id.* § 112.1(b)(1). Whether a facility could reasonably be expected to discharge oil into navigable waters is a determination based "*solely* upon the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.)[.]" *Id.* § 112.1(d)(1)(i) (emphasis added). This determination is made without regard to any manmade features at the facility "such as dikes, equipment or other structures" that might contain or prevent a discharge. *Id.* A "harmful" quantity of discharged oil is an amount that "causes 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." *Id.* § 110.3(b); *see also* 33 U.S.C. § 1321(b)(4).

Under the SPCC regulations, owners of facilities that were in operation before August 16, 2002, must have implemented an SPCC Plan before November 10, 2011. 40 C.F.R. § 112.3(a)(1). "The SPCC Plan must address all relevant spill prevention, control, and countermeasures necessary at the specific facility."[7] *Id.* § 112.1(e). It must be reviewed and certified by a licensed Professional Engineer. *Id.* § 112.3(d). And "when there is a change in the facility design, construction, operation, or maintenance that materially affects its potential for a discharge," the facility owner or operator is required to amend the SPCC Plan within six months

[7] *See also* 40 C.F.R. § 112.7 (describing specific elements of an SPCC Plan).

of the change. *Id*. § 112.5(a). Additionally, regulated facilities must conduct required inspections and tests in accordance with written procedures developed by the owner or certifying engineer, and those written procedures and record of inspections and tests must be signed by the appropriate supervisor or inspector and kept with the SPCC Plan for three years. *Id*. § 112.7(e).

The response component of the regulations addresses a subset of SPCC-regulated facilities that meet certain additional criteria, requiring their owners and operators to prepare and submit to the Agency a Facility Response Plan ("FRP") for responding to a worst case discharge of oil.[8] 40 C.F.R. § 112.20(a). The FRP requirements apply when a facility could "reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines . . . ." *Id*. § 112.20(f)(1). Among other circumstances, this occurs when the facility's total oil storage capacity exceeds one million gallons 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" or "(B) [t]he facility is located at a distance . . . such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments." *Id*. § 112.20(f)(1)(ii). Appendix C to Part 112 provides formulas for calculating the distance within which an oil discharge could cause injury to fish and wildlife and sensitive environments. Facilities that meet the criteria of § 112.20(f)(1) "as a result of a planned change in design, construction, operation, or maintenance" must submit an FRP to the Agency "before the portion of the facility undergoing change commences operations." *Id*. § 112.20(a)(2)(iii). Owners and operators who must prepare and submit an FRP must also implement a training program and a drill/exercise program under the plan. *Id*. § 112.21(a).

FRPs are designed to be implemented in conjunction with the CWA's National Contingency Plan ("NCP") for responding to oil discharges and minimizing their effect. *See* 33 U.S.C. § 1321(d). At the national level, the NCP provides the organizational structure and procedures for preparing for and carrying out such a response, and it applies to discharges of oil into navigable waters of the United States and adjoining shorelines. *Id.*; 40 C.F.R. § 300.1, 300.3(a)(1); *see also* Tr. 17-18. In conjunction with the NCP, Regional Contingency Plans provide a more detailed level of organization and coordination within designated federal regions of the country, and Area Contingency Plans ("ACP") serve an analogous role for areas within a given region to provide a plan for removing a worst case discharge or mitigating or preventing a substantial threat of such a discharge from a facility operating in or near the area. 40 C.F.R. § 300.210; *see also* Tr. 17-18. Finally, individual facilities are required to prepare FRPs that are consistent with the NCP and applicable ACP. 33 U.S.C. § 1321(j)(5)(D); 40 C.F.R. § 300.211; *see also* Tr. 17-18. Additionally, when determining FRP applicability, facility owners and operators are instructed to consult the ACP to identify any fish and wildlife and sensitive environments that must be accounted for. *See* 40 C.F.R. §§ 112.2, 112.20(f)(1)(ii)(B).

---

[8] The OPP regulations set forth in detail the required content of an FRP. *See* 40 C.F.R. § 112.20(h).

The Agency is empowered to enforce the OPA and OPP regulations by assessing a civil penalty against "[a]ny owner, operator, or person in charge of any . . . onshore facility . . . who fails or refuses to comply with any regulation issued under subsection (j) to which that owner, operator, or person in charge is subject." 33 U.S.C. § 1321(b)(6)(A).

III. FACTUAL BACKGROUND

a. Respondent and the Facility

Respondent is a California corporation that manufactures asphalt emulsions and other products used principally for application on roadways. Joint Stipulations, ¶¶ 1, 6 [hereinafter Jt. Stips.]. Respondent conducts business in at least three states, and since the late 1980s, it has owned and operated a bulk storage and aggregation facility ("the Facility") for petroleum surfacing materials, including asphaltic cement. Jt. Stips., ¶¶ 3, 5, 7, 8; RX 2 at 3. A parent company, Basic Resources, Inc., wholly owns Respondent and is itself owned and controlled by the Reed family. Tr. 411-13, 427-28.

The Facility is located on nearly 10.5 acres at 3785 Channel Drive, West Sacramento, in Yolo County, California. Jt. Stips., ¶¶ 4, 9; CX 23 at 3. The Facility grounds include "an office, a maintenance shop, the product storage and manufacturing area, bulk asphalt containment area, rubberized asphalt plant, rail spur, truck/equipment wash, and parking areas for fleet vehicles, equipment, and employees." Jt. Stips., ¶ 10; CX 23 at 3. The Facility also contains several above-ground storage tanks ("ASTs") in containment, some of which are heated or insulated. Jt. Stips, ¶¶ 14, 17; CX 23 at 3. These tanks store oil or oil products such as asphaltic cement. Jt. Stips, ¶¶ 14, 17; CX 23 at 3. Many of the tanks have been in service for decades and are more than 50,000 and 75,000 gallons in size. Jt. Stips., ¶ 15; Tr. 636, 643; CX 17 at 103; CX 18 at 95.

Additionally, inside the bulk asphalt containment area there are two 2.4 million-gallon field-constructed insulated ASTs that store oil, referred to as Tank 2001 and Tank 2002. Jt. Stips., ¶ 18; CX 23 at 19. Overall, the Facility's oil storage capacity exceeds 5 million gallons.[9] Jt. Stips., ¶ 19; *see also* Tr. 56; CX 1.

Roughly 200 feet south of the Facility's south boundary fence lies the Sacramento River Deep Water Ship Channel ("Channel").[10] Jt. Stips., ¶ 20. The Channel is an artificially

---

[9] Based on the above facts, the parties agree that Respondent is a "person" that is the "owner and operator" of the Facility, as those terms are defined by the Clean Water Act and the OPP regulations. Jt. Stips., ¶¶ 2-3; *see also* 33 U.S.C. §§ 1321(a)(6), (a)(7), 1362(5); 40 C.F.R. § 112.2. Additionally, the parties agree that the Facility is a "non-transportation related onshore facility" that uses and stores oil and oil products under the Act and OPP regulations. Jt. Stips., ¶¶ 11-13; *see also* 33 U.S.C. § 1321(a)(10); 40 C.F.R. §§ 112.1, 112.2.

[10] Put another way, the Facility's ASTs are less than one half mile from the Channel. Tr. 496.

constructed deep channel for ships to access the Port of Sacramento, and it extends from the Port to the Channel's mouth on Cache Slough. Jt. Stips., ¶¶ 21-22; Tr. 36; CX 2 at 1. The Channel is a navigable water of the United States. *See* Order Complainant's Mot. Accelerated Decision Liability ("AD Order") at 8 n.15.

The Facility and the Channel are located in Geographic Response Area Eight ("GRA 8") within Area Contingency Plan Two ("ACP 2"), which the U.S. Coast Guard developed for the San Francisco Bay and Delta region. Tr. 18-20, 22-23; CX 33 at 1, 4; RX 83 at 1-2. There are numerous environmentally sensitive sites within GRA 8 of ACP 2. Tr. 21-22; RX 83. The Channel is one such site, and the full length of the Channel from the Port to Cache Slough is listed as Site 2-859 in the ACP. Tr. 22-23, 36; CX 2 at 1; RX 83 at 1-2. A site summary in the ACP describes the Channel as having emergent marsh along its entire length, with occasional shrub-scrub. The marsh is listed as a "seasonal and special resource concern," and marshy areas are designated as having "high priority at all times." Tr. 24-25; CX 2 at 1. There are also a large variety of water birds; suitable habitat for beaver, muskrat, amphibians and other semi-aquatic creatures; and salmon and other migratory fish concentrate in the Channel during migratory periods. The ACP identifies all of these as resources "of primary concern." Tr. 24-25; CX 2 at 1. The ACP is a key information source for identifying fish and wildlife and sensitive environmental areas. *See* 40 C.F.R. § 112.20(f)(1)(ii)(B); Tr. 61-63.

b. Initial inspections of the Facility

On January 19, 2012, Michael Sears, a hazardous materials specialist with the Yolo County Environmental Health Department, inspected the Facility and documented several violations of California's Aboveground Petroleum Storage Act ("APSA"). APSA also requires facilities like Respondent's to maintain an SPCC plan. Tr. 394-96, 575, 577-78, 586-87; RX 47. In fact, the state's APSA regulations largely reference or incorporate the federal SPCC Plan requirements of 40 C.F.R. pt. 112, and although Mr. Sears was implementing a state program under state law, some of the violations with which he cited Respondent mirrored SPCC-related violations that could be cited under federal law. Tr. 587-88, 590-93; CAL. HEALTH & SAFETY CODE §§ 25270-25270.13.

The Yolo County inspection and violations alerted Respondent's corporate environmental health and safety manager, Randall Tilford, to the fact that Respondent needed to revise its SPCC Plan to comply with state and federal law.[11] Tr. 394-96, 577-78; RX 47. He commissioned Condor Earth Technologies Inc. to prepare a new SPCC Plan for the Facility. Tr. 394. Condor completed an SPCC Plan that was finalized on April 6, 2012 ("Condor Plan"). Tr. 395; RX 40.

---

[11] Mr. Tilford, who is charged with overseeing Respondent's environmental and safety compliance, is a former official with the state of South Carolina's Department of Health and Environmental Control. Tr. 391.

In May 2012, Mr. Sears informed Respondent by email that the Condor Plan did not correct all the violations found during the January inspection but that it was "much better than the [SPCC Plan] I originally reviewed for this facility." Tr. 580-85; RX 41. When Respondent challenged the notion that the Condor Plan did not resolve the violations, Mr. Sears consulted an Agency employee, who agreed that various SPCC Plan requirements had not yet been met. Tr. 585-87; RX 41; RX 42. Mr. Sears forwarded the Agency employee's response to Respondent. Tr. 585-86; RX 42 at 1.

On June 4, 2012, Mr. Sears notified Respondent that the county considered all the APSA violations pending from the January inspection to have been corrected as of June 1, 2012. Tr. 588-89, 593; RX 47 at 1.

On November 27, 2012, Agency inspector Janice Witul inspected the Facility on behalf of the Agency. Jt. Stips., ¶ 23; Tr. 120-21, 145, 209-210; CX 4 at 2. Also present for the inspection were Mr. Tilford; Mr. Sears; the Facility's Director of Operations; and the Facility's Operations Manager. Tr. 399-400, 575; RX 2 at 2. During the inspection, Ms. Witul conducted a walkthrough of the Facility and took several notes and photographs. Tr. 147-48, 210; CX 5. Respondent also provided Ms. Witul with a copy of the Condor Plan that it presented as its SPCC Plan. Jt. Stips., ¶ 24; Tr. 146, 394, 577-78; CX 16.

While inspecting the Facility, Ms. Witul observed its two 2.4 million-gallon tanks, Tanks 2001 and 2002. Tr. 148; CX 5 at 1. Tank 2001, an insulated tank, had already been operating for several months, Facility personnel told Ms. Witul.[12] Tr. 148-49, 222; CX 5 at 1. Ms. Witul also observed the tank's insulation and piping running from the tanks to adjacent railroad tracks, another indication to her that the tank was in service. Tr. 149, 222. She did not physically see the interior of the tank or asphalt flowing into the tank, but she did not expect to because "it's not possible to see the inside of the tank" and transfers of asphalt into the tank "are generally sealed operations." Tr. 222-23. Ms. Witul also noted that the quantity of oil that might be in the tank at that time was not relevant; what mattered was that the tank was available for use. Tr. 244. Ms. Witul could not recall whether she observed any rail cars on the adjacent railroad tracks during the inspection. Tr. 223-24. However, in preparation for this proceeding, Ms. Witul obtained a Google Earth image that shows an overhead photograph of the Facility dated May 19, 2012. Tr. 161; CX 52. In the photograph, there are nine railcars on the track next to Tank No. 2001, which also has piping connected to it. Tr. 162, 164-65; CX 52. According to Ms. Witul, the presence of the piping and railcars, plus the fact that Tank 2001 is insulated, indicate it was in active service on this date. Tr. 165; CX 52.[13]

---

[12] Tank 2002, the uninsulated tank, was not yet completed and had not been put into service. Tr. 148-49, 222; CX 5 at 1.

[13] In contrast, Mr. Tilford testified that Respondent later submitted documents to the Agency that showed Tank 2001 was not in service until May 21, 2013, based on information that Mr. Tilford received from Pat McNairy, Respondent's Director of Operations. Tr. 414. Mr. Tilford said he

At the end of the Facility walkthrough, Ms. Witul told Respondent that its SPCC Plan – the Condor Plan – was noncompliant with federal regulations because it did not address inspections or testing of any of the ASTs, and the plan did not include Tank 2001. Tr. 150-51; *see also* CX 4 at 3. Ms. Witul also informed Respondent that it needed an FRP if Tank 2001 held asphaltic cement. Tr. 151. According to Mr. Tilford, Ms. Witul said only that she had not found anything that would result in penalties or fines. Tr. 401-02. Mr. Tilford additionally stated that he did not know if tank integrity records were available for Ms. Witul to review during the inspection. Tr. 417. But he surmised they did not exist, because the type of testing called for under the regulations was not taking place when Mr. Tilford came to work for Respondent in 2011. Tr. 418-19.

On June 25, 2013, the Agency sent to Respondent an Information Request under 33 U.S.C. §§ 1318 and 1321(m) requesting additional information about its SPCC Plan and FRP. Tr. 151-52, 403; CX 10. Respondent replied on August 23, 2013. Tr. 153-54, 403; RX 2. In its response, Respondent stated that Tank 2001 had been in service since "late March, 2012," and Tank 2002 was not yet operational.[14] RX 2 at 4; *see also* CX 4 at 3.

On September 23, 2013, Ms. Witul completed her SPCC Field Inspection and Plan Review Checklist ("2013 SPCC Checklist") as part of her final inspection report from the November 2012 inspection. Tr. 156-59; CX 4. She noted in the 2013 SPCC Checklist that Respondent had placed into service a 2.5 million-gallon tank and transfer rack that were not covered in the Condor Plan, violating OPP regulatory requirements for facilities to update their SPCC plan within six months of a change that materially affects the potential for discharge. Tr. 159-160; CX 4 at 5; *see also* 40 C.F.R. § 112.5(a). She also noted that the Facility had inadequate secondary containment at the rail transfer rack, where oil from Tanks 2001 and 2002 would be transferred to rail cars, violating OPP regulatory requirements to maintain an appropriate containment system to contain a discharge before cleanup occurs. Tr. 160-62; CX 4 at 8; *see also* 40 C.F.R. § 112.7(c).

On May 22, 2014, the Agency sent a "show cause letter" to Respondent outlining the alleged violations observed during the 2012 inspection. Jt. Stips., ¶ 25; Tr. 169-170, 403; RX 6. The letter specifically addressed the lack of AST integrity testing required by 40 C.F.R. § 112.8(c)(6) and the lack of an FRP, although it also included as an attachment the SPCC Checklist outlining other potential violations. Tr. 171, 211; RX 6. Ms. Witul had concluded that Respondent was subject to FRP requirements because it met the substantial harm criteria

---

was not very familiar with Respondent's operations then because he was relatively new to the company. Tr. 419. He testified that he did not personally know when Tank 2001 went into service. Tr. 429.

[14] This information was based on the knowledge of the Facility's Director of Operations as well as its Operations Manager, who were both present during the 2012 inspection. RX 2 at 2-3.

outlined in 40 C.F.R. 112.20(f)(1) based on the Facility's proximity to the Channel.[15] Tr. 217-18; RX 104.

c. Respondent attempts to create a consolidated SPCC Plan and FRP

After receiving the show cause letter, Respondent hired WHF Inc., an Oakdale, California-based environmental and engineering firm, to develop a new SPCC Plan for the Facility and to determine whether Respondent was required to prepare an FRP as the Agency alleged.[16] Tr. 171-72, 404-05, 439, 444-45. WHF's effort was overseen by Kari Casey, the company's general and operations manager.[17] Tr. 439-440. She was assisted by Lee DeLano, a licensed civil and agricultural engineer who provided technical support.[18] Tr. 452, 514. Respondent also hired a tank integrity expert, Craig Fletcher, to address the lack of AST integrity testing that the Agency had identified. Tr. 405-06, 448, 607, 617-18. Mr. Fletcher is a registered geologist, registered hydrogeologist, and Steel Tank Institute certified inspector authorized to conduct certified external and internal inspections of aboveground storage tanks consistent with the SP001 inspection standard.[19] Tr. 601.

Respondent then scheduled a meeting with the Agency in mid-2014 where the parties discussed issues related to the SPCC Plan, FRP, and tank integrity schedule. Tr. 403-04, 445-48. According to Mr. Tilford, Respondent indicated at the meeting that it was interested in developing an FRP and would welcome the Agency's guidance in doing so. Tr. 404. Mr. Tilford's understanding was that an FRP was simply "an expanded SPCC plan." Tr. 404. Ms. Casey, who also attended the meeting, testified that there was general discussion about the FRP, and Respondent was going to be given additional time to determine whether an FRP was required. In the meantime, she testified, Respondent would be permitted to present a consolidated plan that "included some additional emergency response stuff that's in addition to the SPCC guidelines that we thought would maybe sort of bridge a gap a little bit on this FRP

---

[15] Ms. Witul did not consider lack of secondary containment in making this determination, because Respondent provided conflicting information about the location of one of its ASTs. Tr. 219-221, 243; CX 52 at 1-3.

[16] On January 10, 2014, Respondent had obtained a report from the engineering firm Hayley & Aldrich ("H&A Report") concluding that an FRP was not required, because any oil discharge was unlikely to reach the Channel. Tr. 173; CX 15 at 5.

[17] At hearing, Ms. Casey was qualified as an expert in the preparation of SPCC plans. Tr. 444.

[18] At hearing, Mr. DeLano was qualified as an expert in civil engineering and in the preparation of SPCC plans. Tr. 515.

[19] At hearing, Mr. Fletcher was qualified as an expert in the field of aboveground storage tanks. Tr. 605.

issue." Tr. 446. That is, her takeaway from the meeting was that "a full FRP would maybe not be required, depending on the information we were submitting, but that we would, in an effort to comply, submit some additional emergency response procedures and such and see if that would, would be sort of in a, a modified submittal." Tr. 447; *see also* Tr. 499-500. In Ms. Casey's mind, the SPCC Plan issues were clear, but the question of whether an FRP was necessary remained unanswered after the meeting. Tr. 480-81.

