UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	DOCKET NO. OPA 09-2018-0002
	)	
VSS International, Inc.,	)	
	)	
	)	
Respondent.	)	

COMPLAINANT'S PREHEARING BRIEF

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

In accordance with the Presiding Officer's Prehearing Order, Complainant, the U.S. Environmental Protection Agency, Region 9 Enforcement Division, ("Complainant" or "EPA") hereby respectfully submits the following Prehearing Brief.

I. INTRODUCTION

This case is about a sophisticated company that stores millions of gallons of oil and oil products at its facility located merely 200 feet from a navigable water of the United States. At hearing, Complainant will show that, for more than five years, this company, VSS International, Inc. ("VSSI," or Respondent) consistently failed to promptly and completely comply with the federal laws designed to protect these navigable waters from actual or potential oil spills from its facility, despite frequent government monitoring and admonishment.

A. Statutory and Regulatory Background

The Oil Pollution Act of 1990 ("OPA") amended Clean Water Act ("CWA") Section 311 (33 U.S.C. § 1321) to strengthen the provisions of the CWA pertaining to oil pollution. Congress enacted OPA in response to the Exxon Valdez spill of over 11 million gallons of crude oil into the pristine waters of Prince William Sound in Alaska in 1989. This environmental disaster made clear that the United States needed to act because it lacked adequate resources and mechanisms for addressing oil spills at that time. Pursuant to Section 311, EPA promulgated the Oil Pollution Prevention ("OPP") regulations at 40 C.F.R. Part 112. These regulations establish procedures, methods and other requirements to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or upon the navigable waters of the U.S. or adjoining shorelines.

The OPP regulations apply to owners or operators of non-transportation-related onshore facilities that are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products; have oil in any aboveground container; have an aggregate aboveground oil storage capacity greater than 1,320 U.S. gallons; and which, due to location, "could reasonably be expected to discharge oil in quantities that may be harmful, as described in 40 C.F.R. Part 110, into or upon the navigable waters of the U.S. or adjoining shorelines. 40 C.F.R. §112.1(b). In relevant part, 40 C.F.R. § 110.3 provides that:

> [F]or purposes of CWA Section 311(b)(4), discharges of oil in such quantities that the Administrator has determined may be harmful to the public health or welfare or the environment of the U.S. include discharges of oil that:
>
> (a) violate applicable water quality standard; or
>
> (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

When applicable, the OPP regulations require that the owner or operator of a regulated facility in operation on or before August 16, 2002, prepare in writing and implement a Spill Prevention Control and Countermeasure ("SPCC") Plan for the facility in accordance with 40 C.F.R. § 112.7 and any other applicable section of the OPP regulations no later than November 10, 2011. 40 C.F.R. § 112.3. Additionally, the owner or operator of a facility subject to the OPP regulations must:

- prepare an SPCC Plan in accordance with good engineering practices, and with the full approval of management at a level of authority to commit necessary resources to fully implement the Plan (40 C.F.R. § 112.7);

- describe in the SPCC Plan the physical layout of the facility and include a facility diagram, which must mark "the location and contents of each fixed oil storage container and the storage area where mobile or portable containers are located" and "all transfer stations and connecting pipes (40 C.F.R. § 112.7(a)(3));
- address in the SPCC Plan the types of oil in each fixed container and its storage capacity (40 C.F.R. § 112.7(a)(3)(i)), discharge prevention measures (40 C.F.R. § 112.7(a)(3)(ii)), and discharge or drainage controls such as secondary containment around containers and other structures, equipment, and procedures for the control of a discharge (40 C.F.R. § 112.7(a)(3)(iii));
- conduct inspections and tests in accordance with written procedures for the facility developed by the facility or the certifying Professional Engineer ("PE") in accordance with industry standards (40 C.F.R. § 112.7(e)); and
- maintain with the SPCC Plan a record of the inspections and tests above, signed by the appropriate supervisor or inspector, for a period of three years (40 C.F.R. § 112.7(e)).

The regulations also require that a licensed PE must review and certify the SPCC Plan for it to be effective to satisfy the requirements of 40 C.F.R. Part 112. By means of this certification, the PE must attest that:

-he is familiar with the requirements of Part 112;

-he or his agent has visited and examined the facility;

-the Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of Part 112;

-procedures for required testing have been established; and

-the Plan is adequate for the facility. 40 C.F.R. § 112.3(d)(1).

