

Richard J. McNeil (SBN 116438)  
Christine E. Cwiertny (SBN 222098)  
CROWELL & MORING LLP  
3 Park Plaza, Suite 2000  
Irvine, CA 92614  
Telephone: 949-263-8400  
Facsimile 949-263-8414  
[rmcneil@crowell.com](mailto:rmcneil@crowell.com)  
[ccwiertny@crowell.com](mailto:ccwiertny@crowell.com)

Attorneys for VSS INTERNATIONAL, INC.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**BEFORE THE ADMINISTRATOR**

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

DOCKET NO. OPA 09-2018-0002  
  
**TRIAL BRIEF OF RESPONDENT VSS  
INTERNATIONAL, INC.**

**TRIAL BRIEF OF VSSI**

In accordance with the Chief Administrative Law Judge's Prehearing Hearing Order, Respondent VSS International, Inc. (Respondent or VSSI) hereby respectfully submits this Trial Brief.

In short, Complainant the United States Environmental Protection Agency ("EPA") has failed to establish any of the alleged violations that correspond to its Counts I through V of its Administrative Complaint and therefor the Administrative Complaint must be dismissed in its entirety.

Each Count is discussed in turn.

**I. The 2012 SPCC Facility Diagram Adequately Depicts All Required Items Of Compliance**

As the Court may recall, VSSI respectfully requests reconsideration of the granting of accelerated liability in favor of EPA on Count I, which principally relates to the depiction of certain information on figures included in an SPCC Plan.

EPA acknowledges that an SPCC Plan for the VSSI facility was prepared by Condor Earth Technologies Corporation on or about April 27, 2012 but EPA has contended that the Facility Diagram accompanying that report did not comply with the SPCC regulations.<sup>1</sup>

EPA's Administrative Complaint provides little in the way of specificity as the nature of any alleged violations as follows, thus it is difficult to respond to EPA's non-specific allegations, which read as follows:

“At the time of EPA's inspection, Respondent's SPCC plans failed to include a facility diagram with all regulated fixed containers, storage areas and connecting pipes, and stating the oil type and capacity for containers (40 CFR Section 112.7(a)(3)).<sup>2</sup> At the time of EPA's inspections, Respondent's SPCC plans failed to include an containment or diversionary structures in the Facility Diagram for tanks not permanently closed (40 CFR Section 11.2(c) ....”

(Complaint, Pars. 31-32.)

Complainant's Memorandum In Support Of Its Motion For Accelerated Decision

(“Motion”) also alleges only as follows:

---

<sup>1</sup> Complainant also alleges the failure of the plan to include written evidence of management approval, which question has been conclusively resolved in VSSI's favor, *see* RX 2, 11 (signed management approval).

<sup>2</sup> Section 112.7(a)(3) states in pertinent part: Describe in your Plan the physical layout of the facility and include a facility diagram which must mark the location of each container.... The facility diagram must also include all transfer stations and connecting pipes. You must also address in your Plan: (i) the type of oil in each container and its storage capacity .....” Section 112.7(c) states in pertinent part: “Provide appropriate containment and/or diversionary structures ....”

“... the April 2012 Plan did not include all ASTs listed on Table 3 of the April 2012 SPCC Plan [and] the October 2104 SPCC/FRP Plan did not include piping details of the production storage and manufacturing areas [and t]he diagram, labeled as Site Plan, in the January 2016 SPCC Plan did not include detail regarding the rubberized asphalt plant and piping diagrams of the production storage and manufacturing area.”

(Motion, pp. 23 and 24).

Based on the foregoing, EPA’s complaint with the Condor Plan seems to be that the April 2012 Condor report did not identify all of the tanks depicted by area and location on Figure 3 (CS 16, 24) on Table 3 (CX 6, 29)

However, this is incorrect. All of the regulated tanks were shown by tank number and location and they were outlined on Figure 3. As to a small number of exempt tanks, the interior circular area was blacked out in order to distinguish these tanks as being Exempt Non-Oil ASTs - - as the Figure 3 legend so states. CX 17, pages 93 and 107, corroborate these facts and show the “unoutlined” tanks so their number may be verified as a cross-check.

Likewise, the assertion that the January 2016 SPCC Plan did not include detail regarding the rubberized asphalt plant is incorrect. CX 17, 20 depicts the Rubberized Asphalt Plant Area in the southwestern portion of the figure (Figure 5). Due to space constraints, the figure includes a chart detailing the materials housed in the rubberized asphalt plant area with an arrow directing the reader to a hashed rectangular box depicting the contents of that area, including container type and quantity. From this figure, the location, quantity and contents of the containers in the rubberized asphalt plant area are easily visible.

Similarly, piping diagrams of the production storage and manufacturing areas were referenced in the updated January 2016 plan (CX, 95: 145: “Note: Some Features And Piping Not Shown For Clarity”); piping details not initially included due to their scale were included in detail in Figure 1 of the May 1, 2017 FRP (CX 21, 67)..

Likewise, EPA apparently attempted to note a deficiency associated with a rail car transfer rack. Ms. Witul's comment in this regard, "not having sized containment," does not track any applicable regulatory requirement but, regardless of her exact meaning, the SPCC Plan would still be compliant, *see, e.g.*, 40 CFR Section 112.7(c), governing secondary containment and authorizing, among other secondary containment, "dikes," "berms," "culverting," "gutters or other drainage systems, such as, obviously, the stormwater drainage interceptors as shown on Figure 3, which in this case are proximate to the rail car transfer rack, as is other secondary containment. *See* CX 16, 24.