Following the meeting, WHF focused on rewriting Respondent's SPCC Plan. Tr. 451. Ms. Casey also "just tried to look at the general guidelines for the FRP and see if we could sort of fit in certain sections and kind of make that contingency plan that we normally write, fit a few of the guidelines from the FRP." Tr. 451. In Ms. Casey's experience with SPCC plans, she typically consolidated multiple planning requirements into one document. Tr. 499-500. However, in this case, she never obtained written approval from the Agency to do so. Tr. 500. Ms. Casey had no prior experience preparing an FRP, although she had prepared more than 30 SPCC plans. Tr. 441-42, 496, 501. Mr. DeLano, like Ms. Casey, also had no prior experience preparing FRPs. Tr. 553.

Meanwhile, Respondent asked Mr. Fletcher to prepare an industry-standard inspection program for the Facility. Tr. 607. At the time of Mr. Fletcher's involvement, none of Respondent's tanks had ever received formal, certified inspections even though most of the tanks were old and likely constructed in the 1940s or 1950s. Tr. 636, 643; CX 17 at 103; CX 18 at 95. Respondent paid Mr. Fletcher between $10,000 and $15,000 for his work. Tr. 644.

After visiting the Facility and assessing its inventory of tanks and materials, Mr. Fletcher produced a report ("Fletcher Report") that included a series of periodic inspection checklists as well as a formal inspection program to be conducted by certified tank inspectors. Tr. 607-09, 617; CX 17 at 98. The Fletcher Report established a regular schedule for inspections that would require only a portion of Respondent's tank inventory to be formally inspected at one time over the course of a five-year cycle. Tr. 619-620, 621; RX 2 at 58; RX 50 at 4. Routine, informal inspections by Respondent's personnel were scheduled to occur every month. CX 17 at 101-03. Formal external inspections performed by experienced, certified inspectors of 25 ASTs at the Facility were scheduled for every five years. Formal internal inspections of these tanks performed by experienced, certified inspectors were scheduled for every ten years. CX 17 at 103-04. To establish a baseline, the plan called for formal external inspections of every tank to take place during the winter of 2014-2015. Tr. 420-21, 621-22; CX 17 at 104; RX 9. Then, each year during the four winter seasons thereafter, a quarter of the tanks would receive formal internal inspections. CX 17 at 104. This approach was created so that all formal internal and external testing would be complete by 2019, the anticipated recertification year for Respondent's SPCC Plan. CX 17 at 104. Inspections and the inspection schedules were also designed to comply with the two main industry standards, API 653 and STI SP001. CX 17 at 101-02. However, Mr. Fletcher acknowledged that, if based on the 2012 Condor Plan that Respondent was using as its SPCC Plan, then according to the Agency Fact Sheet the five-year testing cycle should have begun then and ended in 2017. Tr. 637-38; RX 2 at 58; RX 50 at 4. But because a testing baseline had not been established in 2012, Mr. Fletcher's plan was designed to get the tanks inspected as soon as possible without causing undue disruption to Respondent's operations.[20] Tr. 638-39; CX 18 at 96.

The Fletcher Report was completed September 30, 2014 and sent to the Agency on October 2, 2014. Tr. 610, 620; RX 9 at 1-2. The Fletcher Report was intended to be incorporated into the Facility's SPCC Plan and to satisfy integrity testing requirements of 40 C.F.R. § 112.8(c)(6). Tr. 607-08.

On October 24, 2014, WHF completed a document for Respondent that purported to serve as a consolidated SPCC Plan, FRP, and documentation for various state requirements ("2014 Consolidated Plan"), and Respondent submitted that document to the Agency. Jt. Stips., ¶ 26; Tr. 175-76, 459, 616; CX 17. In actuality, the 2014 Consolidated Plan contained only "some of [the] elements of the FRP," and Ms. Casey testified that Respondent hoped to receive further feedback from the Agency. Tr. 459. The 2014 Consolidated Plan also included the Fletcher Report. Tr. 617; CX 17 at 45, 98-127.

Mr. DeLano signed the 2014 Consolidated Plan on October 30, 2014, with the intent of fulfilling the professional engineer certification requirement of 40 C.F.R. § 112.3(d). Tr. 523-24, 555; CX 17 at 29. At hearing, Mr. DeLano testified that prior to signing the document, he had reviewed the Fletcher Report and considered it to be part of the 2014 Consolidated Plan. Tr. 524-25. He noted that the 2014 Consolidated Plan expressly referenced the Fletcher Report in certain places. Tr. 525; CX 17 at 42, 44-45. Overall, Mr. DeLano testified, he intended that his signature indicate that he deemed the 2014 Consolidated Plan adequate for the Facility at that time. Tr. 526.

After a few months, when the Agency did not provide feedback on the plan, Respondent made various corrections and revisions on its own and "finalized" the plan in January 2015 ("2015 Consolidated Plan"). Tr. 459-460.

Sometime in February 2015, Powers Engineering and Inspection, Inc. conducted ten certified external tank inspections for Respondent of tanks 835, 836, 837, 838, 849, 852, 865, 880, 882, and 883, according to Mr. Fletcher. Tr. 622, 627, 645. Mr. Fletcher worked with Powers Engineering to complete and review reports of those inspections by May 2015. Tr. 622-23, 627. Each inspection likely cost about $2,000, Mr. Fletcher testified. Tr. 644.

---

[20] Mr. Fletcher relied in part on the "Spill Prevention, Control and Countermeasure Plan (SPCC) Program: Bulk Storage Container Inspection Fact Sheet" ("Agency Fact Sheet"), published in July 2012 by the Agency's Office of Emergency Management. Tr. 618-19; RX 2 at 55, 58; RX 50 at 4. Specifically, Mr. Fletcher testified that he consulted the Agency Fact Sheet when creating Respondent's phased inspection plan. Tr. 619-620, 621; RX 2 at 58; RX 50 at 4.

d. Respondent denies FRP applicability

On June 23, 2015, WHF completed a report titled "Substantial Harm Criteria Determination" ("Substantial Harm Report") that Respondent submitted to the Agency. The purpose of the Substantial Harm Report was to analyze the applicability of FRP requirements to the Facility. Tr. 455, 462, 526-28; CX 23 at 4. The Substantial Harm Report describes its scope as evaluating whether the Facility was located at a distance such that a discharge could injure fish and wildlife and sensitive environments, as contemplated by 40 C.F.R. § 112.20(f)(1)(ii)(B). CX 23 at 4. The Report, discussed in greater detail below, concluded that no FRP was required "because a worst case discharge, taking into consideration the physical layout of the site, including its topography, the physical properties of the asphalt, including its viscosity, would not flow a distance such that it would reach navigable waters via overland flow or into navigable waters via the storm drain system." CX 23 at 4.[21] After submitting the Substantial Harm Report, Respondent did not receive a response from the Agency until the next inspection in 2016. Tr. 410, 453, 455.

On January 15, 2016, Respondent revised its consolidated plan ("2016 Consolidated Plan"). The 2016 Consolidated Plan does not contain an FRP. Tr. 175, 177-78; CX 18. It also retains the Fletcher Report from 2014, which notes that the tanks at the Facility had not been formally inspected, either internally or externally, since their construction at the site. Tr. 636, 643; CX 18 at 95. Additionally, the 2016 Consolidated Plan contains the same professional engineer certification page as the 2014 Consolidated Plan that was signed by Mr. DeLano on October 30, 2014. Tr. 570-71; CX 18 at 39.

On June 1, 2016, Respondent conducted a certified, industry-standard external tank integrity inspection of tank 865. Tr. 624-27, 639-640, 645; RX 66. The same day, Respondent also conducted industry-standard internal tank integrity inspections of tanks 854 and 881. Tr. 629-631; RX 65; RX 67. Mr. Fletcher testified that internal tank inspections typically cost about $3,000 to $4,000. Tr. 644-45.

Around this time, the Agency hired William Michaud, a licensed Professional Engineer, to assess the applicability of FRP regulations to the Facility.[22] Tr. 262; CX 14. In his testimony at hearing, and in a report dated August 23, 2016 ("FRP Applicability Review"), Mr. Michaud concluded that the Facility satisfied the substantial harm criteria of 40 C.F.R. § 112.20(f)(1) and

---

[21] With respect to the secondary containment requirement, Ms. Casey's understanding is that "a lot of times in California" there must be adequate secondary containment for "110 percent of the largest tank volume." Tr. 465-66. At the Facility, the total tank volume that WHF considered was 2.348 million gallons. Tr. 482; CX 23 at 10. Based on that metric, WHF concluded that the Facility satisfied the secondary containment requirement. Tr. 466.

[22] At hearing, Mr. Michaud was qualified as an expert in the applicability of FRP regulations. Tr. 281.

that Respondent was required to prepare and submit an FRP to the Agency. *See generally* Tr. 260-387; CX 14 at 2.

e. 2016 inspection of the Facility and Respondent's revised SPCC Plans and FRPs

On September 30, 2016, Ms. Witul and another Agency official, Connor Adams, inspected the Facility. Prior to the inspection, Ms. Witul obtained a copy of the 2016 Consolidated Plan. Jt. Stips., ¶¶ 27-28; Tr. 175, 177-79, 410; CX 18. During the inspection, Ms. Witul observed that Tank 2002 was in service. She reached this conclusion after noting that the tank was insulated, that piping was complete, and based on information provided by Respondent's personnel. Tr. 179-180. Mr. Adams took photographs of the Facility during the inspection. Tr. 180; CX 9. There is no observable levy or berm in a photograph taken of the southern fence line between Tanks 2001 and 2002 and the Channel. Tr. 381; CX 9 at 4. At the end of the inspection, Ms. Witul and Mr. Adams documented the FRP and SPCC deficiencies they found and provided notices of those deficiencies to Respondent that same day. Tr. 181-84, 454; CX 6; CX 7. Additionally, Ms. Witul told Ms. Casey the Agency did not understand why Respondent was attempting to submit a modified FRP that did not fully comply with the regulations. Tr. 453-54. Mr. Tilford's response was to order Ms. Casey to make the necessary corrections to the SPCC Plan and prepare "a full FRP and get into compliance with this." Tr. 454-55.

On November 28, 2016, Ms. Witul completed her SPCC Field Inspection and Plan Review Checklist ("2016 SPCC Checklist") as part of her final inspection report and provided it to Respondent. Jt. Stips., ¶ 29; Tr. 186; CX 8. The report was based on the 2016 Consolidated Plan that purported to serve as Respondent's SPCC Plan. Tr. 186; CX 8 at 3; CX 18. She noted in the 2016 SPCC Checklist that Respondent's plan did not contain required attestations from a Professional Engineer that procedures for required inspections or testing had been established or that the SPCC Plan was adequate for the Facility. Tr. 186-87; CX 8 at 3; *see also* 40 C.F.R. § 112.3(d). Although Ms. Witul recognized that a consulting firm had developed an inspection and testing program for the Facility, there was no evidence that a Professional Engineer had reviewed that program or determined that it was based on established industry standards. Tr. 187; CX 8 at 3. Ms. Witul also noted that AST No. 865 was insufficiently labeled because it needed an "out of service" date placed on it to be permanently closed under the regulatory definition. Tr. 188-89, 243; CX 8 at 8; CX 52; *see also* 40 C.F.R. § 112.2, 112.7(c). Absent a properly documented closure, the tank posed a discharge risk either because it may still be full or could be put back into use, she noted. Tr. 189, 243.

Also on November 28, 2016, Respondent conducted certified, industry-standard external tank integrity inspections of tanks 817, 818, 831, 832, 833, 834, 839, 848, 854, 878, and 886. Tr. 624-27; RX 54-RX 64.

On January 9, 2017, Respondent created an FRP that it submitted to the Agency ("January 2017 FRP"). Jt. Stips., ¶ 30; CX 19. Ms. Witul reviewed the January 2017 FRP and found several deficiencies that she documented in an FRP Plan Review Checklist dated January 20, 2017 ("January 2017 FRP Checklist"): First, although there was a log form for equipment testing and deployment, there was "no schedule in the plan for that testing and deployment to actually happen." Tr. 193; CX 12 at 3; *see also* 40 C.F.R. § 112.20(h)(1), app. F, § 1.1. Second, although there was a list of equipment for responding to a spill, the list included few details as to the size, quantity, or age of the equipment. Tr. 193-94; CX 12 at 6; *see also* 40 C.F.R. § 112.20(h)(1), (3), app. F, § 1.3. Third, there were no training dates shown for Facility personnel to demonstrate that any training had taken place, there was no indication of what the response time would be for the selected response contractor, and there was no information about the Facility's response team. Tr. 194; CX 12 at 8; *see also* 40 C.F.R. § 112.20(h)(1), (3), app. F, § 1.3.

On March 27, 2017, the Agency sent a "show cause letter" to Respondent outlining the alleged violations observed during the 2016 inspection. Tr. 195, 477-78; RX 23. The letter specifically addressed the fact that Respondent did not have an adequate SPCC Plan or FRP, and it further noted that integrity testing of the Facility's ASTs had not occurred according to the SPCC Plan schedule or industry standards. The letter also included as an attachment the 2016 SPCC Checklist and January 2017 FRP Checklist outlining other potential violations. Tr. 195-96; RX 23 at 2.

On May 1, 2017, Respondent revised its SPCC Plan and submitted it to the Agency ("May 2017 SPCC Plan"). Jt. Stips., ¶ 32; Tr. 196, 460-61; CX 45; RX 96. The May 2017 SPCC Plan addressed some of the violations in the March 2017 show cause letter, but according to Ms. Witul, it did not provide sufficient evidence that tank integrity testing was taking place, nor did the Agency receive any verification that Tank 2001 was being tested. Tr. 196-97. In Appendix C to the May 2017 SPCC Plan, Respondent included the Fletcher Report from 2014 that contained a written schedule and integrity testing program. Tr. 632; RX 96 at 95. The May 2017 SPCC Plan also indicated that the integrity testing program had been modified to reflect the installation of six new tanks, the introduction of Tank 2002, and the removal of several other tanks from service. Tr. 632-33; RX 96 at 57. According to Mr. Fletcher, the replacement of tanks represents a big change to the integrity testing program and a big investment for Respondent. Tr. 634-35. Mr. DeLano signed the May 2017 SPCC Plan on April 26, 2017, to fulfill the professional engineer certification requirement of 40 C.F.R. § 112.3(d). Tr. 597; RX 96 at 40.

Also on May 1, 2017, Respondent revised its FRP and submitted it to the Agency ("May 2017 FRP"). Jt. Stips., ¶ 31; Tr. 197-98, 460-61; CX 20. The revision considered the January 2017 FRP Checklist that Ms. Witul had completed. Tr. 476-77; RX 23 at 78. After receiving the May 2017 FRP, the Agency on June 27, 2017 asked for additional documentation to demonstrate the existence of an executed contract with an Oil Spill Response Organization and that certain training had been completed as indicated by the May 2017 FRP. Tr. 200-01; CX 13.

Respondent did not provide sufficient documentation of its compliance, and Ms. Witul recorded the deficiencies of the May 2017 FRP in an FRP Plan Review Checklist dated September 18, 2017 ("September 2017 FRP Checklist").[23] Tr. 198-99, 201, 226-27, 245; CX 24. Among the violations she noted in the September 2017 FRP Checklist were lack of documentation of an executed contract with an oil spill response organization; lack of documentation of completed required drills and exercises; and lack of documentation of required training of facility personnel. Tr. 199-200; CX 24 at 2-3, 7, 23. In the year preceding the hearing in this matter, Respondent provided additional information to the Agency about its drill and training exercises. Tr. 225. Mr. Tilford testified that Respondent has since signed an agreement with an Oil Spill Response Organization and that it provided an executed contract to the Agency a few months prior to the hearing. Tr. 435-36.

f. Final tank integrity testing assessment

On January 15, 2018, Respondent conducted an industry-standard internal tank integrity inspection of tank 882. Tr. 629-631, 640; RX 68.

On April 16, 2019, Mr. Fletcher revisited the Facility to assess what integrity testing had been accomplished since his last involvement with Respondent in 2015. Tr. 623. He observed several changes, including that some tanks had been replaced or taken out of service and that the certified external inspections outlined above had taken place in 2016. Tr. 624. He also observed that the tanks reported to have been taken out of service in the May 2017 SPCC Plan had indeed been removed from service and that since that plan's submission, tanks 833, 834, and 878 had been replaced. Tr. 633-34. Mr. Fletcher noted that Respondent had completed certified external inspections of essentially all the tanks at the Facility except for those that were out of service. Tr. 634. According to Mr. Fletcher, there is no reason for a tank owner to conduct a formal, external tank inspection if in the short term the tank is going to be replaced. Tr. 634. However, he conceded that an external inspection can be performed on a tank whether it is in or out of service. Tr. 645-46.

Mr. Fletcher also testified that in 2019 he reviewed external tank inspection reports for Tanks 2001 and 2002 and that they satisfy the industry standard for tank integrity testing. Tr. 627-28, 640. One of the inspections was completed before the five-year certification because the tanks are relatively new, he stated. Tr. 628. But he recognized that Tank 2001 should have been inspected by 2017 rather than 2019 to meet the five-year cycle from the date it entered service. Tr. 641, 644. Mr. Fletcher further testified that to his knowledge, all the tanks at the Facility have either been replaced (thereby resetting the inspection standard and timeline) or had a formal

[23] Mr. Tilford testified that Respondent did not receive either the January 2017 FRP Checklist or the September 2017 Checklist. Tr. 410-11. Conversely, Ms. Casey testified that she saw the January 2017 FRP Checklist, which may have been forwarded to her by Mr. Tilford, but she did not see the September 2017 FRP until this proceeding was initiated. Tr. 460-62.

external inspection conducted. Tr. 628-29. However, Mr. Fletcher conceded that Respondent did not follow the tank inspection schedule that he set out in 2014 and was "behind somewhat on this schedule." Tr. 639. At the same time, he said it is common in the industry for tank inspections to be behind schedule because of the number of tanks that were installed before inspections were required. Tr. 646.

IV. BURDENS OF PROOF

The Agency carries the burdens of presentation and persuasion that the violations occurred as set forth in the complaint and that the relief it seeks is appropriate. 40 C.F.R. § 22.24(a). If the Agency establishes a prima facie case, Respondent has the burden of presenting any defense to liability or penalty, and Respondent carries the burdens of presentation and persuasion with respect to any affirmative defenses. *Id.* Matters of controversy shall be decided upon a preponderance of the evidence. *Id*. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts the party seeks to establish are more likely than not to be true. *See, e.g.*, *Smith Farm Enters., LLC*, 15 E.A.D. 222, 228-29, 2011 WL 946993, at *5 (EAB 2011) ("A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not.").