The regulations further require that the owner or operator:

> -amend the Plan for the facility within six months when there is a change in the facility design, construction, operation, or maintenance that materially affects its potential for discharge as described in 40 C.F.R. § 112.1(b) and implemented as soon as possible, but not later than six months following preparation of the amendment (40 C.F.R. § 112.5(a)); and
>
> -complete a review and evaluation of the Plan at least once every 5 years and amend the Plan within 6 months of such review to include more effective prevention and control technology if the technology will significantly reduce the likelihood of a discharge as described in §112.1(b) from the facility. (40 C.F.R. § 112.5(b)).

Moreover, the regulations require that the owner or operator of non-transportation-related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or upon the navigable waters of the U.S. or adjoining shorelines, to prepare and submit a Facility Response Plan ("FRP") to the Regional Administrator. 40 C.F.R. §112.20(a). The regulations specify certain criteria under which a facility, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on navigable waters or adjoining shorelines. Section IV below details how the VSSI facility satisfies the criteria.

The regulations provide that, if a facility comes to meet the threshold criteria as a result of a planned change in design, construction, operation, or maintenance, the owner or operator then must submit an FRP and response plan cover sheet to the Regional Administrator before operations at the portion the facility undergoing the change begins. 40 C.F.R. § 112.20(a)(1)(iii).

It is generally accepted that one gallon of oil can contaminate one million gallons of water. See https://www.epa.gov/recycle/managing-reusing-and-recycling-used-oil (USEPA); https://cfpub.epa.gov/npstbx/files/KSMO_oil.pdf (Mid-American Regional Counsel); https://www.rcbc.ca/files/u3/ps_bcuomabrochure.pdf (British Columbia Used Motor Oil Association). Each element that the regulations require serves the specific purpose of ensuring that facilities with the size and location to impact America's navigable waters work to avoid or contain spills and protect those waters. An owner or operator who violates any of these requirements increases the possibility that any oil spilled will reach navigable waters and cause significant or substantial harm to the environment. Specifically, with respect to those owners or operators of facilities that store over one million gallons of oil, the FRP requirements are designed to ensure that these facilities storing larger quantities of oil have more robust oil spill prevention and response capabilities.

B. Factual Background

Respondent is a corporation that operates a 10.5 acre-facility (the "Facility") located in West Sacramento, California approximately 200 feet north of the Sacramento River Deep Water Ship Channel ("SRDWSC"). Joint Stipulations, April 12, 2019 ("JS") ¶¶ 1, 9, 20. Respondent manufactures asphalt emulsions for application on roadways at the Facility, which includes bulk storage and aggregation of petroleum surfacing materials, including asphaltic cement. JS ¶¶ 5, 6. The Facility has been in operation since the late 1980s and has numerous aboveground storage tanks (ASTs) that store oil, including several types of oil (e.g., asphaltic cement) that are kept in heated and insulated tanks to lower the viscosity of the oil. JS ¶¶ 8, 14, 17. The Facility has two-approximately 2.4-million-gallon field-constructed insulated ASTs that are used to store oil (Tank #2001 and Tank #2002). Tank #2001 was constructed prior to and available for use as

early as March 2012; Tank #2002 was constructed prior to and in use by July 2015. RX 2 at 4; Trial Brief of Respondent VSS International, Inc., January 11, 2019 ("Trial Brief") at 5. Accordingly, the Facility has had storage capacity of over 1 million gallons of oil since at least March 2012.

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

EPA inspected the facility on November 27, 2012 (2012 inspection) and September 30, 2016 (2016 inspection). CX 4, CX 8. EPA also reviewed various SPCC Plans and FRPs, including an April 2012 SPCC Plan; an October 2014 SPCC Plan /FRP; a January 2016 SPCC Plan, a January 2017 FRP, and a May 2017 FRP. CX 4, CX 8, CX 12, CX 24. EPA also issued an information request to Respondent on June 25, 2013, to which Respondent responded on August 23, 2013. As a result of the inspections and the information request, Respondent provided several documents subject to the OPP regulations, including:

-2012 SPCC Plan dated April 6, 2012 (RX 2 at 7 – 51)

-2014 Combined Plan dated October 24, 2014 (meant to satisfy both SPCC and FRP and other requirements, [1] and including both an SPCC Plan and the FRP) (CX 17)

-2016 Combined Plan dated January15, 2016 (FRP removed) (CX 18)

-January 2017 FRP dated January 9, 2017 (CX 19)

-May 2017 FRP dated May 1, 2017 (CX 20)

