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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF
VSS INTERNATIONAL, INC.
3785 Channel Drive
West Sacramento, CA

Respondent.

DOCKET NO. OPA 09-2018-0002

**RESPONDENT VSS INTERNATIONAL, INC.'S
OPPOSITION TO COMPLAINANT'S MOTION
FOR ACCELERATED DECISION**

Respondent VSS International, Inc. ("Respondent" or "VSSI") hereby submits its opposition to Complainant's Motion for Accelerated Decision as to Liability.

I. INTRODUCTION

Respondent VSS International, Inc. ("VSSI") respectfully requests that Complainant's Motion for Accelerated Decision ("Motion") be denied and this case dismissed for the following reasons:

- First, Complainant did not comply with the Prehearing Exchange Order in that Complainant failed to advise counsel for Respondent of its intention to file a Motion for Accelerated Decision in advance, thus warranting denial of the Motion under 40 CFR Section 22.17(a) and (c);
- Second, Complainant has not presented any basis upon which this tribunal could find that there is "no genuine issue of material fact";
- Third, whether or not the Motion is granted or denied, there will still of necessity be a hearing as to any penalty which will involve many of the same facts and issues

II. COMPLAINANT FAILED TO COMPLY WITH THE PREHEARING EXCHANGE ORDER

The Prehearing Exchange Order clearly states (at page 4): “Prior to filing any Motion, the moving party must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other party or parties.”

As can be seen from the Motion and the Opposition, there are a number of undisputed facts which, had counsel for Complainant called counsel for Respondent, which counsel of record for Complainant did not do, could have been eliminated from the Motion, thus narrowing the issues presented to this tribunal for review.

In this case, Complainant’s failure to contact opposing counsel in violation of the Prehearing Exchange Order constitutes a “failure to comply with the information exchange requirements of Section 22.19(a) or, alternatively, is a failure to comply with “an order of the Presiding Officer” (see 40 CFR Section 22.17(a)) – or both – which in turn triggers the default provision of 40 CFR Section 22.17(a).

Section 22.17(c) states that the Presiding Officer “shall” issue a default order upon finding default has occurred “unless the record shows good cause.” Inasmuch as in this case no justifiable explanation or excuse establishing good cause for Complainant’s failure to comply with the Prehearing Exchange Order has been offered, its Motion *must* be dismissed. See Office of Administrative Law Judges Practice Manual (EPA July 2011), p. 5.

III. COMPLAINANT HAS NOT PRESENTED ANY BASIS UPON WHICH IT CAN BE FOUND THAT THERE IS AN ABSENCE OF GENUINE ISSUES OF MATERIAL FACT

40 CFR Section 22.20 allows for an accelerated decision “if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.” The Environmental Appeals

Board has consistently relied upon Fed. R. Civ. Proc 56 and its jurisprudence to adjudicate motions for accelerated decision. *In the Matter of Tony L. Brown and Joshua A. Brown d/b/a Riverview Cattle, Respondents*, 2018 WL 1452759, at 5 (EPA March 13, 2018).

In considering a motion for accelerated decision, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Rogers Corporation v. USEPA*, 275 F. 3d 1096, 1103 (D.C. Cir. 2002) (the movant is entitled to an accelerated decision only if it presents “evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it”). *See also In re Desarrollos Altamira I, Inc. & Cidra Excavation, S.E.*, 2010 WL 4335182, *9 (EPA Oct. 13, 2010) (same).

In its Response To Administrative Complaint And Request For A Hearing (“Answer”),” Respondent in a good faith manner admitted a number of preliminary facts not in dispute so as to limit the matters that require the intercession of this tribunal.¹

However, a significant number of genuine and material facts remain in dispute, including the following (arising from the following allegations of the Complainant):

- “Discharges from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful” (Section V.A.5.ii);
- “A discharge from the Facility could cause substantial harm to the environment” (Section V.A.7);
- “The Facility has insufficient secondary containment in the product storage and manufacturing area and/or a discharge from the Facility could cause injury to fish and wildlife and sensitive environments” (Section V.A.7(ii)(a));
- “A discharge from the Facility could cause injury to fish and wildlife and sensitive environments” (Section V.A.7(ii)(b));

¹ By way of example, Respondent admitted “[i]t is a person and an “owner” or “operator” of the facility, that the facility is a “non-transportation related onshore facility,” that it is “engaged in ... storing, processing and distributing ... oil and oil products,” that it “has oil in aboveground containers” and that the Facility’s “total oil storage capacity is greater than one million gallons”

- “Respondent’s SPCC Plan(s) did not include management approval; a facility diagram with all regulated fixed containers, storage containers, storage areas and connecting pipes; and containment or diversionary structures for tanks not permanently closed” (Section V.B.1);
- “Respondent’s SPCC Plans did not have an adequate certification from a Professional Engineer” (Section V.B.2);
- “Respondent failed to update its SPCC Plan within six months after putting Tank #2001 and Tank #2002 into Service” (Section V.B.3);
- “Respondent failed to keep records of inspections and tests” (Section V.B.4); and
- “Respondent failed to submit a timely and adequate FRP” (Section V.B.5).

Each of these is discussed in turn.