V. LIABILITY

a. Respondent is subject to the OPP Regulations

As previously established in the Order on Complainant's Motion for Accelerated Decision as to Liability ("AD Order"), Respondent is subject to the Clean Water Act ("CWA") and Oil Pollution Prevention ("OPP") regulations. Respondent is the owner and operator of a non-transportation related onshore facility ("the Facility") within the meaning of the OPP regulations. The Facility stores oil and oil related products, including asphaltic cement, in aboveground storage tanks in quantities that are subject to regulation. Based on the Facility's proximity to the Sacramento River Deep Water Ship Channel ("Channel"), the Facility could reasonably be expected to discharge oil in quantities that may be harmful into the Channel, a navigable water of the United States. AD Order at 14-17. All these facts were further demonstrated in the evidence produced at hearing.

b. Count I

Respondent is required to prepare and implement a Spill Prevention Control and Countermeasure Plan ("SPCC Plan") in accordance with 40 C.F.R. § 112.7 and other applicable sections of Part 112. 40 C.F.R. § 112.3. Among other requirements, an SPCC Plan must have management approval; a facility diagram with all fixed oil storage containers, storage areas, and connecting pipes, and stating the oil type and capacity for those containers; and appropriate containment and diversionary structures. *Id*. § 112.7(a), (a)(3), (c).

The Agency has alleged that Respondent's SPCC Plan did not meet these requirements between November 27, 2012 and May 1, 2017, violating 40 C.F.R. § 112.3. Compl., ¶¶ 28-38. The AD Order found Respondent liable for the violations alleged in Count I of the Complaint, with the period of liability beginning February 13, 2013 and ending May 1, 2017 after the statute of limitations was applied. AD Order at 20. There was no evidence produced at hearing to undermine this prior ruling. The findings of fact and conclusions of law contained in the AD Order with respect to Count I are adopted and made part of this Initial Decision.

Accordingly, Respondent is liable for the violations alleged in Count I of the Complaint between February 13, 2013 and May 1, 2017.

c. Count II

A licensed Professional Engineer must review and certify an SPCC Plan for it to be effective and satisfy the requirements of Part 112. 40 C.F.R. § 112.3(d). "By means of this certification the Professional Engineer attests:

> (i) That he is familiar with the requirements of [40 C.F.R. pt. 112];
> (ii) That he or his agent has visited and examined the facility;
> (iii) That the [SPCC] Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of [40 C.F.R. pt. 112];
> (iv) That procedures for required inspections and testing have been established; and
> (v) That the [SPCC] Plan is adequate for the facility.

40 C.F.R. § 112.3(d)(1).

In Count II of the Complaint, the Agency alleges that Respondent failed to have a Professional Engineer certify that the Facility's SPCC Plan was prepared in accordance with good engineering practice, including consideration of applicable industry standards, and in accordance with requirements that the procedures and frequency for required inspections, maintenance, and testing are established and described in the Plan. Compl., ¶ 41. The Agency alleges that this lack of certification existed from October 24, 2014 until Respondent obtained the certification on January 15, 2016. Compl., ¶¶ 43-44. Accordingly, during this time the Agency contends that Respondent is liable for violating 40 C.F.R. § 112.3(d).

i. Agency's Argument

The Agency contends that Mr. DeLano's purported certification contained in the 2014 Consolidated Plan does not satisfy 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." AB at 11. That is, the

Agency contends that Mr. DeLano's certification should have recited the five elements of 40 C.F.R. § 112.3(d)(1) quoted above. ARB at 4. In support of its argument, the Agency cites to the preamble to the 2002 amendment to the engineer certification requirement and to guidance that the Agency provides to its regional inspectors. ARB at 4-5.

ii. Respondent's Argument

Respondent argues that there is no case law supporting the Agency's contention that each element of § 112.3(d)(1) must be recited verbatim and that such a requirement is not self-evident from the text of the regulation. RB at 4; RRB at 3. The Agency's reliance on its own guidance is inadequate, Respondent adds. RRB at 3-4. In any event, Respondent asserts, the certification "cross-referenced" the applicable regulation. RB at 5; RRB at 4. Additionally, Respondent alludes to its previously raised argument that the Condor Plan contained a valid engineer's certification and that that plan was in effect during the relevant time period because the plans that followed were merely drafts. RB at 3-4.

iii. Discussion

There is no dispute that the Condor Plan from 2012 contains an adequate Professional Engineer's certification. ARB at 5; RB at 3-4. Similarly, the Agency allows that a satisfactory certification was included again in the 2016 Consolidated Plan. AB at 12 & n.3. Therefore, the primary issue that must be resolved under Count II is whether Mr. DeLano's Professional Engineer's certification in the 2014 Consolidated Plan is adequate under OPP regulations. After comparing it with the specific requirements of the regulation, I conclude that it is not, but that Respondent is not liable under this count because the Condor Plan was properly certified.

Mr. DeLano's signed certification in the 2014 Consolidated Plan states the following: "***5.1.2 Professional Engineer's Certification (40 CFR 112.3(d))*** 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.

Contrary to Respondent's argument, it is evident that the text of 40 C.F.R. § 112.3(d)(1) requires more of Mr. DeLano than this. Mr. DeLano's certification states that he "examined" the Facility, but it does not indicate that he (or his agent) "visited . . . the facility" in person. Similarly, the certification states Mr. DeLano's belief that the 2014 Consolidated Plan was "prepared in accordance with good engineering practices," but this does not specifically demonstrate his assessment that the plan was also "prepared in accordance with . . . applicable industry standards" or that it was "prepared in accordance with . . . the requirements of [40 C.F.R. pt. 112]." Additionally, the certification says nothing to suggest that Mr. DeLano determined that "procedures for required inspections and testing have been established," and the certification does not show that Mr. DeLano believed the 2014 Consolidated Plan to be "adequate for" the Facility in particular. Without attesting that he has engaged in these specific tasks, there is not sufficient evidence that he intended them to be included within the scope of his certification. Consequently, based on the regulatory text and the certification alone, it is apparent that Mr. DeLano's attestation is lacking.

It is further notable that the language of Mr. DeLano's certification mirrors an outdated version of Section 112.3(d). Prior to its 2002 amendment, the regulation stated in part:

> No SPCC Plan shall be effective to satisfy the requirements of this part unless it has been reviewed by a Registered Professional Engineer and certified to by such Professional Engineer. By means of this certification the engineer, *having examined the facility and being familiar with the provisions of this part, shall attest that the SPCC Plan has been prepared in accordance with good engineering practices*.

40 C.F.R. § 112.3(d) (2002) (emphasis added).

As early as 1991, the Agency made efforts to revise this regulation to resemble something close to its current form to "promote the Agency's intent in the original promulgation of § 112.3(d) that SPCC Plans be certified by a Registered Professional Engineer exercising independent judgment." Oil Pollution Prevention; Non-transportation-related Onshore and Offshore Facilities, 56 Fed. Reg. 54,612, 54,619 (Oct. 22, 1991) (Proposed Rule). One way of enacting that intent was mandating that the engineer "attest that required testing has been completed and that the Plan meets the requirements of regulation for the facility." *Id.* The proposed rule also specifically sought to require the engineer to visit the facility rather than simply "examine" it because "some facility owners and operators have argued that they have not interpreted the current regulatory language to require that the certifying Engineer physically visit the facility." *Id.*

After making various updates to its 1991 proposed rule, the Agency finalized an amendment to § 112.3(d) in 2002. *See* Oil Pollution Prevention and Response; Non-transportation-related Onshore and Offshore Facilities, 67 Fed. Reg. 47,042, 47,053-47,054 (July 17, 2002) (Final Rule). The preamble to this rule describes the engineer's responsibility "for certifying that the Plan is adequate and meets all regulatory requirements, including enumeration of all tests that have been completed, plus those that should be completed before the facility commences operations and those that should be undertaken periodically after it commences operations." *Id*. at 47,053-54. Consequently, the Agency adopted "a requirement in which the [engineer] attests that the procedures for required inspections and testing have been established, and the Plan is adequate for the facility." *Id.* at 47,054. The Agency further noted the importance of a site visit to the Facility, with the expectation that "[a]fter the site visit, the [engineer] will have to devise appropriate inspection and testing standards based on the facility's unique characteristics." [24] *Id.* Additionally, the Agency recognized that "applicable industry

[24] The Agency's final rule allowed an agent of the engineer to conduct the site visit in place of

standards" must be independently considered because it is "an essential element" of "good engineering practices," so the rule was amended to "specifically include consideration of applicable industry standards as an element of the PE's attestation that the Plan has been prepared in accordance with good engineering practice." *Id.* at 47,085. Ultimately, the Agency noted, any professional engineer certifications required after the effective date of the 2002 amendment "must include the required attestations" listed in § 112.3(d)(1). *Id.*

Thus, even if a plain reading of the current regulation did not set forth the attestations that a certifying engineer must make, the fact that Mr. DeLano's certification so clearly aligns with an outdated regulation further underscores the inadequacy of his certification. As far as anyone examining the certification can tell, Mr. DeLano's review was incomplete because his certification referred only to pre-2002 requirements. This is clearly insufficient given the Agency's extensive revisions to § 112.3(d). The fact that the Agency amended the rule to enumerate tasks a reviewing engineer should specifically address necessarily requires that the corresponding certification assert that they were in fact addressed. Respondent protests that there is no clear requirement that § 112.3(d)(1) be repeated "verbatim" in the certification. But that is beside the point. Ultimately, as the Agency indicates in the regulatory preambles above, the point of the certification is to demonstrate that the Professional Engineer made certain considerations in his review of a facility's SPCC Plan. A verbatim recitation of those considerations would be the simplest way to meet that requirement, but a certification that in some other way shows that the Professional Engineer's review took into account *all of* the elements of § 112.3(d)(1) would presumably be acceptable too. Regardless, Mr. DeLano's certification plainly does not make such a demonstration, so it does not meet the requirements of § 112.3(d). For the same reason, Respondent's argument that the certification "cross-referenced" the five relevant elements of § 112.3(d)(1) falls flat. The most specific potential cross reference is in the title of the certification, which includes the parenthetical "(40 CFR 112.3(d))." *See* CX 17 at 29. But this provides even less indication of the substance of Mr. DeLano's review than does the text of his certification.

After considering the above points, it is evident that Respondent failed to have a Professional Engineer adequately certify the 2014 Consolidated Plan. However, the regulations also provide that certification of the SPCC Plan is necessary "for it to be effective to satisfy the requirements of this part." 40 C.F.R. § 112.3(d). Because the 2014 Consolidated Plan was never certified, it was never effective as an SPCC Plan under Part 112. To that end, whether Respondent *intended* the 2014 Consolidated Plan to be a draft or a final product is somewhat beside the point for the purposes of determining liability under this count. The Agency's allegation is that Respondent did not have an SPCC Plan that was properly certified by a

---

the engineer himself. But the rule still placed great importance on a site visit to escape the "uncertainty" of the requirement that the engineer "examine" the facility. *See* Oil Pollution Prevention and Response; Non-transportation-related Onshore and Offshore Facilities, 67 Fed. Reg. at 47,054.

Professional Engineer from October 24, 2014 until January 15, 2016. Yet it is apparent that the Condor Plan did contain an effective certification, and the Condor Plan could not have been displaced by the 2014 Consolidated Plan if that plan was never effective in the first place. Accordingly, the Condor Plan provides Respondent with an acceptable certification under § 112.3(d) during the time period alleged in the Complaint.

For the foregoing reasons, I find that Respondent is not liable for the violation the Agency alleges under Count II.

d. Count III

Owners and operators of regulated facilities must amend their SPCC Plan in accordance with the general requirements in 40 C.F.R. § 112.7 within six months of "a change in the facility design, construction, operation, or maintenance that materially affects its potential for a discharge as described in §112.1(b)." 40 C.F.R. § 112.5(a).

The Agency alleges that Respondent changed the Facility's design, construction, and operation in a manner that materially affected its potential for a discharge when it put Tank 2001 into service in March 2012. Compl., ¶ 49. Specifically, the Agency alleges Tank 2001 was not included in the Condor Plan, which Respondent provided to the Agency during the November 2012 inspection, and that Respondent failed to reflect the entry into service of Tank 2001 until adding the tank to the 2014 Consolidated Plan. Compl., ¶¶ 50, 53-54.

Additionally, the Agency alleges that Respondent again changed the Facility's design, construction, and operation in a manner that materially affected its potential for a discharge when it put Tank 2002 into service in July 2015. Compl., ¶ 51. The Agency further alleges Tank 2002 was not included in the 2016 Consolidated Plan, which Respondent provided to the Agency during the September 2016 inspection, and that Respondent failed to reflect the entry into service of Tank 2002 until adding the tank to the May 2017 SPCC Plan. Compl., ¶¶ 52, 55-56.

Consequently, the Agency contends that Respondent violated 40 C.F.R § 112.5(a) by not amending its SPCC Plan within six months of Tanks 2001 and 2002 entering service, and that Respondent remained in violation for a total of 905 days until amending its SPCC Plans in October 2014 and May 2017.

i. Agency's Argument

The Agency asserts that the addition of Tanks 2001 and 2002 were changes at the Facility that materially affected the potential for a discharge because each tank added approximately 2.3 million gallons of oil storage capacity. AB at 13. This obligated Respondent to amend its SPCC Plan within six months of the addition of each tank, the Agency argues. AB at 13.

With respect to Tank 2001, the record establishes that the tank was in service on March

21, 2012, the Agency argues. AB at 14; ARB at 6. But the Condor Plan neither showed the tank was in service nor accounted for its existence, the Agency asserts, and Respondent should have amended its SPCC Plan to address Tank 2001 no later than September 21, 2012. AB at 14; ARB at 7. Instead, Respondent did not amend its plan until the 2014 Consolidated Plan was certified by Mr. DeLano. AB at 14.

Regarding Tank 2002, the Agency concedes the record is unclear whether the tank entered service on July 15, 2015 or on a date sometime in January 2016.[25] AB at 15. Either way, the Agency argues, Respondent did not timely update its SPCC Plan because the 2016 Consolidated Plan labels the tank as either empty or out of service, and the tank is not fully accounted for until the May 2017 SPCC Plan. AB at 15. Further, by adding nearly 2.3 million gallons of storage capacity, Tank 2002 clearly constituted a change to the Facility that materially affected the potential for discharge because it nearly doubled the Facility's storage capacity. ARB at 8.

ii. Respondent's Argument

Respondent first contends, as a general matter, that the Condor Plan was valid and in effect for five years from the date of its creation in 2012. RB at 5. However, "based on a continuing dialogue with EPA beginning in 2013 and continuing into 2017, [Respondent] submitted several updated and enhanced versions of its SPCC in draft form – in fact, one every year for 2014, 2015, 2016 and 2017." RB at 5. Though initially published as drafts, once it "became evident" that the Agency was not going to provide feedback, then "in the interest of ensuring ongoing compliance" the documents were "released to [the Facility] so that it would have as current as possible a version of the SPCC in the event of an emergency." RB at 5.

Against that backdrop, Respondent does not contest that Tank 2001 constituted a change to the Facility that materially affected its potential for a discharge. Rather, Respondent asserts the tank was properly included in a photograph and diagram within the Condor Report in 2012, even though the tank was not actually placed into service until March 21, 2013. RB at 5-6. Tank 2001 was identified again in the 2014 Consolidated Report, Respondent states, arguing that no amendment was necessary before then because the tank had been included in the Condor Report. RB at 6.

Regarding Tank 2002, Respondent states that it entered service in January 2016 and is depicted in the January 2017 FRP. RB at 7. However, Respondent argues that the addition of Tank 2002 did not constitute a change to the Facility that materially affected its potential for a discharge because it was the same size as Tank 2001 and the Facility Response Plan ("FRP") regulations contemplate planning for the loss of only the single largest tank. RB at 7; RRB at 5. Respondent also notes that Tank 2002 was included in the Condor Report, "which remained

[25] In light of this uncertainty, the Agency seeks a finding of liability beginning July 31, 2016, six months after the last day in January 2016. AB at 16.

valid until the [May 2017 SPCC Plan].” RB at 7.

iii. Discussion

As discussed below, Respondent violated 40 C.F.R § 112.5(a) by not amending its SPCC Plan within six months of Tanks 2001 and 2002 entering service.

1. Tank 2001

The evidence in the record indicates that Tank 2001 was put into service by March 21, 2012. Perhaps most convincingly, Respondent’s own documents demonstrate this fact: In response to the Agency’s June 25, 2013 Information Request, Respondent stated that Tank No. 2001 had been in service since “late March, 2012,” and Tank No. 2002 was not yet operational. CX 11 at 4; RX 2 at 4. This date was provided by the Facility’s Director of Operations, Pat McNairy, as well as its Operations Manager, Jeff Nowlin, who were both present during the 2012 inspection. CX 11 at 2-3; RX 2 at 2-3. Additionally, Respondent’s 2014 Consolidated Plan and 2016 Consolidated Plan record March 21, 2012 as the “reported service date” for Tank 2001. CX 17 at 106; CX 18 at 98. Similarly, Respondent’s January 2017 FRP, May 2017 FRP, and May 2017 SPCC Plan also note a “reported date of initial service” for Tank 2001 of March 21, 2012. CX 19 at 14; CX 21 at 20; RX 96 at 12.

Further, Ms. Witul provided credible testimony at hearing to substantiate the fact that Tank 2001 was in service in 2012. When she inspected the Facility in November 2012, Ms. Witul testified that Facility personnel told her during the inspection that Tank 2001 had already been operating for several months. Tr. 148-49, 222; CX 4 at 3; CX 5 at 1. Moreover, Ms. Witul testified that she personally observed the tank’s insulation and piping running from the tanks to adjacent railroad tracks, evidence to her that the tank was in service. Tr. 149, 222. She did not physically see the interior of the tank or asphalt flowing into the tank, but she did not expect to because “it’s not possible to see the inside of the tank” and transfers of asphalt into the tank “are generally sealed operations.” Tr. 222-23. Additionally, while preparing for this proceeding, Ms. Witul obtained a Google Earth image that shows an overhead photograph of the Facility dated May 19, 2012. Tr. 161; CX 52. In the photograph, there are nine railcars on the track next to Tank No. 2001, which also has piping connected to it. Tr. 162, 164-65; CX 52. According to Ms. Witul, the presence of the piping and railcars, plus the fact that Tank No. 2001 is insulated, indicate it was in active service on this date. Tr. 165; CX 52.

Respondent complains that Ms. Witul did not complete the 2013 SPCC Checklist formalizing the inspection results until September 2013 and that her observations are therefore unreliable. RB at 6 n.6. This might be true if Ms. Witul completed the report purely from memory. However, Ms. Witul testified that she took notes during the inspection on a copy of the 2013 SPCC Checklist and then formally completed the document at a later date. Tr. 159, 210-211. I accept her testimony on this point as truthful, and I consider the completed 2013 SPCC Checklist to be as reliable as any contemporaneously recorded observations she might have made during the inspection. Additionally, Respondent points out that the April 2012 Condor Plan describes Tank 2001 as "under construction," implying that this demonstrates that the tank was not in service. RB at 5. It is true that a written description and a drawing of the Facility label Tank 2001 as "under construction." CX 16 at 8, 24. However, the plan indicates it was originally drafted in March 2007, and the drawing of the Facility is dated February 7, 2012, more than a month before Tank 2001 would have gone online. CX 16 at 4. Further, prior to its issuance by Condor the plan was last reviewed on March 13, 2012. CX 16 at 4. This suggests that the information the Condor Plan presents about Tank 2001 was not up to date when it was released on April 6, 2012. So, I do not find the "under construction" descriptor to be persuasive evidence that the tank was *not* in service on March 21, 2012, particularly when it is weighed against Respondent's other documents and Ms. Witul's personal observations.