-May 2017 SPCC Plan dated May 1, 2017 (CX 45)

C. Procedural History of Case

On February 13, 2018, Complainant filed a Complaint and Notice of Opportunity for Hearing ("Complaint") against Respondent, in which Complainant alleges five violations of the OPP regulations. Specifically, the five counts are:

Count 1- Respondent failed to prepare a complete SPCC Plan in accordance with 40 C.F.R. § 112.7 from 2012 to 2017 in violation of 40 C.F.R. §112.3. Specifically, the Facility's 2012, 2014, and 2016 Plans failed to include management approval of the Plan (40 C.F.R. § 112.7(a)), a facility diagram with all regulated fixed containers, storage areas and connecting pipes, and stating the oil type and capacity for containers (40 C.F.R. § 112.7(a)(3)), and containment or diversionary structures in the Facility Diagram for tanks not permanently closed (40 C.F.R. § 112.7(c));

Count 2- From October 24, 2014, to January 15, 2016, Respondent failed to have a PE certify the Facility's SPCC Plan in accordance with 40 C.F.R. §112.3(d), by omitting any certification that the plan was prepared in accordance with good engineering practices that considered applicable industry standards and that the plan established and described

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

the procedures and frequency for required inspections, maintenance and testing consistent with the applicable regulatory requirements;

Count 3- Respondent failed to amend the SPCC Plan within six months following a change in the Facility's design, construction, operation or maintenance that materially affected its potential for discharge, specifically when Tank #2001 was put into service in March 2012 and when Tank #2002 was put into service in July 2015;

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

Count 5- Respondent failed to prepare a compliant FRP and submit it to the Regional Administrator prior to the start of certain operations at the Facility, as required by 40 C.F.R. §§ 112.20(a)(2) and (a)(2)(ii). Specifically, the 2014 and January 2017 FRPs were not based on criteria in 40 C.F.R. §112.20(f)(1) and did not address each element required under 40 C.F.R. § 112.20(h).

Respondent filed an Answer to the Complaint on March 20, 2018. On August 3, 2018, Complainant filed a Motion for Accelerated Decision, which the Presiding Officer partially granted in the December 26 Order. Specifically, in the December 26 Order, the Presiding Officer determined that, as a matter of law, Respondent is subject to the OPP regulations at 40 C.F.R. Part 112 and liable for any violations thereof. In addition, the Presiding Officer found that Respondent is liable for Count I, because Complainant had established that Respondent's 2012, 2014, and 2016 SPCC plans each failed to have a facility diagram that marked the location and contents of each fixed oil storage container, as required by 40 C.F.R. § 112.7(a)(3), for the period of February 13, 2013, through May 1, 2017. December 26 Order at 20.

Concurrent to finding liability on Count I, the Presiding Officer determined for the purposes of 33 U.S.C. § 1321 and 40 C.F.R. Part 112 that: (1) VSSI is the owner and operator of the West Sacramento facility; (2) the West Sacramento facility is an on-shore, non-transportation related facility; (3) the West Sacramento facility is engaged in the storing of oil or oil products, including asphaltic cement; (4) oil and oil products are stored at the West Sacramento facility in aboveground storage containers ("ASTs"); (5) the West Sacramento facility has a total oil storage capacity greater than 1,000,000 gallons; (6) the SRDWSC is a navigable water; and (7) due to the location of the West Sacramento facility, it could be reasonably expected to discharge oil into or upon a navigable water of the United States. See December 26 Order, at 15-16. Many of these findings establish elements of the other four counts, as discussed below.

II. Count II – Respondent's Documents Confirm that its 2014 SPCC Plan Lacked Proper PE Certification

The OPP regulations state that the owner or operator must have a PE review and certify the SPCC plan for it to be effective to satisfy the requirements of 40 C.F.R. Part 112. See 40 C.F.R § 112.3(d). The PE's attestation must affirm that procedures for required inspections and testing have been established and that the plan is adequate for the facility, among other requirements. Id. Count II alleges, that what VSSI had for an SPCC plan for its West Sacramento facility, the October 24, 2014 Hazardous Materials, Environmental Compliance, and Contingency Business Plans ("2014 Combined Plan"), lacked PE Certification that met the requirement of the OPP regulations. This plan was intended to meet the Spill Prevention, Control and Countermeasures Plan requirements. CX 17 (2014 Combined Plan) at 29.