A. “Discharges from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful” (Motion, Section V.A.5.ii)

This allegation tracks 40 C.F.R. Section 112.20(f)(1)(ii)(B), which states in part as

follows:

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-1 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 . . . (B) The facility is located at a distance (as calculated using the appropriate formula in appendix C to this part or a comparable 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 of this part, section 13, for availability) and the applicable Area Contingency Plan prepared pursuant to section 311(j)(4) of the Clean Water Act.²

² Complainant also alleges violation of the FRP requirement predicated on 40 C.F.R. Section 112.20(f)(1)(ii)(A) – which provides that an FRP must be prepared under certain circumstances in which a facility lacks sufficient secondary containment. This section does not apply, however, inasmuch as Complainant has mistakenly relied on a passage in an October *draft* report by WHF (that was on its first page so designated as bearing a “Current Revision Date: October 24, 2014) (CX 17, page 1 of 131) that indicated sufficient secondary containment was lacking in one area of the facility. However, that report was later corrected to confirm that the volume used in that calculation was initially in error as it included a tank that was already by that time permanently out of service (Tank 865). In actuality, Tank No. 865

However, whether 40 CFR 112.20(f)(1)(ii)(B) requires Respondent to prepare an FRP rests in turn on the analysis of whether the substantial harm criteria of the statute is met, discussed immediately below.³

B. “A discharge from the Facility could cause substantial harm to the environment” (Motion, Section V.A.7)

Whether a discharge from the Facility would in fact reach the channel and cause substantial harm to the environment is the central issue in this case. Complainant’s allegations and evidentiary support, however, do not even establish a *prima facie* case for such a discharge, much less demonstrate the absence of a genuine issue of material fact.

Complainant’s contentions respecting this issue are set forth in Section V.A.7(ii)(b)(2) of the Motion (pp. 20-21). To begin with, Complainant does not set forth the correct legal interpretation of the regulations, rather stating in the barest of legally conclusory terms that the substantial harm criteria are met upon a showing of:

- (i) location (Complainant states: because “the Facility is within 200 feet of the DRDWCC, there is a *reasonable expectation* that a discharge from the

has been permanently out of service since December 2004. The tank volume that should have been reported was for Tank 881 with a volume of 118,531, which is supported by Figure 4 as well as in other subsequent reports. *See* Declaration of Kari Casey, ¶ 7. Although this error was corrected in subsequent plans, Complainant has not acknowledged the actual situation that was applicable in 2014 – although, in fn. 5 of the Motion (at p. 17), Complainant does in fact acknowledge that there is a factual dispute regarding whether the tank was “out of service” or “permanently closed.” (These facts are detailed further in Section III.C, *infra*.) The only other two sections that would require the preparation of an FRP, 40 CFR 112.20(f)(1)(ii)(C) (involving threats to public water systems) and (D) (involving past releases of 10,000 gallons or more) are not applicable and Complainant has not alleged them to be applicable. Thus, insofar as whether an FRP was required, the solitary question is whether the requirements of 40 CFR Section 112.20(f)(1)(ii)(B) so dictated given the facts of this case.

³ In this regard, Complainant (Motion, p. 2) simply assumes, by reference to the expert declarations but without any analysis, that because the facility is located approximately 200 feet from the channel, there is a reasonable expectation that a release from the facility would reach the channel virtually instantaneously, irrespective of the planning distance required to be performed under 40 C.F.R. Part 112, Appendix C, Attachment C-III. Respondent’s opposition addresses Complainant’s two expert declarations that purportedly support this contention (Swackhammer and Michaud) but the Motion cannot be considered to raise the absence of any genuine issue of material fact as it only tracks the statutory analysis and presents no factual or legal analysis in support thereof.

Facility would be *virtually instantaneous*” (citing the Swackhammer Declaration, ¶ 19) (emphasis added); and

- (ii) planning distance (Complainant states: “the Facility is within any planning distance that may be calculated and therefore satisfies the substantial harm criteria set forth in 40 CFR Section 112.20(f)(1)(ii)(B)” (citing Michaud Declaration, Pars. 8-9).⁴

As noted, Complainant’s argument regarding substantial harm (as stated on p. 21 of the Motion), and its analysis of the “substantial harm criteria,” rests entirely on the Declaration Of James Swackhammer ¶ 19 and the Declaration Of William Michaud, ¶¶ 8 and 9.⁵

- Swackhammer Declaration

The Swackhammer Declaration provides no basis for this tribunal to find the “substantial harm” criteria has been met by Respondent. This declaration does nothing more than merely track the regulatory language in 40 C.F.R. Section 112.20 and provides no analysis or factual basis for Mr. Swackhammer’s conclusions that there is a “reasonable expectation” that a discharge to a sensitive environment would be “virtually instantaneous.” (Swackhammer Decl., ¶ 19.)

⁴ This appears to be a typo and it is assumed that Complainant’s counsel intended to cite to Michaud Declaration, Pars. 8-9 as the full declaration ends at ¶ 9.