Because Tank 2001 was in service by March 21, 2012, Respondent was obligated to update its SPCC Plan within six months – no later than September 21, 2012. Contrary to Respondent's argument, Tank 2001 was not incorporated into the Condor Plan. For example, the Condor Plan's list of Facility containers does not include Tank 2001; its list of potential discharge sources does not include Tank 2001; and it is not listed in the plan's table of ASTs. CX 16 at 9-11, 15-16, 29. More generally, the Condor Plan does not address the type of oil in Tank 2001 and its storage capacity; predict the direction, rate of flow, and total quantity of oil that could be discharged if Tank 2001 failed; discuss the secondary containment for Tank 2001; or address periodic integrity testing of Tank 2001. *See* 40 C.F.R. § 112.7(a)(3)(i), (b), (c), (d). Presumably this is because the Condor Plan itself still considered Tank 2001 to be "under construction" even as the evidence, as discussed above, points to the tank actually being in service by March 21, 2012. Despite the entry of Tank 2001 into service on this date, Respondent did not attempt to amend its SPCC Plan to account for Tank 2001 until it completed the 2014 Consolidated Plan. *See* CX 17 at 20, 24, 35, 42, 102, 104, 106, 107, 123, 127; AB at 14.

Consequently, with respect to Tank 2001, I find that Respondent was in violation of § 112.5(a) between September 21, 2012 and October 30, 2014, the date that Mr. DeLano attempted to certify the 2014 Consolidated Plan.[26] However, liability is assessed only for the period beginning February 13, 2013, to take into account the five year statute of limitations for this violation. *See* 28 U.S.C. § 2462; AB at 14-15.

2. Tank 2002

The record does not definitively show when Tank 2002 was put into service. Various

[26] As discussed above, because Mr. DeLano's certification was insufficient under 40 C.F.R. § 112.3(d), the 2014 Consolidated Plan was ultimately not an effective amendment of the Condor Plan. However, with respect to Tank 2001, the Agency does not allege that Respondent's liability for violating § 112.5(a) extends beyond this date nor has it amended its Complaint to make such an allegation. *See* Compl., ¶¶ 54, 58; AB at 14-15.

documents and testimony suggest it was either July 15, 2015 or sometime in January 2016. *Compare* CX 19 at 14; CX 21 at 20; RX 96 at 12 *with* CX 18 at 17, 19, 45; RX 96 at 57; Tr. 632-33. Respondent contends that the "best evidence . . . [is] that the tank was placed in operation in January 2016." RB at 7. The Agency, recognizing the conflicting facts, declared after the hearing that it was seeking a finding of liability based on a service start date of January 31, 2016. AB at 16. Accordingly, for purposes of assessing liability in this Initial Decision, I find that Tank 2002 entered service on January 31, 2016.

Because the Facility introduced Tank 2002 into service on January 31, 2016, Respondent was obligated to amend its SPCC Plan to reflect the addition within six months – no later than July 31, 2016. However, the 2016 Consolidated Plan did not address Tank 2002 other than referring to it as "out of service," "empty," or "not in service," and Respondent did not present an amended SPCC Plan that accounted for Tank 2002 until May 1, 2017, the date of the May 2017 SPCC Plan. CX 18 at 17, 19, 98; CX 45.

Respondent's main argument in defense of its untimely amendment is that the addition of Tank 2002 did not materially affect the potential for a discharge at the Facility. If this were true, then an amendment would not be necessary in the first place. However, Respondent's assessment is incorrect. The regulations cite the "commissioning" of a container or the "installation of piping systems" as examples of changes that require an amendment to the SPCC plan. 40 C.F.R. § 112.5(a). Tank 2002 is a container, the commissioning of which added more than 2.3 million gallons of oil storage capacity at the Facility. This nearly doubled the capacity that existed before the tank came online and required the installation of new piping to transfer material into and out of the tank. *See, e.g.*, Tr. 84, 188, 189, 222-23, 572-73 (testimony discussing the association of piping with tanks). By the plain language of the regulation, this was a material change that required amendment of Respondent's SPCC Plan. Joseph Swackhammer[27] also testified on behalf of the Agency that adding a two-million-gallon tank constituted a material change that would trigger both an SPCC Plan amendment and likely cause any given facility to cross the FRP threshold. Tr. 77-78. Increasing the quantity of oil by this magnitude changes how a facility must conduct tank inspections and plan for responding to a spill, because "now you have quite a bit more oil stored at the facility." Tr. 78.

Moreover, the Environmental Appeals Board ("EAB") has previously ruled that installation of a 20,000-gallon aboveground storage tank constitutes a change that could materially affect the potential for discharge under § 112.5. *Pepperell Assocs.*, 9 E.A.D. 83, 106-07, 2000 WL 576426, at *19 (EAB, May 10, 2000)*; see also Ashland Oil, Inc. Floreffe, PA*, 4

[27] Mr. Swackhammer is a chemical engineer in the Agency's Office of Emergency Management who serves as the national lead on FRP coordination with the regions and the regulated community. Tr. 48-49. Mr. Swackhammer was qualified as an expert on the Agency's interpretation of FRP applicability standards. Tr. 71-73.

E.A.D. 235, 245, 1992 WL 235125, at *7 (EAB, 1992) (holding that a facility's 30 percent increase – or 840,000 gallons of oil – in one tank's volumetric capacity was a material change requiring amendment, because it increased the facility's potential to discharge oil and the potential for oil to be discharged into navigable waters). In *Pepperell*, the EAB cited testimony about the danger that aboveground tanks pose when they fail and observed that the 20,000-gallon tank had "a storage capacity fifteen times the . . . threshold" of 1,320 gallons that subjects facilities to SPCC regulation in the first place. 9 E.A.D. at 107. The U.S. Court of Appeals for the First Circuit upheld the EAB's materiality finding and called petitioner's argument to the contrary "frivolous." *Pepperell Assocs. v. U.S. Envtl. Prot. Agency*, 246 F.3d 15, 28 (1st Cir. 2001). In this case, Tank 2002 increased the Facility's storage capacity by an amount that is *more than 1,700 times* the regulatory threshold. To contend that this is not a material change that affects the potential for a discharge at the Facility is also frivolous. *See id*.

Further, I am entirely unpersuaded by Respondent's argument that Tank 2002 is "merely additive" of Tank 2001 and therefore not a material change. RB at 7. Under Respondent's logic, once Tank 2001 came online, Respondent could add an unlimited number of similarly sized tanks thereafter and never materially affect the potential for a discharge at the Facility, despite the ever-increasing volume of oil being stored there. That is absurd and undermines the ability to plan for spill prevention in the first place, as an unamended SPCC Plan may reflect only a fraction of the oil being stored at a facility.

Finally, the Condor Plan did not account for Tank 2002 in the same ways that it did not account for Tank 2001. Respondent cannot rest on any argument that relies on the tank's inclusion in the Condor Plan.

Consequently, with respect to Tank 2002, I find that Respondent was in violation of § 112.5(a) between July 31, 2016 and May 1, 2017, the date of the May 2017 SPCC Plan.

e. Count IV

The general requirements for SPCC Plans include standards for inspections, tests, and records, which require owners and operators of regulated facilities to

> [c]onduct inspections and tests required by this part in accordance with written procedures that [they] or the certifying engineer develop for the facility. [Owners and operators] must keep these written procedures and a record of the inspections and tests, signed by the appropriate supervisor or inspector, with the SPCC Plan for a period of three years.

40 C.F.R. § 112.7(e). With respect to these inspections and tests, Part 112 further provides that owners and operators must

> [t]est or inspect each aboveground container for integrity on a regular schedule and whenever [they] make material repairs. [They] must determine, in accordance with industry standards, the appropriate qualifications for personnel performing tests and inspections, the frequency and type of testing and inspections, which take into account container size, configuration, and design (such as containers that are: shop-built, field-erected, skid-mounted, elevated, equipped with a liner, double-walled, or partially buried). . . . [They] must keep comparison records and [they] must also inspect the container's supports and foundations. In addition, [they] must frequently inspect the outside of the container for signs of deterioration, discharges, or accumulation of oil inside diked areas.

Id. § 112.8(c)(6).

The Agency alleges that at the time of the inspections, "Respondent had failed to keep records of inspections and tests of the Facility for a period of three years in accordance with 40 C.F.R. § 112.7(e)." Compl., ¶ 63. Specifically, the Agency alleges Respondent "lacked documentation of external tank and internal tank inspections and tests that were due in 2014 based on the schedule in Respondent's applicable SPCC Plan." Compl., ¶ 64.

Consequently, the Agency contends that Respondent violated 40 C.F.R. § 112.7(e) by not keeping records of these inspections and tests for three years, from January 1, 2015 until January 1, 2018. Compl., ¶ 65.

i. Agency's Argument

Under industry testing standards, the Agency argues that Respondent was required to have formal external tank inspections by certified inspectors every five years, and formal internal tank inspections by certified inspectors every ten years. AB at 16. However, Respondent did not indicate it would comply with the inspection and record keeping requirement until it sent the Agency a copy of the Fletcher Report, dated September 20, 2014, and no inspections took place before 2015, the Agency contends.[28] AB at 17.

After the Fletcher Report was implemented, the Agency alleges that Respondent failed to perform any of the formal external inspections that the Fletcher Report called for in the 2014-2015 or 2015-2016 winter seasons. AB at 17-18. The Agency further asserts that there is no evidence that, as of the hearing date, Respondent had completed all the required internal

[28] The Fletcher Report was incorporated into the 2014 Consolidated Plan, the 2016 Consolidated Plan, and the May 2017 SPCC Plan.

inspections set forth in the Fletcher Report.[29] AB at 18; ARB at 11.

To that extent, the Agency argues that Respondent violated § 112.7(e) by failing to keep written procedures for inspections and tests until adding the Fletcher Report to the 2014 Consolidated Plan, failing to maintain documentation of inspections and tests completed in accordance with the schedule established by the Fletcher Report, and failing to demonstrate compliance with the required inspections and tests for all ASTs at the Facility between January 1, 2015 and the filing of the Complaint. AB at 18-19; ARB at 12.

ii. Respondent's Argument

As an initial matter, Respondent argues that the Agency can seek liability for Count IV only for the dates between January 1, 2015 and January 30, 2016. RB at 8-9; RRB at 6-7. Respondent bases this argument on the Agency's Motion for Accelerated Decision and supporting briefs, in which the Agency cited certain inspection reports submitted with Respondent's prehearing exchange as grounds for not seeking a finding of liability after January 2016. RB at 9; RRB at 6-7.

Addressing this more limited time period, Respondent contends there can be no violation because it followed Agency guidance with respect to establishing the baseline condition of its storage tanks and the inspection schedule that should follow. RB at 10. Under this guidance, Respondent asserts, Respondent had five years from the date of the Condor Plan to perform its baseline inspections – a deadline of April 5, 2017. RB at 11-12. Additionally, Respondent asserts the Agency cannot prove that it failed to keep records of its tank testing between January 1, 2015 and January 30, 2016, because the September 30, 2016 Agency inspection fell outside this window of time. RB at 12.

But regardless of the timeframe that is considered, Respondent argues that contrary to the Agency's assertions, the record demonstrates that every tank at the Facility "has either (1) had formal external inspections conducted in accordance with industry standards, (2) been replaced, or (3) been placed out of service." RB at 13; RRB at 8. With respect to formal internal inspections, Respondent asserts that only "a handful of tanks" are overdue and that it made a good faith effort to comply with inspection requirements for most of its tanks. RB at 14-16; RRB at 8-9.

---

[29] The Agency further adds that even if Respondent remained on schedule with the inspection plan outlined in the Fletcher Report, it would still have been out of compliance with the regulations because Respondent was required to establish the baseline condition of its ASTs long before it commissioned the Fletcher Report. AB at 18.

iii. Discussion

1. The relevant time period

First, I must address Respondent's claim that the Agency narrowed the time frame of its alleged violation.

The Complaint alleges that Respondent violated § 112.7(e) "for each day during the period from January 1, 2015, for a total of at least 1,095 days," i.e., for at least three years from the beginning of 2015. Compl., ¶ 65. Subsequently, in its Motion for Accelerated Decision ("AD Motion"), the Agency reported that Respondent had provided in its prehearing exchange previously unsubmitted records of inspections and tests performed between June 1, 2016 and January 15, 2017. AD Mot. at 30. Taking these records into account, the Agency declared that "there is no genuine issue of material fact" that Respondent violated § 112.7(e) "through at least January 2016." AD Mot. at 30. Then, in a reply brief supporting its AD Motion ("Reply"), the Agency stated that it "is not seeking a finding of liability on this issue after January 2016. Respondent has not produced any evidence showing that there is a genuine dispute that Respondent failed to keep records of required ultrasonic testing and internal inspections through January 2016." Reply at 17.

The AD Order addresses these statements by observing that "Complainant appears to acknowledge in its Accelerated Decision Memoranda that Respondent ceased the violation of 40 C.F.R. § 112.7(e) alleged in Count IV following January 2016." AD Order at 25. The AD Order further notes that in its Reply, "Complainant clarifies that it is not seeking liability for Count IV after January 2016." AD Order at 26.

Although Respondent argues otherwise, I do not agree that the Agency has narrowed the liability timeframe for the violation alleged in Count IV. First, the Agency has never amended its Complaint to reflect such a limitation. Second, the Agency's statements in briefs supporting its AD Motion were made in the context of seeking accelerated decision. That is, the Agency was claiming that it was entitled to judgment as a matter of law because, *at that point in the proceeding*, there was no genuine dispute of material fact regarding the alleged violation before January 2016. Thus, the Agency expressly stated that based on the evidence then available, "there is no genuine issue of material fact" that the violation lasted "through *at least* January 2016." AD Mot. at 30 (emphasis added). Importantly, this is not the same as stating that Respondent'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 Respondent 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. Similarly, this Tribunal's commentary in the AD Order about the Agency's statements were made in the context of accelerated decision and construed the Agency's statements as being made within that context. Third, even if taken out of the context of accelerated decision, the Agency refers to liability extending through "at least" January 2016. The plain meaning of this language sets January 2016 as the earliest date by which liability might have ended, not the latest.

Consequently, I find that the time frame within which the Agency alleges Respondent violated § 112.7(e) includes each day beginning January 1, 2015 and lasting for at least 1,095 days thereafter.

2. Respondent's violations during the relevant time period

Section 112.7(e) contains several requirements that Respondent must meet to maintain compliance.

Respondent must develop written procedures for integrity inspections and tests of each of its aboveground containers. These inspections must occur on a regular schedule or when material repairs are made. Inspections must comply with "industry standards" with respect to their frequency, type, and personnel qualified to conduct the inspection. Respondent must complete its inspections in accordance with its written procedures. These written procedures must be kept with the SPCC Plan for three years. And a record of completed inspections and tests signed by the appropriate supervisor or inspector must also be kept with the SPCC Plan for three years. *See* 40 C.F.R. §§ 112.7(e), 112.8(c)(6).

The two primary industry standards for tank integrity testing are the American Petroleum Institute's ("API") 653 inspection standard and the Steel Tank Institute's SP001 inspection standard. Tr. 79, 126, 134-35, 137, 606; *see also* CX 25 (American Petroleum Institute's Tank Inspection, Repair, Alteration and Reconstruction Standard 653); CX 26 (Steel Tank Institute's Standard for the Inspection of Aboveground Storage Tanks SP001). The API 653 inspection standard would typically be used for the inspection of field-erected tanks such as Tanks 2001 and 2002, whether the Facility is conducting its own monthly inspection or whether it is a more formal and comprehensive inspection. Tr. 79-80, 606. Conversely, the SP001 standard would "typically be used to form the basis for inspection and testing of shop-built tanks at the facility." Tr. 83. *See also* Tr. 606.

Inspectors certified under API and SP001 inspection standards are authorized to perform formal external and formal internal inspections under their respective inspection standards. Tr. 83-84, 612. If the inspector is not certified, then the inspection would not be valid. Tr. 84, 85. A formal external inspection would involve a comprehensive evaluation of the external portion of the tank, including determining primary wall thickness and evaluating the roof and associated valves and piping. Tr. 84, 614. A formal internal inspection would require taking the tank out of service, cleaning it out, and entering it for a formal inspection. Tr. 84, 614.

Respondent first developed written procedures for integrity inspections and tests of each of its aboveground containers when the Fletcher Report was completed on September 30, 2014.

CX 17 at 98-127. At that time, none of the Facility's tanks had ever been formally inspected. Tr. 643; CX 18 at 95. The Fletcher Report established a regular schedule for inspections based on either the API 653 or SP001 standards: routine, informal inspections by Respondent's personnel were scheduled to occur every month. Formal external inspections performed by experienced, certified inspectors of 25 ASTs at the Facility were scheduled for every five years. Formal internal inspections of these tanks performed by experienced, certified inspectors were scheduled for every ten years. Tr. 609, 611-12; CX 17 at 101-04. Thus, to establish a baseline, the plan called for external inspections of every tank to take place during the winter of 2014-2015. Tr. 621-22; CX 17 at 104; RX 9. Then, each year during the four winter seasons thereafter, a quarter of the tanks would receive formal internal inspections. CX 17 at 104. This approach was created so that all formal internal and external testing would be complete by 2019, the anticipated recertification year for Respondent's SPCC Plan. CX 17 at 104.

To that end, Respondent possessed written procedures for inspections and tests during the three years following January 1, 2015. But Respondent did not complete its inspections in accordance with these procedures, as evidence in the record demonstrates only partial compliance with the plan. Mr. Fletcher testified that Respondent completed ten certified external tank inspections in February 2015 and that he reviewed reports of the results in May of that year. But Respondent did not introduce into the record copies of these reports or any documentary evidence of these inspections. *See* Tr. 622-23, 627, 645. In short, Respondent was unable to adequately demonstrate that it maintained a record of completed inspections and tests or that it completed the inspections in the first place. Additionally, even if those inspections took place as Mr. Fletcher testified, they represent less than half of the inspections that the report scheduled to take place in the winter of 2014-2015. It was not until November 28, 2016 that the next round of certified external tank inspections took place, when eleven more tanks were examined. *See* Tr. 624-27; RX 54-RX 64. By not adhering to the schedule for formal external inspections established by the Fletcher Report, and by only maintaining a record of some of its completed inspections, Respondent did not conduct its inspections and tests in accordance with industry standards and the written procedures it had developed nor did it satisfy its record-keeping obligations.