The 2014 Combined Plan includes a form of a certification by A. Lee Delano, dated October 30, 2014, which states, "I hereby certify that I have examined the facility, and being familiar with the provisions of 40 C.F.R. Part 112, attest that this SPCC plan has been prepared

in accordance with good engineering practices." CX 17. This ostensible certification is identical to one supplied in another SPCC Plan that Respondent provided to EPA, the January 15, 2016 Hazardous Materials, Environmental Compliance, and Contingency Business Plans ("2016 Combined Plan"); the certification in the 2016 plan is also dated October 30, 2014. (CX 18) This raises a question on the actual timing of these certifications, but regardless this language fails to satisfy the requirements at 40 C.F.R. § 112.3(d), specifically in omitting attestation that the plans are in accordance with regulatory requirements and that the procedures and frequency for required inspections, maintenance and testing have been established and described in the plans.

As a defense to this violation VSSI appears to contend that the 2014 Combined Plan was not final, and that the 2012 SPCC plan remained in effect. See Respondent's Opposition to Motion for Accelerated Judgment ("MAD Opp."), at 17. If, as Respondent seems to argue, only the 2012 and 2017 SPCC plans were final, then this 2014 Combined Plan may not have needed to comply with the PE certification requirements, but it begs the question why it was certified and provided to EPA after the initiation of administrative enforcement process. Additionally, if Respondent's position is taken as true, Respondent must concede the allegations of Count III, discussed below, that VSSI failed to amend its SPCC Plan within six months of a material change (adding Tank #2001 in the year 2012).

However, VSSI's more recent pleadings in this litigation refer to the 2014 Combined Plan as "interim" plan, rather than drafts. *See e.g.*, Trial Brief at 3. Such desperate arguments torture facts and regulations in an effort to escape liability. The OPP regulations do not provide for "interim" plans, and clearly state that without adequate PE certification, an SPCC plan cannot be effective to satisfy the requirements of 40 C.F.R. Part 112. 40 C.F.R. § 112.3. As a combined plan to serve many regulatory purposes, its urgency suggests it would be deemed final as signed

by the PE. Furthermore, the OPP regulations generally reference one document ("*a* Spill Prevention Control and Countermeasures Plan") to satisfy all of the requirements set out at 40 C.F.R. § 112.3 (emphasis supplied). The regulations provide that where an SPCC plan does not address the requirements following the sequence specified in but 40 C.F.R. § 112.7, there must be a separate cross-reference identifying the respective provisions in the plan with the applicable requirements. Without such a cross-reference, any responder to a potential discharge would not know where to find direction to avoid or mitigate a potential discharge. Short of such a cross-reference, VSSI cannot pick and choose sections of various plans spanning 2012 through 2017 in an effort to create one whole, compliant document to escape liability for the violations alleged in the Complaint. VSSI has not provided any such cross-referencing document apart from its bald assertions in this adjudication.

III. Count III – Respondent's Documents Confirm that it Failed to Amend its SPCC Plan within Six Months of Installing Tanks 2001 And 2002

The OPP regulations require a regulated entity to amend its SPCC plan in accordance with the general requirements at 40 C.F.R. § 112.7 no later than six months following a change in the facility's design, construction, operation or maintenance which materially affects its potential for a discharge, and to have a PE certify any technical amendments to the Plan in accordance with section 112.3(d). See 40 C.F.R. § 112.5(a) and (c). In its Count III, Complainant alleges, and the record confirms, that VSS failed to meet this requirement.

Respondent does not contest that adding a 2.4-million-gallon tank that stores oil qualifies as a change "which materially affects its potential for discharge" but rather argues about dates and the status of multiple SPCC plans. See MAD Opp. At 18. Respondent states that Tank 2001, a 2.4-million-gallon tank, was available to store oil by March 21, 2013 (the MAD Opp., at 18 refers to RX 37 at 5, which states "only 1 of the 2.5 MG is in use 3/21/2013"), and Tank 2002,

another 2.4-million-gallon tank, was available to store oil by "the latter half of 2015." Trial Brief at 5. Accordingly, by its own admissions, Respondent put two tanks into use that each materially affected the potential for discharge from the West Sacramento facility. As noted above, Respondent has asserted that that the only final SPCC plans that it had in place were the April 6, 2012 SPCC Plan and the May 1, 2017 Hazardous Materials Business Plan ("2017 SPCC Plan"), and any other versions are merely "drafts." Because the 2012 SPCC plan did not provide for the two massive tanks, and VSSI did not have a plan that did provide for the tanks until 2017, Respondent's admissions necessarily demonstrate that it failed to amend its SPCC plans within six months following a material change in the potential for a release. MAD Opp. At 17.