⁵ This Section also relies on the Declarations of Janice Witul and David Meer who assert that the purported location of the site is within the ACP. Respondent disputes these facts, as well, inasmuch as the Complaint has not established whether the site is within the ACP and Respondent previously has established that the site is not within any other protected fish and wildlife designated area. However, in any event, and without conceding this point for the moment, neither of those declarations cure the fatal flaw in the Motion and its supporting declarations that no factual analysis was performed by Complainant to ascertain whether a worst-case release could reach the channel and cause substantial harm to fish and wildlife sensitive environments. (*See, e.g.*, Witul Decl., ¶ 18 (“Based on my November 2012 inspection, and subsequent review of Respondent’s documentation, I determined that Respondent’s Facility is subject to FRP requirements because it meets the substantial harm criteria in 40 CFR Section 112.20(f)(1) (*i.e.*, it has over 1,000,000 gallons of storage capacity and is located at a distance such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments”) and ¶ 31(e) (“The Facility is within the planning distance because, since the SRDWSC is both a navigable water and a sensitive environment and the Facility is within 200 feet of the SRDWSC, there is a reasonable expectation that a discharge to a sensitive environment would be virtually instantaneous”).

To begin, while paragraph 19 of the Swackhammer Declaration purports to prove that the “substantial harm” criteria has been satisfied based on Respondent’s location, his attestation simply mirrors the same regulatory language of 40 C.F.R. 112.20 and relies solely on the “fact” that the “Facility is within 200 feet” of the shipping channel to conclude the substantial harm criteria has been met. Indeed, although Mr. Swackhammer discusses that this analysis requires calculation of a planning distance, and sets forth the purpose and process for calculating a planning distance for this analysis, he does not perform any planning distance calculation whatsoever. (*See* ¶¶ 18-19).

Nor does he explain why he did not do so, or why such a calculation might be unnecessary, despite the fact that calculation of the planning distance is a requirement for the “substantial harm” analysis as provided in 40 C.F.R. Part 112, Appendix C, Attachment C-III (“Calculation of Planning Distance”), as he concedes. Instead, Mr. Swackhammer seemingly (like Ms. Witul) simply assumes that a release would reach that channel based on this 200 foot distance – irrespective of other facts (required to be considered) listed in 40 C.F.R. Section 112.20(f)(i) and states conclusorily that “the Facility is within any planning distance that may be calculated”

The failure to calculate a planning distance is fatal to Complainant’s Motion.

Attachment C-III to Appendix C to 40 C.F.R. Part 112, Section 5.5 (Oil Transport Over Land), provides the applicable standard, which Complainant acknowledges is correct (*see* Motion, p. 20): “[a] facility owner or operator whose nearest opportunity for discharge is located with 0.5 miles of a navigable water [which is what is alleged by Complainant, Motion p. 4] must complete the planning distance calculation (D3) for the type of navigable water near the facility or use a comparable formula.”) Complainant further concedes: “*The planning distance is a*

planning tool for an owner or operator to determine if its facility is FRP subject and, if subject, to develop response strategies to protect fish, wildlife and sensitive environments in the event of a discharge.” Motion, p. 20 (emphasis supplied).

Planning distance calculation D3 (insofar as fish and wildlife sensitive environments are concerned), as cited by Complainant (Motion, p. 20) states:

“Assuming a length of 0.5 miles from the point of discharge through on open concrete channel or concrete storm drain to a navigable water, the travel times (distance/velocity) are: 1.8 minutes at a velocity of 25 feet per second, 14.7 minutes at a velocity of 3 feet per second, 20.0 minutes at a velocity of 2 feet per second.”

40 C.F.R. Part 112, Appendix C, Attachment C-III, section 5.3.

Nor is it the case, as suggested by ¶ 19 of the Swackhammer Declaration (“the Facility is within any planning distance that may be calculated”) that the preparation of an FRP is essentially “automatic” if a facility is located less than 0.5 miles from a fish and wildlife and sensitive environment. See 40 CFR 112.20, Appendix C Section 5.6, which addresses facilities at which the nearest opportunity for discharge is “less than 0.5 mile and other factors are conducive to oil travel over land”.⁶

Inasmuch as neither Mr. Swackhammer nor any other of Complainant’s experts performed a planning distance calculation, Complainant has not presented a *prima face* case of substantial harm.

- Michaud Declaration

Nor did Complainant’s other expert, Mr. Michaud, calculate a planning distance. Rather, similar to Mr. Swackhammer’s conclusory declaration, the Michaud Declaration merely tracks the regulatory language in 40 C.F.R. Section 112.20 and provides no analysis or factual basis for

⁶ Mr. Michaud also acknowledges that this section is required to be included in the analysis of whether an FRP is required. CX 14 at page 9.

his conclusions that there is a “reasonable expectation” that a discharge to a sensitive environment would be “virtually instantaneous.” (See Michaud Decl., ¶¶ 8-9).

But performing a planning distance calculation is mandatory under Attachment C-III to Appendix C to 40 C.F.R. Section 112.20. Disregarding the requirement to perform a planning distance calculation by assuming the 200 foot distance between Respondent’s large tank and the deep water ship channel makes the calculation unnecessary is not legally permissible and certainly cannot form the basis of granting a Motion for Accelerated Decision. As noted above, it is improper to simply assume that an FRP is required because of the distance from the facility to the channel, though this seems to be what EPA did in this case.