Respondent points out that some external inspections were not performed because it eventually replaced certain tanks. However, the tanks that Respondent identifies were not replaced until 2017, well after they were scheduled to have been inspected in the winter of 2014-2015. *See* RX 96 at 57; RB at 14-16. Similarly, Respondent's argument that Agency guidance provided it a five-year window to complete baseline testing is not persuasive. The guidance that Respondent cites speaks to establishing a testing schedule based on industry standards and current container conditions, which the Fletcher Report did. *See* RX 2 at 58. But once that schedule was established, the regulations required Respondent to follow it. Respondent did not do so in this case. Additionally, whether the five year cycle began on the regulatory compliance date of November 10, 2011, on the date the Condor Plan was finished, April 6, 2012, or on the date the 2014 Consolidated Plan was purportedly complete, October 24, 2014, Respondent still has no excuse because even after the hearing Respondent had not completed all of the required testing.

As for the formal, certified internal inspections, Respondent concedes that it has not completed that process and that inspections are still overdue for several tanks. *See* RB at 14-16. Like many of the external inspections, there is scant evidence that Respondent kept or provided to the Agency records of any other formal internal inspections that it may have completed in the three years following 2015.

Thus, it is clear that in the three years since January 1, 2015, Respondent did not conduct inspections or tests in accordance with the written procedures that it developed, nor did it keep a sufficient record of the inspections and tests, signed by the appropriate supervisor or inspector, with its applicable SPCC Plan.

Consequently, Respondent was in violation of § 112.7(e) between January 1, 2015, and January 1, 2018.[30]

f. Count V

"The owner or operator of any 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 on the navigable waters or adjoining shorelines shall prepare and submit a facility response plan" if the facility meets criteria set forth in 40 C.F.R. § 112.20(f)(1). 40 C.F.R. § 112.20(a), (a)(2). Under § 112.20(f)(1):

> [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 shorelines pursuant to paragraph (a)(2) of this section, if it meets any of the following criteria applied in accordance with the flowchart contained in attachment C-I to appendix C to this part:
> ….
> (ii) The facility's total oil storage capacity is greater than or equal to 1 million gallons, and one of the following is true:
> (A) The 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; [or]
> (B) The facility is located at a distance (as calculated using the appropriate formula in appendix C to this part or a comparable

[30] The Agency argues the period of violation is longer if the 2014 Consolidated Plan and 2016 Consolidated Plan were merely drafts. AB at 18 n.9. However, the Agency did not amend its Complaint to make this allegation.

> formula) such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments. For further description of fish and wildlife and sensitive environments, see Appendices I, II, and III of the "Guidance for Facility and Vessel Response Plans: Fish and Wildlife and Sensitive Environments" (see appendix E to this part, section 13, for availability) and the applicable Area Contingency Plan prepared pursuant to section 311(j)(4) of the Clean Water Act . . . .

Id. § 112.20(f)(1)(ii)(A), (B).

The Agency alleges that Respondent was required to prepare and submit an FRP in accordance with the requirements of § 112.20 following the installation of Tank 2001 on March 21, 2012, because the Facility exceeded 1 million gallons in oil storage capacity and is located at such a distance from the Channel that a discharge could cause injury to fish and wildlife and sensitive environments. Compl., ¶ 70. The Agency further alleges that Respondent failed to submit an FRP by that date and that the subsequently submitted 2014 Consolidated Plan and January 2017 FRP did not meet all the requirements outlined in § 112.20(h). Compl., ¶¶ 71-74.

Consequently, the Agency contends that Respondent violated § 112.20(a)(2) because it failed to timely prepare and submit a compliant FRP, and Respondent remained in violation for 1,825 days, i.e., five years, preceding the filing of the Complaint. Compl., ¶¶ 75-76.

i. Agency's Argument

The Agency contends that Respondent has been obligated to prepare and submit an FRP since it installed Tank 2001 in March 2012 and caused the Facility's oil storage capacity to exceed one million gallons. AB at 20. Noting that the Facility's oil storage capacity is undisputed, the Agency contends that there is both insufficient secondary containment in the Facility's bulk asphalt storage area and that a discharge from the Facility could cause an injury to fish and wildlife and sensitive environments. AB at 20.

With respect to secondary containment, the Agency contends that the containment area dike wall around the bulk oil storage area can withstand a maximum fluid height of 3 feet, 2 inches. AB at 22; ARB at 14-15. Based on this wall height, the secondary containment is not large enough to contain the capacity of Tank 2001, according to the Agency, because if the full contents of the tank were released, the height of the material would reach 3 feet, 5 inches. AB at 22-23; ARB at 14-15. Additionally, the Agency argues that Tank 865 was not located within any secondary containment area between May 19, 2012 and sometime after October 25, 2015, and moreover, the tank was never permanently closed. AB at 23; ARB at 15-16.

Regarding fish and wildlife and sensitive environmental areas, the Agency argues that because the Facility is located less than one half mile from the Channel, a navigable water, there is a regulatory presumption that a worst-case discharge will enter the waterway. AB at 24-25; ARB at 17-18. In this case, the Agency asserts, the Channel itself is a fish and wildlife and sensitive environment, so any discharge into the Channel is necessarily a discharge into a fish and wildlife and sensitive environment. AB at 26-27; ARB at 16-20. Further, a discharge could cause injury simply by reaching the Channel. ARB at 20-21. Consequently, Respondent is required to prepare an FRP, the Agency states, and must further plan for a discharge that impacts 22.4 miles of the channel based on planning distance calculations provided in the regulations. AB at 27-28; ARB at 20.

The Agency dismisses Respondent's efforts to avoid FRP requirements based on its claim that in the event of a spill asphaltic cement would not enter the Channel because it would cool and harden before reaching the water. AB at 28. Specifically, the Agency contends the regulations do not permit Respondent to offer an alternative analysis for calculating overland flow. AB at 29.

Further, the Agency asserts that despite its obligation to prepare and submit an FRP, Respondent never did so. AB at 30; ARB at 22. The 2014 Consolidated Plan contained Respondent's first FRP attempt, and it was submitted more than two years after the installation of Tank 2001 subjected Respondent to FRP requirements, the Agency states. AB at 31. Additionally, the Agency argues, the 2014 Consolidated Plan did not follow the format outlined in the regulations and lacked several requirements for FRP content. AB at 31; ARB at 22-23. The Agency found the January 2017 FRP and May 2017 FRP deficient as well, particularly in that they lacked documentation that Facility personnel had performed various drills and exercises and acquired certain training. AB at 31-32.

Finally, the Agency declares that because Respondent satisfied the substantial harm criteria, it was bound to prepare an FRP without the Agency proceeding under 40 C.F.R. § 112.20(b)(1) and (c) and notifying Respondent of its obligation. ARB at 23. Additionally, the Agency observes, it is Respondent's obligation to comply with the law without waiting for input or feedback from the Agency. ARB at 24-25.

ii. Respondent's Argument

Respondent's initial argument is that the Agency waived its right to require an FRP because it elected not to proceed under 40 C.F.R. § 112.20(b)(1) and (c), which allows Regional Administrators to "at any time" require facilities to prepare an FRP once various factors are considered. RB at 16-17. In this case, Respondent contends that once it determined that FRP requirements did not apply, it only had to complete and maintain its certified analysis of the substantial harm criteria, which it appended to the Condor Plan. RB at 17. Respondent argues that by not following the procedures of § 112.20(b)(1) and (c), the Agency was essentially able to act in bad faith by suggesting to Respondent that it would help the company come into compliance and then pursuing an enforcement action instead of collaboration. RB at 18. This approach undermines trust in the Agency, Respondent asserts. RB at 18-19.

Regarding secondary containment, Respondent argues that the Agency's conclusion as to the fluid height of the containment wall is based on an unsupported assumption that Mr. Michaud made when interpreting a drawing of the wall in the H&A report. RB at 19-20; RRB at 12-13. There is insufficient evidence to determine what fluid height the wall can contain, Respondent asserts. RB at 20-23. Consequently, Respondent continues, the Agency cannot meet its burden of proof on this point. RB at 23-24. As for Tank 865, Respondent argues that it was permanently closed in 2004 and therefore not subject to inclusion in secondary containment requirements. RB at 24-25; RRB at 13-14.

Respondent disputes that there is a regulatory requirement that all facilities within one half mile of a navigable water must automatically prepare an FRP. RB at 29; RRB at 14-16. Respondent further contends that the Facility is not within the portion of the ACP that the Agency alleges, and therefore not within a fish and wildlife and sensitive environment or in a location that a discharge would impact such an area. RB at 30-33; RRB at 16. Similarly, Respondent argues that the Agency did not prove a discharge would cause an "injury." RB at 33-34; RRB at 16-17.

Respondent further relies on the WHF analysis of a worst-case discharge and conclusion that a spill would not reach the channel. RB at 34-36. It also contests the reliability of the Agency's discharge modeling. RRB at 17-19. Based on this conclusion, Respondent notes, an FRP would not be required. RB at 34-36.

iii. Discussion

As outlined above, the Facility must prepare and submit an FRP if it satisfies the substantial harm criteria of § 112.20(f)(1).[31] It is clear and undisputed that the Facility stores more than one million gallons of oil. *See* Jt. Stips., ¶ 19; Tr. 56; CX 1; *see also* 40 C.F.R. § 112.20(f)(1)(ii). Therefore, the remaining factors are whether the Facility has sufficient secondary containment or whether a discharge could cause injury to fish and wildlife and sensitive environments. After reviewing the evidence, I conclude that Respondent satisfies criterion (B) – the Facility is located close enough to the Channel that a discharge could cause

[31] Respondent's argument that it does not have to prepare and submit an FRP because the Agency elected not to proceed under 40 C.F.R. § 112.20(b)(1) and (c) is a nonstarter. Sections 112.20(b)(1) and (c) set forth conditions under which a Regional Administrator can compel facility owners to prepare and submit an FRP. This authority exists independently of the facility's obligation to comply with § 112.20(a) and to prepare and submit an FRP if it satisfies the substantial harm criteria of § 112.20(f)(1). The flowchart in Attachment C-1 to Appendix C to Part 112 demonstrates this fact, noting that if none of the (f)(1) substantial harm criteria are met, there is "no submittal of response plan *except at RA discretion*." (emphasis added). This proceeding arose from an enforcement action under 33 U.S.C. § 1321(b)(6)(A), not an order by the Regional Administrator that Respondent prepare and submit an FRP. Accordingly, the procedures of 40 C.F.R. § 112.20(b)(1) and (c) do not apply here.

injury to fish and wildlife and sensitive environments.[32]

As referenced in 40 C.F.R. § 112.20(f)(1)(ii)(B), Appendix C to Part 112 addresses the substantial harm criteria in greater detail. With respect to criterion (B), it mandates that "[f]acility owners or operators must determine the distance at which an oil discharge could cause injury to fish and wildlife and sensitive environments using the appropriate formula presented in Attachment C-III to this appendix or a comparable formula." 40 C.F.R. pt. 112, app. C § 2.3. Attachment C-III directs facility owners or operators to "evaluate whether the facility is located at a distance such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments" by calculating a "planning distance." *Id*. attachment C-III § 1.1. The planning distance is quantified using formulas based on how a spill would travel over land, still water, moving water, or tidal influenced water and the time that it would take for response resources to arrive. *Id*. Once a company has calculated its planning distance, it should determine whether the applicable ACP identifies any fish and wildlife and sensitive environments within that distance. Tr. 61-62. A facility may satisfy the substantial harm criteria without having to perform a planning distance calculation, such as when it has inadequate secondary containment or a history of spills. 40 C.F.R. pt. 112, app. C, attachment C-III § 1.3. But unless one of those factors is true, "calculation of a planning distance for proximity to fish and wildlife and sensitive environments . . . is required, unless it is clear without performing the calculation (e.g., the facility is located in a wetland) that these areas would be impacted." *Id*.

When calculating a planning distance, the component distances that must be considered are represented in the regulations by D1, D2, D3, and D4. *Id*. § 5.4, fig. C-1; Tr. 66. D1 is the distance from the nearest opportunity for discharge – in this case, from Tank 2001 or 2002 – to a storm drain or open concrete channel leading to navigable water. 40 C.F.R. pt. 112, app. C, attachment C-III § 5.4; Tr. 60, 268. This planning distance excludes any kind of secondary containment system that might surround the tank. 40 C.F.R. pt. 112, app. C, attachment C-III § 5.4; Tr. 60. D2 is the distance through the storm drain to a navigable water. 40 C.F.R. pt. 112, app. C, attachment C-III § 5.4; Tr. 60, 268. D3, often the main planning distance, is the distance downstream from the point of entry into navigable water within which fish and wildlife and sensitive environments could be injured. 40 C.F.R. pt. 112, app. C, attachment C-III § 5.4; Tr. 60-61. D4 is the distance from the point of discharge to fish and wildlife and sensitive environments not bordering a navigable water, such as a wetland. 40 C.F.R. pt. 112, app. C, attachment C-III § 5.4; Tr. 63. Consequently, for purposes of determining FRP applicability, the primary question is whether a discharge could reach any fish and wildlife and sensitive environments within the calculated planning distance.

Despite Respondent's suggestion to the contrary, the regulations presume that a discharge

[32] Because Respondent satisfies criterion (B), it is not necessary to determine whether Respondent satisfies § 112.20(f)(1)(ii)(A) for purposes of determining FRP applicability. Accordingly, I make no finding with respect to the sufficiency of secondary containment at the Facility.

will reach a navigable water if the discharge occurs less than one-half mile away. This is reflected in the text of the regulations: in general, facility owners and operators are required to "evaluate the potential for oil to be transported over land to navigable waters of the United States," whether by open channel flow or sheet flow across land. 40 C.F.R. pt. 112, app. C, attachment C-3, § 5.1; Tr. 66. However, if the "nearest opportunity for discharge is located within 0.5 mile of a navigable water," then the facility "*must* complete the planning distance calculation (D3) for the type of navigable water near the facility or use a comparable formula." 40 C.F.R. pt. 112, app. C, attachment C-III, § 5.5 (emphasis added). That is, there is no need to calculate the overland distances, D1 and D2, because the only relevant calculation is the water-based distance, D3. 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. Further, two of the Agency's expert witnesses, Mr. Swackhammer and Mr. Michaud, testified persuasively in support of this regulatory presumption. *See* Tr. 67, 94-98, 102, 103-04, 268, 312-13, 370-71; CX 14 at 9, 12. As they observed, when considering the overland transit of an oil discharge, a facility within one-half mile of navigable water must "automatically" complete the D3 planning distance. Tr. 67, 94-98, 102; CX 14 at 9, 12. There is no need to model whether a discharge would in fact reach the water or be hindered by any manmade depressions or containment structures, "because it's assumed that given that location that oil will, indeed, reach the navigable water." Tr. 101-02, 104, 370-71; CX 14 at 9, 12. Similarly, a facility must complete the D3 planning distance when the potential point of discharge is within one-half mile of a storm drain, because the regulations assume that it takes "a negligible amount of time" for a discharge to enter a navigable water once it reaches a storm drain. Tr. 68, 94-98; *see also* 40 C.F.R. pt. 112, app. C, attachment C-III § 5.6.[33]

Respondent argues that the regulation "does not contain an 'automatic FRP requirement' for facilities within one-half mile of a navigable water." RB at 29. This is true – Respondent's argument simply mischaracterizes the requirement. As just discussed, the regulation mandates that facilities calculate *a D3 planning distance* based on the distance to navigable water. This is different from stating "that *preparation of a* [sic] *FRP* is 'automatic' if a facility is within one-half mile of a navigable water," as Respondent phrases it. RB at 29 (emphasis added). Respondent also argues that Section 5.5's regulatory presumption that a spill will enter the water renders meaningless Section 5.1's requirement that "[f]acility owners or operators must evaluate the potential for oil to be transported over land to navigable waters of the United States." 40 C.F.R. pt. 112, app. C, attachment C-III, § 5.1; RB at 29-30 & n.26; RRB at 14-16 & n.9. But these two provisions are not in conflict. Section 5.1 sets forth a broad requirement for facilities

[33] Conversely, a facility that is greater than one-half mile from a navigable water can instead consider overland transport characteristics, such as manmade depressions and other factors that would prevent portions of a discharge from reaching the water. Tr. 67.

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.

Nevertheless, since at least 2015 Respondent has contended that it evaluated the potential for oil to be transported over land to the Channel and that a worst-case discharge would not reach the water.[34] Respondent specifically relies on WHF's Substantial Harm Report, which focuses on overland flow and whether a spill "could really get to the channel" or even "into the storm drain." Tr. 466-67. WHF concluded that there "was a relatively low possibility" that a discharge would reach the channel either directly or through the storm drain "because the material cools so quickly" that it would reach a semi-solid state and not flow past the southern boundary. Tr. 467-68, 471, 538, 548, 551-52; CX 23 at 12. WHF's calculations accounted for the topography of the containment area, man-made depressions[35] around the tanks, and viscosity of the asphaltic cement but disregarded the effect of any other aspect of the secondary containment system. Tr. 468-89, 528, 545-46; CX 23 at 5, 29. Using the "Guo model,"[36] Respondent envisions a side seam split of the tank in which 1.4 million gallons are immediately captured by the man-made depressions surrounding the tanks while 948,000 gallons continue to flow outward as a .57-foot wave, traveling 271 feet in 21.99 seconds. Tr. 482, 484-87, 528, 548, 549-550; CX 23 at 5, 9-10. At a spill angle of 45 degrees, the flow of asphalt would travel 810 feet over 2 hours before

[34] A facility may calculate planning distances using more sophisticated formulas than what the regulations provide that consider broader scientific or engineering principles, or local conditions. 40 C.F.R. § 112.20(e) & app. C, attachment C-III § 1.2. But if the facility uses an alternative formula, it must "attach documentation to the response plan cover sheet contained in appendix F to this part that demonstrates the reliability and analytical soundness of the alternative formula and shall notify the Regional Administrator in writing that an alternative formula was used." *Id*; Tr. 105-06. In this case, there is no evidence in the record that Respondent complied with this requirement, and I do not find Respondent's Substantial Harm Report to be an acceptable alternative to the planning distance requirements in the regulations.

[35] Mr. Michaud described the "manmade depressions" as not very significant and more properly described as "changes in slope." Tr. 376-78.

[36] The Guo model is based on a paper that describes the overland sheet flow of asphalt after an initial release and that accounts for the asphalt's increasing viscosity as it cools. *See* Tr. 299-300; CX 14 at 10 (citing James C.Y. Guo, *Overland flow model for asphalt oil spills*, 78 J. ENVTL. MGMT. 102, 102-5 (2006)).

hardening to a semi solid state, according to the model. However, the flow would not reach the channel because the wave would not overtop the 1.2-foot grade of the Facility's southern boundary, according to WHF. Tr. 489, 548; CX 23 at 10-11. Rather, the more likely scenario is that the grading and drainage patterns at the Facility "would move the spill in a northerly direction towards Channel Drive" where the spill would travel along the street before entering a storm drain. Tr. 550-51; CX 23 at 11. Once inside the storm drain, the spill would flow another 900 feet before cooling and hardening in the pipe, WHF concluded. Tr. 551; CX 23 at 12-13.