Regardless, even if the 2014 Combined Plan was not a draft, VSSI did not amend its SPCC Plan within six months of adding Tank 2001. While there is some debate as to the precise date that Tank 2001 was in service, the latest date in time that Respondent has offered so far is March 21, 2013. MAD Opp. At 18 (citing to RX 37 at 5). Given that the 2014 Combined Plan is dated October 24, 2014, with an ostensible PE certification on October 30, 2014, at least eighteen months elapses from the time that Tank 2001 was in service and VSSI amended its SPCC plan to account for the material change. If the 2017 plan is the only applicable plan, then the violation spanned years.

Similarly, if the 2016 Combined Plan was not a draft, VSSI failed to adequately amend its SPCC plan within six months of adding Tank 2002, which was another material change in the potential for a discharge from the facility. Respondent has asserted that Tank 2002 went into service "the latter half of July 2015." Respondent further asserts that Tank 2002 was "referenced and depicted in the interim SPCC dated January 15, 2016 thus there is no violation." Trial Brief at 5. The 2016 Combined Plan, if viable, only includes Tank 2002 as a circle outline on certain

figures, with no additional information regarding the capacity, the type of oil managed or relevant inspection, maintenance, or response planning. See 2016 Combined Plan, Figure 3 (circle outline notated "Out of Service") (CX 18 at 17); 2016 Combined Plan, Figure 5 (circle outline notated "Empty") (CX 18 at 19). 40 C.F.R. § 112.7(a)(3) would require, as an amendment in accordance with 40 C.F.R. § 112.5(a), that the amended SPCC plan include much more information to effectively plan to prevent or respond to a release, including the type of oil in each new tank, the storage capacity of each new tank, discharge prevention measures including procedures for routine handling, and drainage controls. 40 C.F.R. § 112.7(c) would require information regarding containment measures for such massive tanks. Thus, only the 2017 SPCC Plan is relevant to measuring compliance with the requirement to amend the SPCC plan following the addition of Tank 2002. Given the less specific evidence of the date that Tank 2002 went into service, Respondent is at least liable for not amending its SPCC plan until twenty-one months following the addition of Tank 2002 to account for the material change (August 2015 through April 2017).

Accordingly, regarding the addition of Tank 2001 in 2012 (or 2013) and Tank 2002 in 2015, the record is clear that Respondent on these two occasions failed to amend its SPCC plan for the West Sacramento facility within six months, as required by 40 C.F.R. § 112.5(a). At best, these violations occurred over eighteen months and twenty-one months respectively.

IV. Count IV - VSSI Failed to Document Compliance with Tank Inspection Requirements

The OPP regulations require regulated entities to keep written procedures developed for inspections and tests for the facility, as well as records of such inspection and tests for a period of three years. 40 C.F.R. § 112.7(e). Count IV alleges, and evidence in the record demonstrates, that Respondent failed to meet this requirement.

The requirement at 40 C.F.R. § 112.7(e) refers to the standards at 40 C.F.R. § 112.8(c)(6), which require a regulated entity to document its compliance with the following inspection requirements for aboveground tanks:

> Test or inspect each aboveground container for integrity on a regular schedule and whenever you make material repairs. You 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). *Examples of these integrity tests include*, but are not limited to: visual inspection, hydrostatic testing, radiographic testing, *ultrasonic testing*, acoustic emissions testing, or other systems of non-destructive testing….

40 C.F.R. § 112.8(c)(6) (emphasis added).

Within VSSI's 2012 SPCC Plan, VSSI had recommendations to both document all AST inspections and observations, and to conduct specific monthly inspections and maintain documentation for three years. CX 16 at 2. The 2012 SPCC Plan required monthly visual inspections of all shop-built above-ground containers, and the maintenance of documentation of such inspections. CX 16 at 17. The 2012 SPCC Plan does not, however, address inspections for the subsequently field-constructed Tanks 2001 and 2002, each with a capacity of more than 2 million gallons.