Moreover, neither Mr. Michaud nor Mr. Swackhammer reviewed, opined upon, or critiqued Respondent’s Substantial Harm Criteria analysis. Respondent submitted its analysis to Complainant in 2015, and that analysis is included in Ms. Witful’s files when she sent what presumably she considered relevant to Mr. Michaud in 2016, but it appears, inexplicably, that the WHF Substantial Harm Criteria was not provided to Mr. Michaud for consideration.⁷

If Mr. Michaud had been provided with this report, he and the other experts would have been on notice that Respondent had performed a substantial harm criteria analysis that included a planning distance calculation and, presumably, would have addressed the sufficiency or

⁷ This is known from Complainant’s own submissions: Mr. Michaud’s report (CX 14) is dated August 23, 2016, and references emails received by Ms. Witul in July 2016, but cites as its references only the January 10, 2014 Haley & Aldrich report for VSSI. By July, 2016, Ms. Witul admittedly had had in her possession the June 23, 2015 WHF Substantial Harm Criteria report was over a year. (CX23) See also RX 21 (Letter dated July 7, 2018 from Richard J. McNeil to J. Andrew Helmlinger stating: “In any event, as requested, VSS Emultech has now prepared and submits herewith a Substantial Harm Criteria Determination, prepared by WHF, Inc. and dated July 8, 2015), which provides further detailed analysis regarding the potential applicability of 40 CFR Section 112.20 to this situation” and **RX 22** (Email dated July 8, 2018 from Andrew Helmlinger to Richard J. McNeil’s assistant Sandi Martinez, with a “cc” to Richard J. McNeil and Janice Witul and stating: “Thank you, Sandi. EPA will review this information and follow up with our impressions and any questions we may have”).

insufficiency of that analysis for substantial harm purposes. But, as noted, neither did, despite being required to do so.⁸

In this regard, the Substantial Harm Criteria Determination report from Respondent's expert, WHF, Inc. ("WHF") dated June 23, 2015 (RX88) addresses a number of these factors that apparently were disregarded by Complainant's experts.

For example, there was a significant amount of discussion between Complainant and Respondent respecting the viscosity of the asphaltic cement in the large tanks (such that it falls within 112.20(f)(2)(i)(G)). These discussions took place because "SPCC Guidance [] explains that hot-mix asphalt (HMA), is exempt from the SPCC rule because it is unlikely to flow and therefore it is unlikely that a discharge of HMA would have a potential to reach navigable waters or adjoining shorelines." (*See* Witul Declaration, ¶ 10, fn. 1).⁹

The question of viscosity, as well as related questions respecting the fate and transport of a worst-case spill from the largest asphaltic cement tank, were addressed at length in WHF's June 23, 2015 Substantial Harm Criteria report (RX 88). Among other things, that report noted:

⁸ *See* 40 CFR 112.20(f)(2)(i): "To determine whether 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 (b) of this section [authorizing the Regional Administrator at any time to require the owner or operator of any non-transportation related onshore facility to prepare and submit a facility response plan], **the Regional Administrator shall consider the following:** (A) Type of transfer operation; (B) Oil storage capacity; (C) Lack of secondary containment; (D) **Proximity to fish and wildlife and sensitive environments and other areas determined by the Regional Administrator to possess ecological value;** (E) Proximity to drinking water intakes; (F) spill history; (G) **Other site-specific characteristics** and environmental facts that the Regional Administrator determines to be relevant to protecting the environment from harm by discharges if oil into or on navigable waters or adjoining shorelines." (Emphases added).

⁹ Ms. Witul also declares under penalty of perjury (*see* ¶ 14), "the Facility stores asphaltic cement and asphalt emulsions, which form a sludge beneath the water and a sheen on the surface of the water." As there has not been any release to the channel, this statement is obviously entirely speculative and lacks foundation. Respondent objects to it being considered in support of Complainant's Motion and is filing a separate Objection addressing this and numerous other evidentiary deficiencies submitted in support of the Motion.

- “[t]he 2.38 million gallon tank is a vaulted tank, meaning that part of the spill containment is subsurface and there is a man-made depression [*i.e.*, not secondary containment] that would not fail in a catastrophic event” (RX 88 p. 5 of 41);
- “[t]he containment structure is a concrete block wall that is an average height of 5 ft however, 1.9 ft (on average) is below the surrounding grade” (*id.*);
- “[t]herefore, based on the net area (adjusting for tank displacement) of 97,812 ft², and the average height of the man-made depression of 1.9’, approximately 1.4M gallons of a worst case discharge would be captured” (*id.*);
- “[a]dditionally, the site’s grading and drainage also provides additional storage volume of a worst case discharge. The onsite catch basins located north of the bulk asphalt storage area are a total combined volume of 234,865 gallons and the railroad spur provides an additional 287,973 gallons. When you add this volume into the overall site capacity you get a total contained volume of 1,930,524 gallons of material” (*id.*, at pp. 5-6 of 41);
- “a man-made berm has been constructed on the southern property boundary that consists of [a] continuous berm constructed of K-rail and earthen berms for the protection of the channel” (*id.*, p. 6 of 41); and
- “[t]he viscosity of the asphalt cement is orders of magnitude greater as the material cools to average ambient temperatures. This point is absolutely critical in the evaluation of this site because asphalt cement does not behave as a typical Newtonian fluid. Hot asphalt cement is a non-Newtonian laminar fluid that increases in viscosity as the temperature decreases which is time dependent [citations omitted]” (*id.*, p. 6 of 41).