After Respondent presented the Agency with the Substantial Harm Report, the Agency commissioned Mr. Michaud to assess whether a worst-case spill would flow overland and into the Channel. *See* CX 14. In his FRP Applicability Review and at hearing, Mr. Michaud reached a different conclusion than Respondent. Mr. Michaud modeled a catastrophic collapse of Tank 2001 and determined that in such a scenario, there was "a reasonable probability" that oil would enter the Channel. Tr. 295, 298; CX 14 at 11. Mr. Michaud used inputs from two different sources to simulate the event: He assessed the initial release of material using the "Roche Model"[37] and the subsequent overland flow using the Guo Model.[38] Tr. 296, 299-300, 328-29, 335, 378; CX 14 at 10. Mr. Michaud assumed that asphalt would be released in all directions, and he used information from Respondent to identify distances and determine the impact of topographic features, including the grading of the bulk asphalt storage area around Tank 2001. Tr. 298-99, 315-22, 328-29; CX 14 at 10. He also estimated average kinematic viscosity of the material during the overland flow phase using viscosity-temperature relationships provided by the U.S. Federal Highway Administration.[39] Tr. 300, 386-87; CX 14 at 10.

Under Roche, Mr. Michaud first "estimated that the initial 'splash' phase would occur in a period of less than a minute and would result in a spread of material of approximately 176 feet from the edge of [Tank 2001] in all directions." Tr. 299-300; CX 14 at 10, 16. This led to the conclusion "that the leading edge of the initial release could reach and overtop the curb at the southern site boundary." Tr. 337-38; CX 14 at 11, 16. In making this determination, Mr. Michaud accounted for the manmade depressions and upward sloping topography between the tank and the high point of the curb at the southern site boundary. Tr. 332-34, 336, 344-47, 354-360, 373-75; CX 14 at 16; CX 17 at 22. Due to the predominant forces of gravity and

[37] This model is based on empirical results published in a paper by Olivier Roche. Olivier Roche et al., *Experimental observations of water-like behavior of initially fluidized dam break granular flows and their relevance for the propagation of ash-rich pyroclastic flows*, J. GEOPHYSICAL RES., Dec. 10, 2008 at 1, 1-15; *see* CX 14 at 10.

[38] Mr. Michaud has subsequently used this methodology to determine FRP applicability in other cases. Tr. 352-53.

[39] CX 14 at 10 (citing U.S. DEP'T TRANSP. FED. HIGHWAY ADMIN., FHWA-HRT-10-035, LTPP COMPUTED PARAMETER: DYNAMIC MODULUS (2011)).

momentum, viscosity plays a less significant role during this phase, which "is all taking place within maybe a minute or two minutes." Tr. 347-48, 360-61. Mr. Michaud then used the initial spread predicted by Roche as a "splash radius" to inform the Guo Model, and assuming that half of the material that overtopped the curb would continue to flow toward the Channel due to momentum from the initial collapse, Mr. Michaud then determined the spill would travel another 230 feet beyond the curb, or more than 400 feet from the edge of Tank 2001. Tr. 299-300, 301, 302-03, 335, 349-351; CX 14 at 11, 12, 17, 19. By that point, the material would travel down the slope and enter the Channel, which is roughly 360 to 380 feet from the tank.[40] Tr. 303, 334, 341; CX 14 at 11, 12, 17, 19.

I am more persuaded by the Agency's spill prediction than I am Respondent's, because Mr. Michaud provided a more sophisticated analysis that more fully accounts for the forces at work during a catastrophic tank failure. Specifically, Mr. Michaud recognized that different stages of such an event – the collapse of the tank followed by the spread of its contents – require different analytical approaches. Conversely, Respondent modeled a catastrophic collapse of Tank 2001 using *only* the Guo Model. Tr. 302. That is, Respondent's use of the Guo Model subsumed the initial splash phase of the collapse in addition to the subsequent sheet flow of oil across the ground. Tr. 302. That was inappropriate, Mr. Michaud testified, "because . . . [Guo is] a sheet flow model, and column collapse is not sheet flow." Tr. 302. The Guo Model requires someone applying the model to assume what the splash radius would be and does not provide any guidance on how to calculate it, Mr. Michaud noted. Tr. 322. On the other hand, the Roche Model was established to evaluate how viscous material would react and what type of wave would develop if its containment was suddenly removed and its initial viscosity was modified in some way. Tr. 323-25. This allowed Mr. Michaud to model the initial wave that would result from a collapsing column of fluid of the same volume, height, and shape as is contained in Tank 2001. Tr. 323-25; CX 14 at 16. As time passes, the shape of the column and resulting wave change as the fluid is propelled downward and outward by gravity, momentum, and shifting viscosity. Tr. 326-27; CX 14 at 16. As the fluid height in the initial footprint of the tank reaches the same height of the leading wave, it aligns with the starting point for the Guo Model, Mr. Michaud testified, which he then used to predict the outward spread of that wave. Tr. 326-27, 329; CX 14 at 16.

Similarly, I find Mr. Michaud a more credible witness on this issue than I do Ms. Casey, who was the primary author of the Substantial Harm Report and who ran the Guo Model for Respondent. Tr. 452, 481, 563. Mr. Michaud has conducted FRP applicability reviews for the

---

[40] According to Mr. Michaud, the collapse of Tank 2001 might anecdotally resemble the Great Molasses Flood that occurred in Boston in 1919. Tr. 293. In that incident, he said, a 50-foot-tall two million-gallon tank of molasses at about 40 degrees ruptured and collapsed, sending a 25-foot wave of molasses through the surrounding neighborhood at 35 miles per hour. The spill killed 21 people and injured 150 more. Tr. 293-94. "[I]t's a really good way to illustrate . . . the somewhat complicated questions around what happens . . . when the containment structure around viscous fluid fails," he testified. Tr. 294.

Agency on at least four other occasions, while Ms. Casey's work for Respondent was her first FRP experience. Tr. 280-81, 496, 501. Additionally, Mr. Michaud is a Professional Engineer who has employed the underlying technical and mathematical calculations necessary to make FRP applicability determinations "hundreds" of times over the course of a 34-year career. Tr. 262, 279-281. Ms. Casey is not an engineer. Tr. 489. As indicated below, she also made a relatively basic math error when calculating the Facility's planning distance. Although this miscalculation was unrelated to her modeling of a potential spill, it raises questions about the overall reliability of her application of the Guo Model, which also entails significant mathematical calculations. Moreover, the Professional Engineer who helped Ms. Casey prepare the Substantial Harm Report, Mr. DeLano, had never used the Guo model, nor does he consider himself familiar with the Guo model. Tr. 562. To that extent, it seems evident that Mr. Michaud's greater technical expertise and experience allowed him to make a more nuanced assessment than Ms. Casey of what a tank collapse at the Facility would look like.

Respondent argues that Ms. Casey's modeling was adequate because it was based on the Guo Model and that Mr. Michaud's modeling was biased and unreliable. RB at 34-36; RRB at 17-19. However, as stated above, I found Mr. Michaud's effort more reliable because it considered a greater number of variables with respect to the initial splash or column collapse phase of a tank failure. By relying only on Guo, Ms. Casey could only assume what the splash radius would be because that model does not provide guidance on how to make that calculation. Additionally, I detected no bias in Mr. Michaud's testimony. To the extent Respondent bases its bias claim on the fact the Agency paid him for his work, there is no evidence this affected his conclusions. Notably, Respondent paid Ms. Casey for her opinions on these same issues, which under Respondent's argument would make her equally susceptible to claims of bias.

Consequently, I find that under the FRP regulations, portions of a worst-case discharge at the Facility would enter the Channel because the point of discharge is located some 200 feet from the Channel. Additionally, even if the regulations did not presume that a discharge within one half mile of a navigable water would automatically enter the water, there is sufficient modeling evidence in the record to demonstrate that portions of a worst-case discharge from the Facility would in fact reach the Channel.

Because the record shows that a spill at the Facility will enter the Channel, Respondent must calculate a D3 planning distance. Ms. Casey attempted to calculate D3 for Respondent and came up with a planning distance of 2.53 miles. CX 23 at 34. However, as Mr. Michaud testified, this calculation was incorrect. Tr. 282-84; CX 18 at 83; CX 55 at 6-7. Mr. Michaud determined that Respondent appeared to use the right inputs for each variable but erred by not applying the standard order for mathematic operations when solving Chezy-Manning's velocity equation. That is, Respondent should have completed exponential calculations before multiplying and dividing. Tr. 283-84; CX 18 at 83; CX 23 at 34; CX 55 at 6. For this reason, I reject Respondent's D3 calculation and adopt Mr. Michaud's calculation instead. Mr. Michaud used the formula provided in the regulations for moving navigable water, $d = v \times t \times c$, where d equals the distance downstream from the Facility within which fish and wildlife and sensitive environments could be injured; v equals the velocity of the Channel; and t equals the substantial harm planning time interval specified in the regulations for the Channel's water body type. Tr. 272-78, 282; CX 55 at 5-6; *see also* 40 C.F.R. pt. 112, app. C, attachment C-III, § 2.1. Mr. Michaud determined the Channel's velocity using Chezy-Manning's equation, $v = 1.5/n \times r^{2/3} \times s^{1/2}$, where v equals the velocity of the Channel; n equals Manning's Roughness Coefficient; r equals the hydraulic radius of the Channel; and s equals the average slope of the Channel. Tr. 269-270, 272-74; CX 55 at 5; *see also* 40 C.F.R. pt. 112, app. C, attachment C-III, § 2.2. After completing these calculations, Mr. Michaud determined the D3 planning distance for the Facility was at least 22.4 miles. Tr. 281-82; CX 55 at 6.

Additionally, in this case, it is apparent even without a D3 calculation that a discharge could cause immediate injury when it reaches the Channel, because according to the applicable ACP, *the Channel itself* is a fish and wildlife and sensitive environment. *See* 40 C.F.R. § 112.20(f)(1)(ii)(B); pt. 112, app. C, § 2.3; Tr. 61-63 (Mr. Swackhammer testifying that the ACP is the Agency's primary source of information for the identification of fish and wildlife and sensitive environmental areas). Specifically, the Facility and the Channel are located in GRA 8 within ACP 2, which the U.S. Coast Guard developed for the San Francisco Bay and Delta region. Tr. 18-20, 22-23; CX 33 at 1, 4; RX 83 at 1-2. There are numerous environmentally sensitive sites within GRA 8 of ACP 2. Tr. 21-22; RX 83. The Channel is one such site, and the full length of the Channel from the Port of Sacramento to its mouth on Cache Slough is listed as Site 2-859 in the ACP. Tr. 22-23, 36; CX 2 at 1; RX 83 at 1-2, 56-57. A site summary in the ACP describes the Channel as having emergent marsh along its entire length, with occasional shrub-scrub. The marsh is listed as a "seasonal and special resource concern," and marshy areas are designated as having "high priority at all times." Tr. 24-25; CX 2 at 1; RX 83 at 56-57. There are also a large variety of water birds; suitable habitat for beaver, muskrat, amphibians and other semi-aquatic creatures; and salmon and other migratory fish concentrate in the Channel during migratory periods. The ACP identifies all of these as resources "of primary concern." Tr. 24-25; CX 2 at 1; RX 83 at 56-57. Mr. Michaud also concluded that because the Channel is itself a fish and wildlife and sensitive environment, it could be injured as soon as a spill reaches the water. Tr. 306-07; CX 14 at 9. For FRP applicability purposes, D3 could be treated as any distance greater than zero, he observed, because if oil "moves into that body of water by one inch," it will have injured the Channel just as if oil penetrated it to a distance of two or 20 miles. CX 14 at 9, 12; Tr. 306-07, 314. "Once I determined that it was within half a mile of [the Channel], that was the end of my calculation for the purposes of determining [FRP] applicability," Mr. Michaud testified. Tr. 371. Consequently, from the moment a spill enters the Channel, it could cause injury to fish and wildlife and sensitive environments.

Respondent argues that the Agency did not show that the Facility is located in GRA 8 of ACP 2 because some of its witnesses were unable to identify the Facility on a map presented at hearing. RB at 30-33. This argument is unavailing because the actual location of the Facility is undisputed, and the record demonstrates that this location is encompassed by GRA 8 of ACP 2. *See* Tr. 18-20, 22-23; CX 33 at 1, 4; RX 83 at 1-2. Similarly, Respondent seems to suggest that only a portion of the Channel includes fish and wildlife and sensitive environments and that that portion is not near the Facility. RB at 33 n.28. Again, this ignores the evidence in the record directly stating that the full length of the Channel "from the Port of Sacramento to its mouth on Cache Slough" is listed as Site 2-859 in the ACP. *See* Tr. 22-23, 36; CX 2 at 1; RX 83 at 1-2, 56-57.

Finally, Respondent contends that "it must be established that the discharge would be likely to cause injury to fish and wildlife and sensitive environments" and that the Agency did not prove "injury" at hearing. RB at 33-34; *see also* RRB at 15-16. But this argument must also be rejected, because Respondent misstates or misunderstands the law. Under criterion (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 criterion (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), 112.20(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 Respondent'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"). To conclude otherwise would, as the Agency notes, undermine the intent of the OPA "that there should be *no* discharges of oil or hazardous substances into or upon the navigable waters of the United States." 33 U.S.C. § 1321(b)(1) (emphasis added).

Because the Facility stores more than 1 million gallons of oil and is located at a distance from the Channel such that a discharge could cause injury to fish and wildlife and sensitive environments, it could reasonably be expected to cause substantial harm to the environment. *See* 40 C.F.R. §§ 112.20(a), 112.20(f)(1)(ii)(B). Accordingly, Respondent was required to prepare and submit an FRP and response plan cover sheet to the Agency on March 21, 2012, when Tank 2001 entered service. An FRP must "follow the format of the model facility-specific response plan included in appendix F to [Part 112]" unless "an equivalent response plan" is prepared that is "acceptable to the Regional Administrator to meet State or other Federal requirements." *Id*. § 112.20(h). In this case, Respondent's purported FRPs, draft or otherwise, did not follow the format of Appendix F to Part 112 or fully contain each element of 40 C.F.R. § 112.20(h), and there is no evidence that the Regional Administrator found the plans to be an acceptable equivalent.

Respondent's first attempt at an FRP was the 2014 Consolidated Plan, which does not "follow the format of the model facility-specific response plan included in appendix F to [Part

112]" and contains only some of the FRP elements discussed in section 112.20(h). *See* Tr. 176, 451, 454, 459; CX 17. For example, the section on "Facility Drills/Exercises," which appears intended to comply with 40 C.F.R. § 112.20(h)(8), is described as "under development." *See* CX 17 at 57-58. Respondent's next attempts also fell short. The January 2017 FRP contains several deficiencies that Ms. Witul documented in her January 2017 FRP Checklist: First, although there is a log form for equipment testing and deployment, there is "no schedule in the plan for that testing and deployment to actually happen." Tr. 193; CX 12 at 3; *see also* 40 C.F.R. § 112.20(h)(1), app. F, § 1.1. Second, although there is a list of equipment for responding to a spill, the list includes few details as to the size, quantity, or age of the equipment. Tr. 193-94; CX 12 at 6; *see also* 40 C.F.R. § 112.20(h)(1) and (3), app. F, § 1.3. Third, there are no training dates shown for Facility personnel to demonstrate that any training had taken place, there is no indication of what the response time would be for the selected response contractor, and there is no information about the Facility's response team. Tr. 194; CX 12 at 8; *see also* 40 C.F.R. § 112.20(h)(1), (3), app. F § 1.3. Finally, the May 2017 FRP takes into account some of the shortcomings of the January 2017 FRP, but still does not comply with the regulations. Jt. Stips., ¶ 31; Tr. 197-98, 460-61, 476-77; CX 20; RX 23 at 78. Ms. Witul recorded the deficiencies of the May 2017 FRP in her September 2017 FRP Checklist. Tr. 198-99, 201, 226-27, 245; CX 24. Among the violations she noted were lack of documentation of an executed contract with an oil spill response organization; lack of documentation of completed required drills and exercises; and lack of documentation of required training of facility personnel.[41] Tr. 199-200; CX 24 at 2-3, 7, 23.

Consequently, I find that despite being required to prepare and submit an FRP since March 21, 2012, Respondent failed to do so in violation of 40 C.F.R. § 112.20(a)(2). This violation continued for the 1,825 days that preceded the filing of the Complaint.

VI. PENALTY

The Agency may assess a civil administrative penalty against any owner, operator, or person in charge of any onshore facility who fails or refuses to comply with any regulation issued under the OPA.[42] 33 U.S.C. § 1321(b)(6)(A). Where a violation has occurred, this

---

[41] Ms. Witul also concluded that Respondent is subject to the FRP requirement because it stores more than 1 million gallons of oil and, based on its observed distance from the Channel and information in the ACP and National Oceanic and Atmospheric Administration documents, a spill at the Facility could cause injury to fish, wildlife, and sensitive environmental areas. Tr. 155-56.

[42] The OPA originally authorized penalties of up to $10,000 per day for each day during which the violation continues and a maximum penalty amount per violation that shall not exceed $125,000. 33 U.S.C. 1321(b)(6)(B)(ii). These statutory maximum penalty levels have been increased over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890, codified as amended by the Debt Collection Improvement Act of

Tribunal "shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the [OPA]" and "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the [OPA]." 40 C.F.R. § 22.27(b). The OPA sets forth penalty criteria that require me 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). "As is evident from the foregoing language, these terms prescribe no precise formula by which these factors must be computed." *Pepperell Assocs.*, 9 E.A.D. at 107, 2000 WL 576426, at *20. *See also Tull v. United States*, 481 U.S. 412, 426-27 (1987) ("highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the [CWA]").

Further, although I "shall consider any civil penalty guidelines issued under the [OPA]," the only guidance the Agency has issued pertaining to the specific violations in this case is oriented more toward settlement negotiations than to litigation. 40 C.F.R. § 22.27(b); CX 40 at 3 (Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (Aug. 1998)) ("Sections 311(b)(3) and 311(j) Policy") ("This civil penalty policy is provided for the use of EPA litigation teams in establishing appropriate penalties in settlement of civil administrative [actions] . . . and it does not bind judges or presiding officers in their assessments of penalties."). Consequently, "it is appropriate . . . to analyze directly each of the statutory factors."[43] *Henry Stevenson & Parkwood Land Co.*, 16 E.A.D. 151, 169, 2013 WL 5793370, at

---

1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 at 28 U.S.C. § 2461. Accordingly, the Agency may assess statutory penalties in this case of up to $16,000 per day or $177,500-187,500 in total for violations that occurred before November 2, 2015, and $19,277 per day or $240,960 in total for violations that occurred after November 2, 2015. *See* 40 C.F.R. § 19.4 & Tables 1-2.