The record supports that STI SP001 and API 653 are appropriate industry standards for tank inspections at the VSSI West Sacramento facility. RX 9 at 1-4. Standard API 653 is the inspection standard applicable for both internal and external tank inspections for large field-constructed tanks such as Tank 2001 and Tank 2002; no documents in the record suggest otherwise. See RX 9 at 4, 8 (Fletcher protocol); RX 2 at 57 (SPCC Fact Sheet); see also 67 Fed. Reg. 47042 (July 17, 2002).[2]

In October 2014, following EPA's initial inspections and the start of compliance enforcement discussions, VSSI sent EPA a September 2014 Integrity Testing Program for Bulk Storage Containers, "to conform with the bulk storage container requirements in the SPCC regulations … (40 C.F.R. § 112.8(c)(6)." RX 9 ("the Fletcher Proposal")). That proposal indicates that "[t]he ASTs at the facility have not been formally inspected (either internally or externally) since their construction at the site." RX 9 at 5. It is estimated that most of the tanks were constructed in the 1940s and 1950s. See RX 60 – RX 68.

API 653 and the Fletcher Proposal state that the API 653 Inspection standard requires a Certified External Tank Inspection every five years, and a Certified Internal Tank Inspection every ten years. CX 25 at 31; RX 9 at 5. This inspection requires an authorized inspector, in

[2] "Industry standards that may assist an owner or operator with integrity testing include: (1) API Standard 653, "Tank Inspection, Repair, Alteration, and Reconstruction"; (2) API Recommended Practice 575, "Inspection of Atmospheric and Low-Pressure Tanks;" and, (3) Steel Tank Institute Standard SP001-00, "Standard for Inspection of In-Service Shop Fabricated Aboveground Tanks for Storage of Combustible and Flammable Liquids." 67 Fed. Reg. 47042 (July 17, 2002).

contrast to the "routine in-service inspections" that may be completed by the facility personnel.[3] CX 25 at 31. VSSI's 2014 Combined Plan incorporates this improved approach to inspections, stating, "Monthly and annual inspections will be performed in a more detailed manor by personnel knowledgeable of the tanks and their components. All monthly and annual inspections will be documented (Appendix E), and will be maintained for a minimum of three years with the SPCC plan." CX 17 at 44. Appendix E to the 2014 Combined Plan specifically incorporates the Fletcher Proposal. Id. at 100.

Here, VSSI violated the inspection requirements by failing to have or maintain documentation of regular Certified External and Internal Inspections beginning at least in 2012; failed to maintain documentation of implementation of inspections on the schedule established by its consultant in 2014 and incorporated into the 2014 Combined Plan; and, based on the absence of documentation, apparently continues to not meet or document the required inspections for all of above-ground tanks. Of note:

- Respondent's 2012 SPCC plan did not address the requirements for Certified Internal and External Inspections. CX 7 at 2.
- In 2014, following initiation of this enforcement action, VSSI hired a consultant to develop a schedule, which recommended beginning External Inspections in the 2014-2015 winter season. RX 9. VSSI has not provided any record of initiating inspections in accordance with this schedule.

[3] In response to Complainant's June 2013 Clean Water Act Section 308 letter requesting the required records of tank testing, VSSI submitted tables of monthly visual assessments. RX 2 at 65 – 154. While the tables demonstrate compliance with the requirement to conduct "routine in-service inspections," it does not meet the API 653 requirement to complete Certified External Inspections every 5 years, and Certified Internal Inspections every 10 years. As evidenced by Fletcher's proposal (RX 9), and the reports generated from the Powers Engineering API 653 External Inspections, there is a significant difference between the routine in-service inspections noted in VSSI's 308 letter response and the API 653 External Tank Inspections.

- Based on the record, VSSI's first Certified External Inspection was in June 2016, almost two years after the proposed start date. RX 65.
- By the January 2017 SPCC Plan, VSSI had not completed all of the required Certified External Inspections, and only a few of the required Certified Internal Inspections.
- VSSI still has not produced evidence of Certified External Inspections for certain tanks (e.g., 819, 821, 822, 2001), and has produced evidence of Certified Internal Inspections for only three of its twenty-five insulated tanks: Tanks 854 (RX 65), Tank 881 (RX 67) and 882 (RX 68).

The record is clear that Respondent was subject to the requirement to inspect tanks pursuant to industry standards; that the appropriate industry standard is API 653; and that VSSI lacks records to demonstrate documenting any API 653 external tank inspections from at least September 30, 2014, when Fletcher Consultants proposed establishing a baseline and noted that no inspections had ever been conducted, to beyond November 2016, when external inspections are conducted on *some* tanks. The Complaint seeks penalties for at least 1,095 days, from January 1, 2015, until approximately the date of the Complaint, and the Complaint has not been amended.[4] As yet Respondent still has not demonstrated compliance for each tank at the facility.