The WHF report, based on the preliminary assumptions, then performs a flow model (*see* RX 88, Section 3.0, pp. 8-12), ***concluding that a worst-case release would not reach (much less cause injury to fish and wildlife therein) the channel.*** RX 88, p. 11 of 41 (“[a] flow from the site would not reach navigable water via overland flow in a southerly direction”).

Thus, Respondent, based on competent evidence (including calculations performed by engineers who had visited the VSSI facility) concluded, in accordance with 40 CRF Section 112.20 that “a worst-case release would not reach the channel.” This conclusion has not been called into question and, in fact, Complainant’s expert opinions are the opinions that did not comply with 40 CFR Section 112.20 and are not based on competent or admissible evidence. If

for no other reason, this clearly raises a genuine issue of material fact as to the central issue in this case, namely, whether a release from the facility could reasonably be expected to cause substantial harm to fish and wildlife and sensitive environments in the channel and the motion should be dismissed.

As for Mr. Michaud, Mr. Michaud's report first acknowledges that a worst-case spill would be contained on-site, but he then nevertheless concludes that an FRP would have been required, based on his apparent misinterpretation of 40 CFR 122.20(f)(1).

Regarding his agreement that a release would be contained on-site, Mr. Michaud states (CX 14, pages 7-8):

- “[i]f the containment wall is designed for fluid depths as great as the full height of the wall (stated by Mr. Michaud as 4.0 feet), the freeboard remaining if the full capacity of the largest AST were released into the containment area, would be approximately 6.8 inches” (CX 14, p. 7 of 20);
- “we estimate that the effective water level rise in the containment area for a 25-year, 24-hour rainfall event would be 4.0 to 5.3 inches” (*id.*, pp. 7-8 of 20); and
- if the containment wall is designed to contain fluid at its maximum height, the secondary containment appears to be sufficient to contain the capacity of one of the asphalt cement AST's” (*id.*, p. 8 of 20).

Despite his finding that a release would be contained on-site, Mr. Michaud then disregarded his analysis and concludes an FRP is necessary based solely on the fact – without anything more – that Respondent's facility is within ½ mile of the channel (CX 14, pages 9-11):

- “[t]herefore, because the oil AST's on the VSS facility are with ½ mile of a critical fish and wildlife habitat and the planning distance D3 is non-zero [this, apparently, is Mr. Michaud's terminology for not having calculated a planning distance], the subject VSS facility satisfies the criteria for substantial harm” [and, this, apparently, ends the inquiry as to whether an FRP is necessary] (CX 14, p. 9 of 20); and
- “[n]ote that because locational factors are not considered when an opportunity for discharge is located within ½ mile of a navigable water, considerations of the physical characteristics of the material are not relevant for determining whether the owner or operator must submit an FRP. In addition, the presence of secondary

containment is specifically excluded from the analysis of overland flow and planning distance for this criterion.” (*Id.*)¹⁰

In this case, Mr. Michaud’s analysis is flawed on both counts. First, it is flatly contradicted by 40 CFR Section 112.20(f)(1)(ii)(B) and (2)(i)(D) [proximity to fish and wildlife sensitive environments] and 40 CFR Section 112.20(f)(2)(i)(G) [“[o]ther site-specific characteristics and environmental factors[.]” which would include the viscosity of the material and the size, nature and dimensions of man-made depressions, as discussed above]. Both of these sections provide that locational factors may be considered in the substantial harm analysis, but neither of Complainants’ experts did so.

Second, Mr. Michaud’s analysis is flatly contradicted by 40 C.F.R. part 112, Appendix C, Attachment C-III, which provides for either the use of the “appropriate formula” in Attachment C-III or a “comparable formula” to determine whether a release could cause substantial harm to fish and wildlife sensitive environments (*see* Flowchart of Criteria for Substantial Harm, 40 C.F.R. Pt. 112, App. C, Att. C-I, fn.1 and Att. C-III, section 5.5 [providing that even for facilities within .5 miles the planning distance calculation must be undertaken]). While EPA has provided “simple to use” formulas to calculate planning distances, it also permits facility owners to “calculate planning distances using more sophisticated formulas, which take into account broader scientific or engineering principles, or local conditions.” 40 C.F.R. Pt. 112, App. C, Att. C-III, section 1.1-1.2. The latter is what Respondent’s experts have done here.

What’s more, the regulatory scheme makes clear that the calculations set forth in Appendix C are required inasmuch as “[f]acility owners or operators must evaluate the potential for oil to be transported over land to navigable waters....” 40 C.F.R. Pt. 112, App. C, Att. C-III,

¹⁰ This statement is flatly contradicted by Mr. Michaud’s statement two paragraphs later (CX 14, p. 9 of 20) in which he acknowledges that a planning distance calculation still must be performed where an opportunity for discharge through a storm drain or open concrete channel is located less than 0.5 miles from a covered navigable water.

section 5.0, Oil Transport Over Land. This section allows for a “deduction” for material prevented from reaching navigable waters by man-made depressions (as opposed to secondary containment) (Att. C-III, Section 5.1). Further, based on subsection 40 CFR Section 112.20(f)(b)(2)(ii)(G), the nature of the materials, *i.e.*, its viscosity, not only may be, but is *required to be*, taken into consideration.