[43] The EAB "generally disfavors the use of settlement guidelines outside the settlement context." *Stevenson*, 16 E.A.D. at 169, 2013 WL 5793370, at *16. "Penalty policies that are intended solely for settlement can be consulted for their 'instructive value' in determining how to assess a penalty under the relevant statutory factors." *Id.* (citing *Mountain Vill. Parks, Inc.*, 15 E.A.D. 790, 795, 2013 WL 789026, at *4 (EAB 2013)). "For example, . . . the presiding officer could consult the penalty policy to determine what dates should be considered when calculating economic benefit, or what types of harm to consider when determining the nature, circumstances, extent, and gravity of the violation." *Id.*

*15 (EAB 2013) (citing *Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 395, 2004 WL 1059751, at *13 (EAB 2004)). This analysis may be guided by broader Agency penalty policies, including EPA General Enforcement Policy # GM-21, Policy on Civil Penalties (Feb. 16, 1984) ("General Policy") and EPA General Enforcement Policy # GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (Feb. 16, 1984) ("Penalty Framework"). *Stevenson*, 16 E.A.D. at 169, 2013 WL 5793370, at *15 (citing *Smith Farm Enters., LLC,* 15 E.A.D. 222, 282, 2011 WL 946993, at *48 (EAB 2011)). *See also* CX 39. These policies set forth "[a]n outline of the general process of the assessment of penalties."[44] CX 39 at 2; General Policy at 1. Specifically, the policies direct that a "preliminary deterrence figure" be calculated based on two factors: the economic benefit a respondent received by violating the law and a gravity component that reflects the seriousness of the violation. The preliminary deterrence figure may then be increased or decreased based on other applicable statutory factors. CX 39 at 4-6, 14-16; General Policy at 3-5; Penalty Framework at 2-4.

Notably, I am not required to follow any of these policies or to impose the Agency's recommended penalty. Rather, I am authorized to depart from the Agency's recommendation with explanation, and ultimately, I am constrained only by the statutory penalty criteria and caps limiting the size of the assessible penalty. *See John A. Biewer Co. of Toledo*, 15 E.A.D. 772, 780-81, 2013 WL 686378, at *7 (EAB 2013); *U. S. Army*, 11 E.A.D. 126, 137, 170, 2003 WL 21500416, at *33 (EAB 2003); *M.A. Bruder & Sons, Inc*., 10 E.A.D. 598, 610, 2002 WL 1493844, at *8 (EAB 2002). If the assessed penalty differs from the penalty proposed by the Agency, I must "set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

In this case, the Agency calculated a total penalty of $257,154. CX 48 at 17. However, the Agency seeks an actual penalty of $230,958, which was the total statutory maximum for a single violation available at the time the Complaint was filed. AB at 32; CX 48 at 10-23. Ms. Witul – with input and oversight from other Agency personnel – calculated the Agency's penalty using the Sections 311(b)(3) and 311(j) Policy, which is based on the statutory factors, the General Policy, and the Penalty Framework. CX 39; CX 40; CX 48 at 12; Tr. 201-08, 228-241, 246.

I rely on the statutory factors to complete my penalty assessment below. My analysis will be constructed around a preliminary deterrence figure as referred to in the General Policy and Penalty Framework, and I refer to the Sections 311(b)(3) and 311(j) Policy to the extent that

---

[44] The General Policy is available online at https://www.epa.gov/enforcement/policy-civil-penalties-epa-general-enforcement-policy-gm-21. The Penalty Framework is available online at https://www.epa.gov/enforcement/framework-statute-specific-approaches-penalty-assessments-implementing-epas-policy-civil.

its application is central to the parties' arguments or circumstances of this case. Accordingly, I begin by addressing the economic benefit Respondent received from violating the law. I then determine the seriousness of Respondent's violations. Finally, I use the remaining statutory factors to adjust my preliminary calculation.

a. Economic Benefit

It is appropriate to first consider "the economic benefit to the violator, if any, resulting from the violation." 33 U.S.C. § 1321(b)(8). Recovering a violator's economic benefit that it received by not complying with environmental laws "is a critical component of the Agency's civil penalty program." *San Pedro Forklift, Inc.*, 15 E.A.D. 838, 879, 2013 WL 1784788, at *34 (citing *B.J. Carney Indus.*, 7 E.A.D. 171, 207, 1997 WL 323716, at **26-27 (EAB 1997), *appeal dismissed as moot*, 200 F.3d 1222 (9th Cir. 2000)); *see also* General Policy at 3 ("[I]t is Agency policy that penalties generally should, <u>at a minimum</u>, remove any significant economic benefits resulting from failing to comply with the law"); *accord* Penalty Framework at 6; CX 39 at 4, 18. Generally, economic benefit is calculated as a measure of the benefit from "delayed costs," "avoided costs," or "competitive advantage" gained through noncompliance. *San Pedro Forklift*, 15 E.A.D. at 879, 2013 WL 1784788, at *34 (quoting *Britton Construction Co.*, 8 E.A.D. 261, 287, 1999 WL 362870, at *19 (EAB 1999); *see also* Penalty Framework at 6-11; CX 39 at 18-23. This calculation does not need to be complete or precise: a "reasonable approximation" is enough. *See United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), cert. denied, 531 U.S. 813 (2000); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 575-76 (5th Cir. 1996); *Pub. Interest Research Grp. N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990); *B.J. Carney*, 7 E.A.D. at 217-19, 1997 WL 323716, at *34. But "wholly unsubstantiated guesswork or broad, conclusory statements lacking any reasonable foundation" do not demonstrate economic benefit. *B.J. Carney*, 7 E.A.D. at 218, 1997 WL 323716, at *34. The Agency "must provide, on the record, a reasoned explanation of how the 'reasonable approximation' of economic benefit was derived." *Id.*

The Agency proposes that Respondent's economic benefit from delayed and avoided compliance is $28,159. Tr. 233-34; CX 48 at 17; AB at 43-44. The Agency bases this amount on Respondent's failure to develop an FRP between the inspection of November 2012 and completion of the May 2017 FRP.[45] Tr. 207; CX 48 at 16; AB at 43. The Agency did not obtain the actual costs that Respondent incurred during this time period. Rather, the Agency estimated that Respondent would spend nearly $443 in capital expenses and $18,009 in one-time expenses to prepare an FRP, plus year-to-year recurring costs of $7,193. Tr. 207; CX 48 at 17. The Agency obtained these dollar amounts from its estimates of what it costs regulated entities to comply with FRP regulations, as set forth in a draft version of its 2018 Renewal of Information Collection Request (ICR) for the Implementation of the Oil Pollution Act Facility Response Plan

[45] The Agency did not calculate and does not seek an economic benefit-based penalty for Respondent's SPCC violations. *See* AB at 43-44; CX 48 at 16-17; Tr. 246.

Requirements (40 CFR Part 112) ("ICR").[46] Tr. 85-88, 207, 241; CX 46 at 23-24; CX 47; CX 48 at 16-17; AB at 42. The Agency then input these figures into its BEN financial model to calculate Respondent's delayed costs of preparing and submitting an FRP.[47] Tr. 233-39; CX 48 at 16-18; AB at 43.

Respondent contends that it should not pay anything more than a "de minimis" penalty for its FRP violation. However, Respondent does not specifically contest the Agency's economic benefit calculation or the data upon which it rests. RB at 40-41; RRB at 24-25.

In this case, where Respondent has not provided the Agency with information related to its economic benefit and where Respondent does not dispute the Agency's calculation of this penalty component, I find that the Agency's use of ICR data provides a sufficient basis to form a "reasonable approximation" of the economic benefit that Respondent derived. However, I am not persuaded by the Agency's use of the BEN model to complete that calculation. The Agency provided minimal explanation of the model and the calculations that it performed. At the very least, the Agency should have elicited testimony from Ms. Witul describing her understanding of the computations that were executed using the numbers that she input. The EAB has suggested that simply submitting the results of a BEN calculation is an inadequate showing at this stage of litigation, noting that "BEN is intended to be used for settlement purposes only; it is not intended for use at administrative hearings, where it is anticipated that other evidence, such as expert testimony, will be produced to establish an economic benefit from noncompliance." *B.J. Carney Indus.*, 7 E.A.D. at 209 n.46, 1997 WL 323716, at *28 n.46 (citing BEN User's Manual at 1-2). In this respect, the Agency's economic benefit calculation falls short.

Nevertheless, the record provides grounds for a reasonable approximation of Respondent's economic benefit that exceeds the $28,159 that the Agency seeks. At a minimum, because Respondent did not have a compliant FRP between November 2012 and May 2017, Respondent did not pay yearly recurring costs to maintain an FRP. The ICR estimates that this would have equaled $7,193 per year, which when calculated on an average monthly basis adds up to $32,967 for the 55 months included in this time period. These recurring FRP maintenance expenses that Respondent avoided, such as training, drills, or a contract with an oil spill response organization, are in addition to any savings Respondent realized by delaying the initial costs of

---

[46] The Agency states that it spent most of 2018 updating its ICR from 2011, issuing a final version in December 2018. For its economic benefit calculation, the Agency relied on cost estimates from the *proposed* ICR. However, it notes that those cost estimates were less than estimates published later in the final 2018 ICR and previously in the 2011 ICR. Therefore, the Agency observes, of the three ICR sources, it was the least prejudicial to Respondent. RB at 42 n.15.

[47] BEN is a computer model that the Agency developed to assist it in calculating the economic benefit of noncompliance. *B.J. Carney Indus.*, 7 E.A.D. at 209 n.46, 1997 WL 323716, at *28 n.46.

preparing an FRP for the first time. *See* Tr. 235-36. Moreover, at hearing, Mr. Tilford testified that Respondent's actual compliance expenses with respect to preparing an FRP were substantially higher than the estimates the Agency used, noting that Respondent spent more than $20,000 on consultant fees alone. Tr. 411, 433. It therefore follows that Respondent saved a greater amount in delayed or avoided costs than the Agency estimated. Further, as noted above, the Agency has not sought to recover any economic benefit related to Respondent's SPCC violations. Presumably, the Agency could have shown that Respondent had significant delayed costs there as well.[48]

Consequently, I find there is sufficient evidence in the record to assess an economic benefit-based penalty of $28,159.

b. Seriousness of the violations

I next "consider the seriousness of the . . . violations." 33 U.S.C. § 1321(b)(8). Here, the Penalty Framework is instructive in that it suggests factors for quantifying the seriousness of a violation "based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation." *See* Penalty Framework at 14; CX 39 at 26. How serious a given type of violation might be depends on whether a respondent's activity resulted or was likely to result in a discharge; importance of the requirement to the regulatory scheme; and, for record-keeping violations, the availability of data from other sources. Penalty Framework at 14-15; CX 39 at 26-27. Within a given category of violations, it is possible to assess seriousness based on the amount of pollutant involved; toxicity of the pollutant; sensitivity of the environment; and length of time that the violation continued. Penalty Framework at 15; CX 39 at 27. *See also San Pedro Forklift*, 15 E.A.D. at 880, 2013 WL 1784788, at *34 (applying Penalty Framework factors to violations of Section 404 of the CWA).

The Agency proposes two different calculations based on the seriousness of Respondent's violations: a combined assessment for Respondent's SPCC violations alleged in counts one through four, and a separate assessment for Respondent's FRP violation under count five.

---

[48] For example, in connection with Respondent's SPCC violations, Mr. Fletcher testified that Respondent paid him $10,000 to $15,000 for the Fletcher Report. Tr. 644. Each of Respondent's formal external tank inspections likely cost $2,000, and each of Respondent's formal internal tank inspections probably cost $3,000 to $4,000, Mr. Fletcher added. Tr. 644-45. Mr. Tilford also noted that Respondent probably spent "20-some-thousand-dollars" on tank inspections starting in 2016. Tr. 432-33. These are all expenses that Respondent should have incurred several years earlier.

i. Seriousness of SPCC violations

With respect to the SPCC violations, the Agency values their seriousness at $76,050.[49] CX 48 at 14-15. As grounds for this calculation, the Agency cites Respondent's size and extent of deviation from the regulatory requirements. CX 48 at 14; AB at 37. In particular, the Agency notes that the Facility stores more than 4.6 million gallons of oil but has maintained an inadequate or incomplete SPCC Plan since at least 2012. CX 48 at 14; AB at 37-38. The Agency further highlights Respondent's failure to enact a proper tank integrity inspection program in this context, "leading to the conclusion that the cumulative violations would have a significant impact on the ability to respond to or prevent a discharge." CX 48 at 14; AB at 37. The Agency additionally observes that the Channel is a "sensitive environment" that would be impacted in the event of a discharge and that Respondent's violations have continued for at least five years. CX 48 at 14-15; AB at 37-38. According to these assessments, Ms. Witul used the Sections 311(b)(3) and 311(j) Policy to set a base penalty of $45,000. Tr. 229-231; CX 40 at 9; CX 48 at 14. This was premised on the Facility's size and her apparent conclusion that under the Sections 311(b)(3) and 311(j) Policy the violations reached a level of "moderate noncompliance," because they "have a significant impact on the ability of the respondent to prevent or respond to worst case spills through the development and implementation of a plan." Tr. 230-31; CX 40 at 10; CX 48 at 14. She then increased the base amount by 30 percent because of the Facility's proximity to the environmentally sensitive Channel and by another 30 percent because the violations exceeded the five-year statute of limitations. Tr. 231; CX 40 at 11-12; CX 48 at 14-15.

Respondent contends the Agency has not made a supportable claim for a base penalty of $45,000, because it has not asserted that any actual harm occurred or was likely to occur due to the SPCC violations. RB at 38. Further, Respondent argues, the Agency has not alleged that any of the tanks not included in the SPCC plans were at any risk of discharge or lacking in structural integrity. RB at 38. Instead, Respondent declares, the Agency has merely alleged that its "paperwork" is inadequate without establishing the likelihood of any discharge because of this inadequacy. RB at 38. Conversely, Respondent contends, Mr. Fletcher testified that testing and inspections have in fact occurred at the Facility, and Mr. Tilford testified that personnel at the facility were trained to respond to spills. RB at 38-39 (citing Tr. 430, 625-29). Without demonstrating that Respondent's violations had a significant impact on Respondent's ability to respond to or prevent a discharge, the Agency cannot characterize its noncompliance as "moderate," Respondent asserts. RB at 39. Further, Respondent adds, the penalty is disproportionate given that a facility of Respondent's size in "major noncompliance" must be assessed a base seriousness penalty of "not less than $50,000." RB at 39; CX 40 at 9. With respect to enhancing the penalty based on a discharge into the Channel, Respondent avers that it "does not dispute the sensitivity of the environment" but nevertheless proclaims an increase is

[49] The Agency proposed a total "gravity" calculation for the SPCC violations of $98,865. This includes an additional $22,815 based on Respondent's culpability. However, in this Initial Decision culpability is addressed as a separate statutory factor.

not warranted, because the Agency has assumed without demonstrating that a worst-case discharge would cause a major environmental impact. RB at 39-40. Similarly, Respondent argues that the Agency cannot support a 30 percent penalty increase based on the length of time its SPCC Plans were deficient, because it has not alleged that any harm flows from these deficiencies. RB at 40.

As a starting point, I note that the seriousness of Respondent's SPCC violations and corresponding penalty amount must be based on the following allegations for which it has been found liable: Under Count I, Respondent did not prepare and submit an SPCC Plan in accordance with the applicable sections of Part 112 between February 13, 2013 and May 1, 2017. Under Count III, Respondent twice failed to timely amend its SPCC Plan after installing Tank 2001 and Tank 2002, and it failed to make the amendments for a total of at least 898 days (between February 2013 and October 2014 for Tank 2001, and between July 2016 and May 2017 for Tank 2002). Under Count IV, Respondent did not conduct inspections or tests in accordance with the written procedures that it developed and did not keep a sufficient record of inspections and tests, signed by the appropriate supervisor or inspector, with its applicable SPCC Plan for at least three years, from January 1, 2015 until January 1, 2018.

In keeping with the Agency's approach, I will treat these multiple violations as one, overarching failure to fully prepare and implement an SPCC Plan in accordance with the requirements of Part 112. And this is a failure of significant magnitude: "The purpose of an SPCC Plan is to form a *comprehensive* Federal/State spill prevention program that minimizes the potential for discharges. The SPCC Plan must address *all* relevant spill prevention, control, and countermeasures necessary at the specific facility." 40 C.F.R. § 112.1(e) (emphasis added). Respondent could not possibly satisfy the primary purpose of this regulation because, during the aforementioned time periods, it lacked a comprehensive SPCC Plan and failed to fulfill many of its central requirements over several years. In evaluating the seriousness of noncompliance with SPCC regulations, the EAB has observed their importance: "[t]he SPCC guidelines place great emphasis upon on the need to prepare 'carefully thought-out' and complete SPCC Plans that detail procedures, methods, and equipment necessary to prevent and contain oil spills." *Indus. Chems. Corp.*, 10 E.A.D. 241, 259, 2002 WL 102373, at *16 (EAB, 2002). "If anything, the SPCC guidelines' emphasis on thorough and detailed SPCC Plans suggests that the plans themselves play a key role in ensuring a disciplined and well-considered approach to spill prevention, containment, and preparedness." *Id.* Even Respondent's witness, Mr. DeLano, agreed that the format for the SPCC Plan as prescribed by the regulations is important for responders and others who need to review the information quickly. Tr. 554-55.

By coming up short in its various SPCC obligations, Respondent 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. It does not matter that there was no significant spill during Respondent's periods of noncompliance.[50] Further, the areas of Respondent's

[50] There were, however, minor spills of latex and diesel in quantities of "a few gallons . . . here

deficiencies also reveal the risk of harm inherent in the violations. For example, when Respondent did not amend its SPCC Plan to reflect the installation of Tanks 2001 and 2002, Respondent entirely failed to account for the addition of nearly 5 million gallons of oil to its above-ground storage capacity.[51] In essence, for multiple years the bulk of the oil that Respondent was storing at the Facility after 2012 was unaccounted for in the effort that Respondent was supposed to be making to prevent and contain spills. This is a critical failing on Respondent's part because it increases the potential for harm from a significant discharge. Similarly, by not conducting and keeping records of tank inspections, particularly formal inspections that required certified inspectors, Respondent ignored important preventive measures designed to mitigate the potential that a harmful spill would occur. Given the age of Respondent's tanks, it was imperative that Respondent maintain a robust and accurate inspection program. The fact that Respondent ultimately had to remove or replace many of its tanks after implementing Mr. Fletcher's recommendations demonstrates their intrinsic fallibility and consequently the importance of regular inspections to prevent tank failures. Therefore, there is a high risk of harm inherent in Respondent's violations.

In light of the discussion above, I find a $45,000 base penalty to be an appropriate amount, even in recognition that the Agency's calculation presumed Respondent to also be liable for the violation in Count II. Whatever mitigation that a Professional Engineer's certification might have provided in other circumstances, there is none to be had here. Although the Condor Plan was certified, the certification did not address Respondent's addition of Tanks 2001 and 2002, nor did it acknowledge the lack of tank integrity testing at the Facility. On that same note, I reject Respondent's contention that the Agency had to show some further actual harm or that the tanks not included in an SPCC plan were at a higher risk of failure. The harm of Respondent being significantly noncompliant with the SPCC regulations is present in the very nature of the violations. *See Indus. Chems. Corp.*, 10 E.A.D. at 259, 2002 WL 102373, at *16 (imposition of substantial gravity penalty based on company's failure to prepare a complete SPCC Plan is consistent with emphasis on the *preparation* of SPCC Plans as an important, independent factor in assessing penalties for SPCC violations). Similarly, whatever testing and inspections were conducted by Facility personnel would have been insufficient in formality and thoroughness relative to the applicable industry standards, and they cannot serve as a mitigating factor. The EAB has previously rejected the suggestion that a violation should be treated less seriously based on the performance of staff: "The SPCC planning process would be rendered superfluous if a facility could satisfy its obligations merely by demonstrating that it had competent or adequately trained staff. . . . [R]elying on the good judgment or skill of staff as an alternative to properly prepared plans would be inappropriate." *Id*.