V. Count V – Respondent's Documents Establish that VSSI has Failed to Comply with Applicable FRP Requirements

The FRP requirements of 40 C.F.R. § 112.20 apply when a facility may cause substantial harm by discharging oil into or onto navigable water or adjoining shorelines. See 40 C.F.R. § 112.20(a). The OPP regulations provide that a facility could, because of its location, reasonably

[4] The Dec. 26 Order states that Complainant appeared to acknowledge that Respondent ceased the violation of 40 C.F.R. § 112.7(e) alleged in Count IV following January 2016. EPA has not amended its complaint, and notes that, in the context of seeking to establish facts beyond dispute in its August 3, 2018 Motion for Accelerated Decision, Complainant noted "through *at least* January 2016." Motion for Accelerated Decision, at 30 (emphasis added). Complainant believes that pursuant to the unamended Complaint it may seek penalties for full duration that facts are established at the hearing.

be expected to cause "substantial harm" to the environment by discharging oil into or on the navigable waters or adjoining shoreline if it meets certain criteria, including when the facility's total oil storage capacity is greater than or equal to 1 million gallons (40 C.F.R. § 112.20(f)(1)(ii)) and one of several circumstances exist, including that "[t]he facility is located at a distance (as calculated using the appropriate formula in Appendix C of this part or a comparable formula) such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments" ("FWSE"). 40 C.F.R. § 112.20(f)(1)(ii)(B). Applying the steps in Appendix C to Part 112, it is clear, as set forth below, that VSSI's West Sacramento facility could cause substantial harm to navigable waters or adjoining shorelines, and is subject to the FRP requirements at 40 C.F.R. § 112.20. Count V of the Complaint alleges, and the record shows, that Respondent is subject to the Facility Response Plan requirements and has failed to meet those requirements.

A. <u>Appendix C Planning Distance Calculation</u>

The planning distance calculation in Appendix C to 40 C.F.R. Part 112 considers how far oil may migrate from a facility, and generally considers four distinct distances. If the nearest opportunity for discharge is within half-mile of any navigable water, 40 C.F.R. Part 112 Appx. C 5.5 assumes that a potential discharge will travel over land directly or via storm drains and open channels to the navigable water, and therefore does not require calculation of the first initial distances: the distance from the nearest opportunity for discharge to a storm drain or open channel (D1) or the distance from D1 to the navigable water (D2). It is undisputed and has been determined in this matter that VSSI's West Sacramento facility is approximately 200 feet from the SRDWSC, which is a navigable water. Dec. 26 Order, at 16. Accordingly, the planning distance turns entirely on the distance along the navigable water to any the water that requires

additional protection as a FWSE (the "D3" distance). To make use of the D3 calculation, one must first determine what is the relevant FWSE.

B. The SRDWSC is itself a Fish and Wildlife and Sensitive Environment

The regulations at 40 C.F.R. § 112.2 define "fish and wildlife and sensitive environments" as, *inter alia*, "areas that may be identified by their legal designation or by evaluations of Area Committees (for planning) …. 40 C.F.R. § 112.2. The relevant Area Committee Plan for the SRDWSC, which is part of both Complainant's and Respondent's prehearing exchanges (RX-83, CX 2, and CX 33) designates the SRDWSC as a "sensitive area."[5] By definition, therefore, the SRDWSC is a FWSE.

C. The D3 Planning Distance Calculation

The OPP regulations provide, however, that a formal calculation of the planning distance can be avoided where the potential impact to a FWSE is "clear without performing the calculation," citing an example of a facility located within a wetland. 40 C.F.R. Part 112 Appx. C-1.3. Such is the case in this matter as a clear application of logic that, to determine the D3 distance, how far along a navigable water that oil need migrate to reach an FWSE, where the SRDWSC is both the navigable water and the FWSE, one need only conclude that even any non-significant distance is sufficient to satisfy the regulations to determine applicability of the FRP requirements. To put a fine point on the matter, one also could formally calculate the D3 distance, as one would anyway for determining the geographic scope of the substance of response planning in an FRP. Complainant is prepared to put on testimony of the formal D3

[5] See RX 83 at 56-57 of 107: "Although relatively narrow and artificial, the margin is emergent march along its entire length with occasional shrub-scrub." "Seasonal and Special Resource Concern Marshy areas are high priority at all times" "Anadromous fish use this slough for upstream migration …Salmon and other migratory species concentrate in this channel during migratory periods."

calculation, and would demonstrate that, as properly and formally calculated, the D3 distance is at least 22.4 miles, and may be as much 40.4 miles.