Although Mr. Michaud’s analysis, at pages 10-11 (and referencing Table 4, Column Collapse Calculations, Asphalt Cement AST, of his report), attempts to simulate an overland flow release, his analysis is based on incorrect facts.

These purported facts (and their flaws), as set forth in the accompanying Declaration of Lee DeLano, include the following:

1. Mr. Michaud uses a containment wall height of 4 feet based on Figure 3 of Respondent’s expert Haley & Aldrich’s Evaluation Of Containment Measures For Asphalt-Cement Above-Ground Storage Tanks report prepared in January 2014. Figure 3, however, uses a containment wall height of 4 feet two inches. (CX 15, page 13 of 26).
2. Using a height of 4’2” changes the calculations set forth in Mr. Michaud’s report at Table 3, Secondary Containment Analysis, Bulk Asphalt Containment Area, Design Depth (4’0”) Basis (CX 14 p. 15 of 20), as follows:
 - a. Containment “Raw Volume” becomes 3,137,095 gallons, not 3,009,413 gallons as shown.
 - b. The “Effective volume as % AST capacity” becomes 113%, not 107% as calculated by Mr. Michaud.
 - c. “Freeboard at full release,” under “Spill Scenario Calculations” becomes 9.39”, not 6.80”, as calculated by Mr. Michaud.
 - d. Rainfall depth percentages are then reduced significantly: 43% vs. 59%, 49% vs 67%, and 56% vs 78%.
3. The existing containment wall is 2’2” above the surrounding topography. Using the structural components shown in Figure 3 from the Haley & Aldrich report, the containment wall can be overtopped with 4’3” of asphalt fluid before the elastic limit of the materials of the wall is reached. (CX 15, p. 13 of 26). Failure of the wall is likely not to occur until a height of 9’ of fluid over the wall.

4. The WHF report dated June 23, 2015, App. B, Calculations (RX 88, pp. 28-34 of 41), indicates a volume of 287,793 gallons available for containment of fluid on the VSS site in the railroad bed on the west side of the site. (*Id.*, p. 31 of 41).
5. The “K” rails that are located on the levee towards the shipping channel are approximately 3’ tall. Mr. Michaud’s spill calculation indicates a height of advancing fluid as 1.9 feet at a distance of 175.8 feet. (CX 14 p. 16 of 20). WHF’s height calculation was only 0.57 feet. (RX 88 p. 31 of 41).
6. The WHF report details the total distance fluid traveling north to the shipping channel is 2,490 feet. (RX 88 p. 12 of 41). A worst-case spill from the AST in a northerly direction would cool and solidify before it would reach any navigable waters. A spill in a southerly (or any other) direction likewise would cool and solidify before it would reach navigable waters. (*Id.*, pp. 12-13 of 41).

See Declaration of Lee DeLano, ¶¶ 5-9.

Thus, had Mr. Michaud used the correct information, he presumably also would have concluded that a worst-case release from the above-ground storage tank would not even reach the channel, much less cause substantial harm to fish or wildlife or a sensitive environment. In any event, for present purposes, there clearly is not an absence of a genuine issue of material fact as to this question.

C. “The Facility *has* insufficient secondary containment in the product storage and manufacturing area and/or for a discharge from the Facility could cause injury to fish and wildlife and sensitive environments (Motion, Section V.A.7(ii)(a))

This allegation forms the basis for Complainant’s allegation that an FRP was required pursuant to 40 CFR Section 112.20(f)(1)(ii)(A).

In this regard, Complainant has alleged that secondary containment typically is established by the USEPA using either a “25-year, 24-hour storm event” standard or a “110 percent of storage tank capacity rule of thumb” (Motion, p. 16). Complainant relies solely on the purported admission of Respondent’s expert in its *draft* October 2014 report (as argued in the Motion at page 18 and as incorporated in the Swackhammer Declaration at pars. 8 - 11) that was later, during pre-litigation negotiations, corrected. Specifically, Complainant claims that there

was insufficient secondary containment in the product manufacturing and storage area for the contents of Tank 865 if its full capacity was released. But, as later corrected by Respondent, Tank 865 was, in fact, permanently closed and out of service. *See* Declaration of Kari Casey, ¶¶ 7-8.

In his declaration, Mr. Swackhammer states as follows:

“The October 2014 SPCC/FRP Plan states that Tank 865 is in the product manufacturing and storage area of the Facility and has a shell capacity of 174,993 gallons, and that the secondary containment capacity for the product manufacturing and storage area is 187,881 gallons. CX 17, p. 44. Using these volumes provided by Respondent, I calculated the gross amount of available freeboard for secondary containment . . . [and], once precipitation is accounted for, the secondary containment for the product manufacturing and storage area is inadequate.”

Swackhammer Decl., ¶¶ 8-10.

As noted above, WHF, Respondent’s consultant, made an error in the draft October 2014 report and depicted Tank 865 as active in its Figure 1, Petroleum Tank Layout (CX 17 at p. 107 of 131). This error was identified by Kari Casey of WHF, Inc., and corrected almost immediately and well prior to the commencement of this administrative action (and thus not in anticipation of litigation, but as a matter of course). *See* Declaration of Kari Casey, ¶¶ 7-8. *See, also*, CX 23, p. 19 of 41 (June 23, 2015 WHF, Inc. Substantial Harm Criteria Determination); CX 21, page 67 of 165 (May 1, 2017 WHF, Inc. Facility Response Plan).