---

and there." Tr. 429.

[51] Even though Respondent eventually amended its SPCC Plan to reflect the addition of these tanks, the company did not reliably document the date the tanks first went into operation. Such sloppy record keeping raises further questions about Respondent's ability to truly determine when the tanks should be inspected. This is a significant failing.

I also find the base penalty amount appropriate under the Sections 311(b)(3) and 311(j) Policy, which is instructive when formulating a specific quantification of the base seriousness of Respondent's conduct. The policy advises that for facilities that are in moderate noncompliance and storing more than one million gallons of oil, an appropriate base penalty ranges from $20,000 to $50,000. CX 40 at 9. Additionally, the policy specifically cites "inadequate or incomplete plan," "inadequate or incomplete implementation," and "failure to amend or implement amended plan after. . . any major facility change" as examples of different violation types that illustrate moderate noncompliance. CX 40 at 10. In this case, I have found Respondent liable for at least three different violations that merit an assessment of moderate noncompliance both because the violations "have a significant impact on the ability of the respondent to prevent or respond to worst case spills through the development and implementation of a plan" and also because they are the specific types of violations the Sections 311(b)(3) and 311(j) Policy cite as examples of moderate noncompliance. Further, the Facility stores nearly five times the minimum amount of oil that is the baseline of the policy's largest storage capacity penalty category. Although Respondent protests that $45,000 is disproportionate to the $50,000 penalty proposed for a facility in "major noncompliance" and storing more than one million gallons of oil, I do not find this complaint persuasive for several reasons: Respondent is liable for *multiple* moderate violations; the Facility's storage capacity is *five times* the baseline of the largest storage capacity considered under the Sections 311(b)(3) and 311(j) Policy; and a facility storing more than one million gallons of oil and in major noncompliance is to be penalized "*not less than* $50,000," i.e., $50,000 is the bare minimum suggested penalty. For three violations of moderate noncompliance at Respondent's Facility, which stores nearly five million gallons of oil, $45,000 is very reasonable.

In further evaluating the seriousness of Respondent's SPCC violations, it is also appropriate to consider the sensitivity of the environment. *See* Penalty Framework at 15; CX 39 at 27. The Agency proposes increasing the base seriousness penalty by 30 percent, or $13,500, to account for the environmental sensitivity of the Channel. CX 48 at 14-15; AB at 37-38. The Agency notes that under the Sections 311(b)(3) and 311(j) Policy, the presence of a sensitive environment creates the potential for "a major environmental impact from a worst-case discharge." AB at 38; *see also* CX 40 at 11; CX 48 at 15. According to the policy, a potential environmental impact is "major" when "[a] discharge would likely have a significant effect on human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife (especially endangered species), due to factors such as proximity to water or adequacy of containment." CX 40 at 11. Respondent does not dispute the Channel's sensitivity, but it suggests that Agency is speculating as to the level of impact that would result from a spill. RB at 40.

However, a 30 percent increase to the penalty to account for the sensitivity of the environment is appropriate. As previously established, the Channel is a sensitive environment, and it is located only a few hundred feet from Tanks 2001 and 2002. *See* Section V.f.iii., *supra*. A worst-case discharge would reach the Channel and travel at least 22 miles downstream. *Id.* Notably, the "sensitivity of the environment" factor "focuses on the location where the violation was committed." Penalty Framework at 15; CX 39 at 27. That is, the level of impact is not specifically related to how much oil might be discharged or how extensively a discharge penetrates the environment but to where the discharge occurs. To that end, Respondent's argument is misguided. The Agency does not have to show how much damage would be caused in the event of discharge. I also note that, in addition to proximity to a sensitive environment, it is necessary to consider "facility design and other features that serve to reduce environmental risk," particularly adequacy of containment. *Indus. Chems. Corp.*, 10 E.A.D. at 260, 2002 WL 102373, at *17 & n.18. Here, the adequacy of Respondent's secondary containment system is disputed, but there is evidence that it may not hold the volume of oil stored in Tanks 2001 or 2002. Additionally, the Agency has demonstrated through modeling that a spill would reach the Channel, so in this case the mere presence of Respondent's secondary containment system is not a basis for disregarding the sensitivity of the surrounding environment. Following this increase, the seriousness penalty factor for SPCC violations rises to $58,500.

For the length of time the violations continued, the Agency increased the seriousness factor another 30 percent, or $17,550, because "there have been at least some deficiencies in Respondent's SPCC plan or plan implementation for at least five years, or sixty months." AB at 38; CX 48 at 15. This is based on a 0.5 percent increase per month, as recommended by the Sections 311(b)(3) and 311(j) Policy. CX 40 at 12. Respondent argues that the Agency cannot support this increase because it has not alleged the violations resulted in any harm. RB at 40; RRB at 23. But as discussed above, the seriousness of Respondent's violations does not depend on actual harm, as equal weight is given to the potential for harm. And, as the EAB has observed, "[a] general rule of thumb is that 'the longer a violation continues uncorrected, the greater is the risk of harm.'" *San Pedro Forklift*, 15 E.A.D. at 881, 2013 WL 1784788, at *36 (quoting Penalty Framework at 15); CX 39 at 27. Further, although the Agency describes the duration of violation as 60 months, Respondent's liability for each SPCC violation persisted for more than 50 months under Count I; more than 29 months under Count III; and 36 months under Count IV. Each violation presents its own risk of harm, and each *could* be penalized accordingly. However, in view of the Agency's request and the Sections 311(b)(3) and 311(j) Policy's recommendation that this factor be capped at 30 percent, I accept the Agency's calculation, which raises the seriousness penalty for Respondent's SPCC violations to $76,050.

ii. Seriousness of FRP violation

Regarding Respondent's FRP violation under Count V, the Agency assesses its seriousness at $92,950.[52] CX 48 at 15-16. This calculation is based on Respondent's failure to implement an FRP after placing Tank 2001 into service in 2012 and its continued failure to operate with an FRP even after the Agency notified it of its obligation and after Tank 2002 entered service. AB at 40-41; CX 48 at 15-16. By not having an FRP, Respondent lacked "the additional spill prevention planning, improvements, drills and training required for larger

[52] Like the proposed SPCC penalty, the Agency proposed a total "gravity" penalty of $130,130 for Respondent's FRP violation that also includes a culpability calculation.

facilities with a proximity to water such as Respondent's facility," the Agency states. CX 48 at 15; AB at 40-41. The Agency contends that the cumulative risk of noncompliance with the FRP requirement is "moderate" under the Sections 311(b)(3) and 311(j) Policy, and given the size of the Facility, sets a base penalty of $55,000. AB at 41; CX 48 at 16. The Agency then twice multiplies this base amount by 30 percent based on the sensitivity of the environment and duration of offense, citing the same grounds as it did for its SPCC penalty. AB at 41; CX 48 at 16. These enhancements raise the proposed seriousness penalty to $92,950. In response, Respondent contends that it was not required to prepare and submit an FRP, and that even if it was, its failure merits only a "de minimis" penalty because it made good faith efforts to comply with Agency demands. RB at 40; RRB at 24-25.

Failing to prepare an FRP, or preparing an incomplete FRP, poses the same risks that come with not maintaining an adequate SPCC Plan. There is evidence that a worst-case discharge from Tank 2001 or 2002 will reach the Channel, and the harm that would cause would be magnified by Respondent's lack of a response plan. As Mr. Meer testified, FRPs are designed to ensure that a facility has "appropriate mechanisms in place to prevent discharges and releases, and also to describe the actions that they would take if such a discharge should occur that impacts surface waters." Tr. 17. The plans outline what a company might do to mitigate a discharge, which is important because in a typical spill scenario responding Agency personnel are working with the facility owners and their contractors to minimize the effect of the discharge. Tr. 17. Indeed, FRPs inform real-time decision making in such cases. Tr. 17. Additionally, not preparing an FRP harms the regulatory scheme because it negates the very purpose of requiring a response plan in the first place. Because they are based on characteristics specific to the facility for which they are prepared, FRPs are critical to successfully executing the national response system that Congress called for in the OPA. *See* 33 U.S.C. § 1321(j), (j)(5). A successful response, in turn, is a necessary component to carrying out OPA policy that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States" and the broader purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* §§ 1251(a), 1321(b)(1). Consequently, there is a serious risk of harm because of Respondent's failure to prepare and submit an FRP.

As indicated above, the Agency seeks $55,000 as a base seriousness penalty. The Agency asserts this is based on the size of the Facility and "moderate" noncompliance under the Sections 311(b)(3) and 311(j) Policy. *See* AB at 41; CX 48 at 16. However, for a facility storing more than one million gallons of oil in moderate noncompliance, the policy suggests a range of $20,000 to $50,000. CX 40 at 9. The Agency has not indicated why it is pursuing an additional $5,000 in its base penalty calculation, nor has it provided any specific grounds for doing so. Accordingly, I accept the Agency's assessment that Respondent's noncompliance on this point is "moderate," which under the Sections 311(b)(3) and 311(j) Policy includes FRP violations like Respondent's: those related to submission of inadequate plans; late submission of plans; failure to amend or update a plan reflecting major facility changes; inadequate, incomplete, or late implementation of a plan; or failure to develop and conduct a drill and exercise program. CX 40 at 11. However, I reduce the base penalty amount to $45,000, which coincides with the penalty range suggested by the policy.

For the same reasons cited in connection with the SPCC violations, it is appropriate to increase the penalty by 30 percent, or $13,500, due to the sensitivity of the surrounding environment, bringing the total to $58,500. Likewise, an additional 30 percent increase – based on the 60 months for which Respondent was found liable under Count V – is also appropriate to reflect the duration of the violation. This raises the seriousness penalty for Respondent's FRP violation to $76,050.

Consequently, I find there is sufficient evidence in the record to assess a total penalty of $152,100 based on the seriousness of Respondent's SPCC and FRP violations.

c. Culpability

The next step is to "consider . . . the degree of culpability involved" in Respondent's violations. 33 U.S.C. § 1321(b)(8). A respondent's degree of willfulness or negligence is important to culpability analysis. *Stevenson*, 16 E.A.D. at 176, 2013 WL 5793370, at *20; *see also* Penalty Framework at 17-18. Factors that impact a respondent's degree of willfulness or negligence include:

> · How much control the violator had over the events constituting the violation.
> · The forseeability [sic] of the events constituting the violation.
> · Whether the violator took reasonable precautions against the events constituting the violation.
> · Whether the violator knew or should have known of the hazards associated with the conduct.
> · The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute where applicable.
> · Whether the violator in fact knew of the legal requirement which was violated.

Stevenson, 16 E.A.D. at 177, 2013 WL 5793370, at **20-21 (citing Penalty Framework at 18). Additionally, the EAB has observed that a party's lack of awareness of its legal obligations "should never be used as a basis to reduce a penalty because [t]o do so would be to encourage ignorance of the law." *Id*. at 177-78, *21.

With respect to the SPCC violations, the Agency contends that Respondent should have been able to prevent their occurrence based on Respondent's resources, number of years in business, place in the industry, and general level of sophistication. AB at 38; CX 48 at 15. The

Agency further notes that Respondent's gains in compliance since the Agency first alerted it to its SPCC deficiencies in 2014 "have been slow." AB at 38. For this level of negligence, the Agency proposes a penalty of $22,825, or 30 percent of the seriousness penalty for the SPCC violations. AB at 39. Regarding Respondent's FRP violation, the Agency contends a 40 percent increase for culpability is appropriate, noting "that significant facility modification should bear a reasonable level of diligence," and that the Agency "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." AB at 41.

Respondent calls the culpability enhancement "an overreach." RB at 40. According to Respondent, the Agency's assessment of its sophistication is subjective and conclusory. RRB at 23-24. In fact, Respondent asserts, it "relied heavily" on Condor Earth Technologies Inc. to prepare its SPCC Plan in 2012 precisely because it lacks sophistication. RRB at 24. And Respondent argues that the Agency's notice of violations in 2014 and 2017 "post-date several of the alleged violations by more than two, and as many as five, years, undermining claims that 'respondent should have been able to *prevent* the violation,' as the culpability factor requires." RRB at 24.

The evidence shows that Respondent was negligent to a degree that merits a penalty increase. Respondent had total control over the events that constituted the violations in this case. These violations were entirely foreseeable, because Respondent chose to not fully comply with requirements that were set forth in detail in the Code of Federal Regulations. With respect to the SPCC violations, Respondent took only the most basic precautions by commissioning the Condor Plan in 2012, prior to the Agency's involvement, and then attempting – but failing – to develop a fully compliant plan after the Agency issued its show cause letter on May 22, 2014. *See* RX 6. And even this was the least Respondent could do, given that no special expertise is needed to recognize that any plan that does not include tanks of the magnitude of Tank 2001 or 2002 must be incomplete. Further, Respondent did not take any precautions to avoid its FRP violation, because Respondent has generally contended that FRP regulations did not apply to the Facility even after the Agency instructed otherwise. And the hazards associated with these violations are readily apparent: the risk of a discharge occurring is greater, and the risk of greater harm resulting from a discharge is higher, when these plans are not in place.

Additionally, contrary to Respondent's self-characterization, it is not an unsophisticated operator. Respondent conducts business in at least three states and has operated the Facility for more than three decades. *See* RX 2 at 3. Although it may ultimately be family owned, Respondent is "a large company" with gross annual sales of $25 million to $50 million, and it is one of several interrelated corporate entities. *See* Tr. 208, 411-13, 427-28; CX 35; CX 36. Aside from possessing the resources to hire specialized contractors like Condor and WHF, since 2011 Respondent has employed an in-house corporate environmental health and safety manager whose core job responsibility is environmental and safety compliance. Tr. 391. These are all markers of a company that has the means and sophistication to fully comply with federal regulations governing the industry in which it seeks to profit.

Finally, Respondent knew or should have known of the legal requirements it violated at least as early as the Agency's November 2012 inspection, when Ms. Witul informed Respondent's personnel of the SPCC and FRP violations she observed after her walkthrough of the Facility. Indeed, Respondent should have thought to investigate its federal obligations nearly a year prior, following Mr. Sears's January 2012 inspection for Yolo County. *See Pepperell Assocs.*, 9 E.A.D. at 109-110, 2000 WL 576426, at *21 ("[Respondent's] knowledge that its activities were subject to environmental regulation should have alerted it to the need to make further inquiries into what other regulations, such as EPA's SPCC regulations, might also apply to the Facility.").

In view of the foregoing, I find that Respondent was negligent to such an extent that further enhancement of the penalty is warranted. The Sections 311(b)(3) and 311(j) Policy suggests increasing the seriousness penalty factor by as much as 75 percent based on the degree of a respondent's culpability. CX 40 at 12. As previously mentioned, the Agency requests a 30 percent enhancement for the SPCC violations and a 40 percent enhancement for the FRP violations.

Therefore, I find it appropriate, based on the discussion above, to raise the penalty by $53,235 to account for Respondent's culpability. This is equal to 35 percent of the combined seriousness penalty amount of $152,100.

d. Other statutory factors

The OPA further requires me to consider

> 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). The Agency does not seek any additional penalty based on these factors, and there is no evidence in the record to support such an increase. Similarly, Respondent does not cite any of these factors as specific grounds for reducing the penalty.[53]

Respondent has more generally asserted that any penalty assessed should be minimal, because it sought the Agency's input and worked in good faith to come into compliance. To the extent this could be construed as an argument for a penalty reduction based on other matters justice may require, I reject the argument. As the EAB has observed, "the standard for invoking this factor is high, such that 'the evidence of environmental good deeds must be clear and

[53] "[A] respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury, Ltd.*, 5 E.A.D. 529, 541, 1994 WL 615377, at *8 (EAB 1994).

unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.'" *Phoenix*, 11 E.A.D. at 415, 2004 WL 1059751, at *25 (quoting *Spang & Co.*, 6 E.A.D. 226, 250, 1995 WL 646518, at *15 (EAB 1995)). That bar has not been met here. Respondent did not attempt to come into compliance until compelled to do so by the Agency, and even after several years, it does not appear to have satisfied all its obligations. Nor can Respondent blame the Agency for not holding its hand every step of the way through the plan development process. Respondent, not the Agency, was responsible for complying with the regulations. Although the Agency may, in theory, review and approve a facility's plans "if the resources allow," the Agency's "review and approval or non-review and non-approval does not change the facility's requirement to [develop], maintain, and implement" its SPCC Plan and FRP. *See* Tr. at 26-27. In this case, Respondent's "efforts at compliance are not good environmental deeds that go beyond that which the law required of Respondent, such that the company would be entitled to a penalty adjustment under the 'other matters as justice may require' penalty factor." *Pepperell Assocs.*, 9 E.A.D. at 110, 2000 WL 576426, at *22 (citation omitted).

Accordingly, I will not increase or decrease the penalty based on the other statutory factors above.

e. Penalty conclusion

For the reasons set forth above, it would be appropriate to assess a total penalty against Respondent of $233,494. This includes an economic benefit penalty of $28,159; a penalty assessment of $152,100 for the seriousness of Respondent's violations; and a penalty of $53,235 for Respondent's culpability in committing the violations.

However, I will defer to the slightly lower total penalty amount requested by the Agency in this case. Accordingly, I assess a penalty against Respondent in the amount of $230,958.

VII. CONCLUSION AND ORDER

1. Respondent is liable for violating the Oil Pollution Act as set forth above.

2. For these violations, Respondent is hereby assessed a civil penalty of **$230,958.00**.

3. Payment of the full amount of this civil penalty shall be made within **30 days** after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below:

    Payment shall be made by submitting a certified or cashier's check[54] in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

[54] Respondent may also pay by one of the electronic methods described at the following Agency

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number (OPA-09-2018-0002), as well as the Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

4. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order **45 days** after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within **20 days** after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within **30 days** after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: September 16, 2020
Washington, D.C.

website: https://www.epa.gov/financial/additional-instructions-making-payments-epa.

In the Matter of *VSS International, Inc.*, Respondent.
Docket No. OPA-09-2018-0002

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision and Order**, dated September 16, 2020, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Matt Barnwell
Attorney Advisor

Original by Electronic Delivery to:

Mary Angeles
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copies by Electronic Mail to:

Rebecca Sugerman, Esq.
J. Andrew Helmlinger, Esq.
Rebekah Reynolds, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
Email: sugerman.rebecca@epa.gov
Email: helmlinger.andrew@epa.gov
Email: reynolds.rebekah@epa.gov
For Complainant

Richard J. McNeil, Esq.
Jordan L. Ludwig, Esq.
Crowell & Moring LLP
Email: rmcneil@crowell.com
Email: jludwig@crowell.com
For Respondent

Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Email: durr.eurika@epa.gov

Dated: September 16, 2020
Washington, D.C.