Accordingly, where the record establishes that VSSI's West Sacramento facility stores more than 1 million gallons of oil, is located within 0.5 miles of SRDWSC, that the SRDWSC is a both a navigable water and an FWSE, VSSI is required to maintain and implement an adequate Facility Response Plan is accordance with 40 C.F.R. § 112.20(a).[6]

D. Respondent's FRPs do not Comply with the FRP Requirements

Through the time that Complainant first initiated enforcement discussions and filed its complaint in this matter, VSSI has prepared various FRP versions that that EPA reviewed. EPA noted respective deficiencies in inspection review documents, including CX 20 and CX 24. Complainant will present testimony and exhibits detailing how these FRPs did not comply with the FRP regulations. Specifically, VSSI has failed to certify the plans, failed to demonstrate records of implementation of the plans, and not provided correct or complete substantial harm reviews. Through the pendency of this proceeding, EPA has not been able to verify particular aspects of implementation, and reserves characterization of the current status of VSSI's compliance until facts are established at hearing.

VI. PENALTY

The statutory penalty factors set forth in Section 311(b)(8) of the CWA, are:

> [T]he seriousness of a 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

[6] Respondent's arguments regarding asphalt viscosity are irrelevant for facilities within 0.5 miles of a FWSE. In a 2008 amendment to the OPP, EPA made the clear determination that asphaltic cement is regulated as oil and is not exempt from the rule. 73 FR 74236, 74240 (December 5, 2008). Even if it were relevant, Respondent generally stores approximately 450,000 gallons of oil that is not heated and the viscosity argument would not apply.

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).

Pursuant to 40 C.F.R. § 22.27(b), the Presiding Officer determines the amount of the penalty, and may increase or decrease any amount Complainant proposes. In Complainant's Prehearing Exchange, Complainant proposed a single penalty at the statutory maximum of $230,958 to resolve all five counts. See CX 48 at 10. There is support for the Presiding Officer to determine penalties for each individual Count up to the statutory maximum. See Crown Central Petroleum Corp., CWA 08-2000-06, at 51 (Presiding Officer determined penalty for two respective counts each at the statutory maximum). Complainant will provide testimony to support a recommendation that, based on the training, education and experience of EPA's enforcement staff, the Presiding Officer should determine a penalty of $230,958.

In CX 48, Complainant lays out the presentation of evidence and penalty recommendation as it currently understands it will occur. The recommendation is be based on the EPA enforcement staff's training, education and experience. Because some facts may be established at hearing that are different than Complainant's current understanding, Complainant reserves the right to recommend a different number at hearing. Any penalty should, at a bare minimum, be sufficient to recover the economic benefit of violations. See CX 38 at 3-4; CX 39 at 2-4. The penalty must also include a component to account for the gravity of the underlaying violations. CX 38 at 3. The gravity component of the penalty should address the seriousness of a violation by considering the actual or possible harm, importance to the regulatory scheme, the

size of the violator, the sensitivity of the environment, and length of time a violation continues. See CX 39 at 13-16. Gravity also may consider a number of case-specific considerations, including the violator's degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, and any other unique factors. See CX 38 at 4-5, CX 39 at 17-24. Finally, Complainant will present an economic benefit component based on utilizing the established and publicly available economic modeling program, BEN 5.8.0, which can be found at: https://www.epa.gov/enforcement/penalty-and-financial-models.

Each of these considerations flow from the statutory factors stated at 33 U.S.C. § 1321(b)(8). Although Complainant has stipulated that it would not seek that penalties be assessed for any day in violation prior to February 13, 2013, see March 15, 2019 Stipulation to Exclude Exhibits and Limit Potential Penalties, Complainant maintains that the duration of violations, gravity of violations and economic benefit warrant a penalty of at least $230,958.

Respectfully submitted,

4/26/18
Date

R A Sugerman
Rebecca Sugerman,
Assistant Regional Counsel,
U.S. EPA, Region IX

CERTIFICATE OF SERVICE

I, Rebecca Sugerman, hereby certify that on April 26, 2019, I caused to be filed electronically the foregoing Prehearing Brief in the Matter of VSS International, Inc., Docket No. OPA 09-2018-0002, with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Rebecca Sugerman, herby certify that on April 26, 2019, I served a true and correct copy of the foregoing Prehearing Brief in the Matter of VSS International, Inc. via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: April 26, 2019

Respectfully Submitted,

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