Under these circumstances, Complainant has not established liability for the preparation of an FRP pursuant to 40 CFR Section 112.20(f)(1)(ii)(A). Alternatively, at the very least, there is a genuine issue of material fact in dispute (*i.e.*, whether Tank 865 was active or inactive at the relevant time).

Whether this was or was not the case will of necessity be determined by the trier of fact (bearing in mind that the USEPA’s experts whose testimony was offered in support of this

disputed fact – Mr. Swackhammer and Mr. Michaud – have never visited the facility and thus would not be able to offer competent testimony as to this question. Moreover, the one USEPA representative who did visit the site on two occasions, Ms. Witul, did not record whether the tank was active or not. *See* Witul Declaration, ¶ 31(c), p. 12 (“I agree with the conclusions in Complainant’s Expert Report”).¹¹

D. “A discharge from the Facility could cause injury to fish and wildlife and sensitive environments” (Section V.A.7(ii)(b))

Respondent’s analysis of this allegation already is fully set forth in Section III.A and III.B of this Opposition, *infra*. For the reasons stated therein, Complainant has not even established its *prima facie* case, much less provided a basis upon which this tribunal could find that there is no genuine issue of material fact.

E. ”Respondent’s SPCC Plan(s) did not include management approval; a facility diagram with all regulated fixed containers, storage containers, storage areas and connecting pipes; and containment or diversionary structures for tanks not permanently closed” (Section V.B.1)

Complainant’s Motion misapprehends the nature of the exchange of submittals, information, and documentation between the EPA and Respondent VSSI during 2012 through 2017. As set forth in greater detail in Section III.I, below, EPA committed to providing feedback to VSSI as it was refining its submissions. In the case of the SPCC, the 2012 Plan remained in effect throughout this period, as permitted by 40 CFR Section 112.5(b) (an owner must conduct a review and evaluation of the SPCC Plan at least once every five years”). Moreover, Complainant has acknowledged that the VSSI 2012 SPCC plan was compliant with applicable requirements. (Motion, p. 25, fn. 9).

¹¹ The USEPA also indicates its representative Connor Adams participated in a site visit with Ms. Witul on or about September 30, 2016; however, the USEPA has not submitted a declaration from Mr. Adams in support of his Motion or otherwise indicated whether he observed the status of Tank 865 at that time. *See* Witul Decl., ¶ 20, p. 8).

F. “Respondent’s SPCC Plans did not have an adequate certification from a Professional Engineer” (Section V.B.2)

As noted above, the VSSI 2012 SPCC Plan remained in effect throughout this period, as permitted by 40 CFR Section 112.5(b) and Complainant has acknowledged that the VSSI 2012 SPCC plan was compliant with applicable requirements, including that it had adequate certification from a Professional Engineer. (Motion, p. 25, fn. 9).

G. “Respondent failed to update its SPCC Plan within six months after putting Tank #2001 and Tank #2002 into Service” (Section V.B.3)

EPA’s assertions regarding the dates Tanks #2001 and #2002 went into operation are wrong. Contrary to Complainant’s allegations (Motion, pp. 25 – 26), Tank 2001 was not in service in April 2012 (RX 37, page 5 of 6) and Tank #2002 was not in service in July 2015. IN fact, Tank #2002 did not go into service until January 2016. *See* Declaration of Randall Tilford, ¶ 2. Complainant has not offered competent, admissible evidence to the contrary and, even had it done so, that evidence would be incorrect and thus there remains a genuine issue of material fact.

Regardless, contrary to Complainant’s assertion in the Motion (at page 26) that “[a]lthough Respondent did amend its SPCC Plan in January 2016, Respondent failed to include that Tank #2002 was in service,” Complainant is incorrect. In the January 2016 SPCC Plan, WHF clearly identified the location and tank number of Tank #2002 on Figures 3 (Site Map) (CX 18, p. 17 of 161) and 5 (Chemical/Storage Map) (*id.*, p. 19 of 161). Both figures depict Tank #2002 as being empty and/or out of service as of that date. Moreover, it is obvious from reviewing the color aerial photograph of Tank #2002, depicted in Figure 2, that the construction and installation of that tank has not yet been completed. (*Id.*, p. 16 of 161).

H. “Respondent failed to keep records of inspections and tests” (Section V.B.4)

Although Complainant has alleged in a conclusory fashion that VSSI did not conduct tank integrity inspection and testing, it has not provided any instances of specific non-compliance. (*See* Motion, pp. 26-30). Instead, Complainant asserted only that “Respondent provided no documentation to EPA showing that it met the schedule in its October 2014 SPCC/FRP Plan or its January 2016 SPCC Plan to perform integrity testing[,]” but then acknowledges that “Respondent provided records of inspections and tests performed between June 1, 2016 and January 15, 2017.” (Motion, pp. 29 – 30). Moreover, Complainant fails to acknowledge, much less address, the significant volume of testing documentation provided by Respondent to EPA on August 23, 2013, which certainly contains inspection records responsive (as of that date) to the period of time as to which Complainant is seeking a penalty (April 2012 through January 2016). *See* RX 2. In short, Complainant has simply failed to specify any basis upon which a violation could be predicated.

I. “Respondent failed to submit a timely and adequate FRP” (Section V.B.5)

As discussed in detail in Section III.A, an FRP was and is not required for the VSSI facility.

Notwithstanding this, Respondent agreed voluntarily to prepare an FRP as an accommodation to the USEPA. In the very first in-person meeting between VSSI and the USEPA regarding the question of whether or not an FRP was required, and in subsequent meetings thereafter, the USEPA advised Respondent that it would evaluate, and permit VSSI to submit, an alternative FRP that would be suitable for the VSSI facility. *See* Declaration of Kari Casey, ¶ 4); Declaration of Randall Tilford, ¶ 3.

Both the USEPA and VSSI continued to analyze the question of the potential applicability of the FRP regulations to the VSSI facility between 2014 and 2017. Nonetheless,

VSSI committed to preparing an FRP, notwithstanding its view that an FRP was not required. *See* Declaration of Kari Casey, ¶ 5; Declaration of Randall Tilford, ¶ 4; RX 4, p. 1 of 68 (Letter dated January 29, 2014 from R. McNeil, counsel for VSSI, to Andrew Helmlinger, counsel for EPA [“Our conclusion is that an FRP is not required at this time, however, we remain willing to discuss this question further with you, should you desire”]); RX 9, p. 1 of 29 (Letter dated October 2, 2014 from Mr. McNeil to Mr. Helmlinger [“As I also mentioned, we still will be following up with the Facility Response Plan that we discussed in our recent meeting”]); RX 15, p. 1 of 2 (Email dated June 9, 2015, from Mr. Helmlinger to Mr. McNeil [“Rick, I mean[t] to follow up regarding the engineering analysis that we’ve been expecting that considers the potential flow toward water of a release of the asphalt cement without regard to any berm or other intervening structures. Would you please advise when EPA may receive this information?”]); RX 29, p. 1 of 263 (Email dated May 25, 2017 from Mr. McNeil to Mr. Helmlinger [“As you will recall from our prior discussions, we continue to hold the view that the FRP was not required ... However, in the interest of proactively addressing the concerns expressed by USEPA, we are including [the updated FRP and SPCC] and are prepared to implement them forthwith.”]).

Moreover, in this case, the USEPA understood and acknowledged that whether an FRP was required was an issue that remained in question and unresolved by both Complainant and Respondent. *See* RX 22, p. 1 of 1 (Email from Mr. Helmlinger to Mr. McNeil, upon receipt of July 2015 WHF, Inc. Substantial Harm Criteria Determination [*see* RX 21, p. 1-2 of 2] [“Thank you ... EPA will review this information and follow up with our impressions and any questions we may have....”]).

Even as recently as June 27, 2017, EPA continued to represent to VSSI that it was continuing to evaluate whether an FRP was required and, if so, its parameters. *See* RX 34, p. 1 of 1 (Email from Mr. Helmlinger to Mr. McNeil [“In the meantime, to ensure a most productive meeting, I request that VSS provide to Janice [Witul] the following information, which we would like to confirm assertions in the updated plans”]).

In fact, EPA never provided comments to VSSI respecting its interpretation of the FRP regulations as applicable to its facility. Instead (as VSSI only learned after the Administrative Complaint in this case was filed), Ms. Witul provided VSSI’s substantial harm analysis to EPA’s expert Mr. Michaud, indicating (as shown in her declaration) that she had already concluded that VSSI was required to prepare an FRP. (*See* Witul Declaration, ¶¶ 18, 31). This, however, was contrary to what she was telling Respondent. In fact, Ms. Witul remained unsure whether an FRP was necessary for the VSSI facility well into 2016.¹²

IV. CONCLUSION

As discussed above, Complainant did not comply with the prehearing exchange order and its Motion should be denied on that ground alone. Had Complainant contacted Respondent prior to filing the Motion, the issues could have been narrowed and/or resolved.

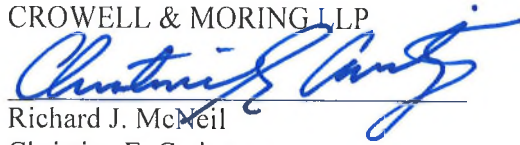
Going to the heart of the Motion, however, there remain genuine issues of material fact respecting whether a release would even reach the Channel, much less cause substantial harm. Moreover, as explained above, Complainant’s assertions regarding the SPCC and tank integrity testing are in error or, at best, clearly raise genuine issues of material fact. For the foregoing

¹² Moreover, Mr. Michaud’s report (Review of FRP Applicability, VSSI [CX 14]), which is dated August 23, 2016, indicates that Ms. Witul did not provide Mr. Michaud with WHF, Inc.’s Substantial Harm Criteria Determination dated June 23, 2015 (even though it had been provided to Mr. Helmlinger in July of 2015 [*see* RX 21]) but, rather, only provided Mr. Michaud with the January 10, 2014 Haley & Aldrich *Report on Evaluation of Containment Measures for Asphalt-Cement Above-Ground Storage Tanks, VSSI*). Mr. Michaud’s conclusions are based on faulty assumptions and his conclusions are inaccurate.

reasons, Respondent respectfully requests that Complainant's Motion for Accelerated Decision be denied.

Dated: August 20, 2018

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