Finally, as reiterated previously, both the EPA 2012 SPCC and the May 2017 SPCC were determined to be compliant insofar as these issues are concerned, thus, no violation has been or can be established for Counts I through IV. *See* RX 47, 1; Complaint, pp. 34, 43, 56 and 65.

## **II. An Adequate Professional Engineer Certification Accompanied The April 2012 And Subsequent Plans**

EPA concedes that the Professional Certification accompanying the April 2012 SPCC Plan is compliant.<sup>3</sup> Since that Plan remained in effect during the relevant enforcement timeframe, there is no violation.

EPA also agrees that the certification in the January 15, 2016 interim SPCC Plan was compliant. *See* RX 47, 1; Complaint, p. 43 "Respondent obtained a PE certification of the Facility SPCC Plan on January 15, 2016."

In addition, a Professional Engineer, A. Lee Delano, provided Professional engineer Certification's on an interim reports dated October 24, 2014 (CX 17, 29).

Since the 2012 SPCC Plan was still in effect in 2016, this tribunal need not reach the advisory question (for which EPA cites no authority) whether a Professional Engineer may state

---

<sup>3</sup> Motion, p. 25 n.9 ("EPA finds no fault with Respondent's Professional Engineer certification in the April 2002 SPCC Plan").

in full some of the professional certification language and at the same time incorporate by reference other such language in order to demonstrate his or her compliance with 40 CFR Section 112.7. Accordingly, Count II should simply be dismissed because EPA concedes an adequate PE certification was in effect during the proposed period of enforcement.

**III. The SPCC Plans Were Properly Addressed Within Six Months of Tank No. 2001 and 2002 Being Placed Into Service**

Respecting Tank No. 2002, it is undisputed that this tank went into service in the latter half of July 2015 and was referenced and depicted in the interim SPCC dated January 15, 2016 thus there is no violation of the plan amendment requirement. *See* CX 18, Figure 3, p. 17 (showing Tank No. 2002 to the immediate east of Tank No. 2001)); CX 18, Figure 5, p. 19 (same); CX 18, 32 (Part 4, Chemical Inventory, listing Asphalt Cement AST with a capacity of 2,348,000 gallons.

Although the date that Tank No. 2001 went into service remains not precisely known, that date will be set prior to the hearing of this matter. Tank No. 2001 was described in detail in the October 24, 2014 interim SPCC report (CX 17, pp. 35, 107.)

More importantly, however, due to the viscosity of the material in Tank Nos. 2001 and 2002, and even notwithstanding that the capacity of these tanks is relatively large, the placement of oil in these tanks would not constitute a change in the facility design ... that materially affects its potential for discharge .....

**IV. VSSI Performed Industry Standard Tank Integrity Testing**

EPA by letter dated May 22, 2014 letter to Mr. Jeffrey R. Reed alleged that tank integrity testing and FRP potential violations as follows:

“Based on the information available to EPA, EPA believes that violations of Section 311 of the Clean Water Act (“CWA”), 42 U.S.C. Section 1321, have occurred at the facility. Specific violations of the Spill Prevention, Control and Countermeasure (“SPCC”) regulations, as promulgated pursuant to /section 311(i) of the Clean Water Act (“CWA”),

33 U.S.C. 1321(j), include failure to have a facility Response Plan (40 CFR Section 112.20), and the failure to conduct integrity testing for aboveground containers in accordance with industry standards (49 C.F.R. 1128.(c)(6). Additional details of the specific violations that EPA alleges are described in the Compliance Inspection Report.”<sup>4</sup>

As an initial matter, EPA requested, and was furnished with, ample tank inspection records in connection with its information request in 2013. *See* CX 11, RX 2, RX 9.

However, Complainant acknowledges in its Reply Brief (as further modified by the Order) that it is seeking liability for failure to conduct required ultrasonic testing and internal inspections between January 1, 2015 and January 1, 2016 that it contends were required by then-prevailing industry standards.

VSSI complied with the SPCC requirements in effect at the time of the preparation of the Condor SPCC in April 2012, however, thereafter, for enforcement purposes, Complainant has asserted that the 2012 SPCC procedures and inspections were inadequate and did not meet industry standards (relying on the Declaration of Janice Witul).

In Paragraph 16(c), Ms. Witul stated:

“Respondent did not develop written procedures for inspections and tests in accordance with applicable industry standards....”

However, EPA has not designated Ms. Witul as an expert witness and thus she would not be eligible to testify as an expert as to industry standards for tank procedures and inspections.

**V. No Facility Response Plan Was Required; VSSI Agreed To Do An FRP Voluntarily As An Accommodation To EPA**

As was set forth in some detail in Respondent’s Opposition to Complainant’s Motion for Accelerated Decision, whether an FRP is required has been the subject of ongoing discussions between the parties, beginning in approximately 2014.

---

<sup>4</sup> RX 6, p. 1. No Compliance Inspection Report was attached to Respondent’s copy of this May 22, 2014 letter.

Given the factors applicable to the determination whether an FRP is required, the parties engaged experts and held meetings in order to reach a resolution. VSSI ultimately agreed to prepare an FRP as an accommodation to EPA; nonetheless, this enforcement proceeding ensued.

VSSI, as stated in its Opposition, does not believe that EPA's position that an FRP is sustainable. Without repeating its chief allegations in their entirety, VSSI believes the following:

- 40 CFR 112.20(f)(1)(II)(B) governs;
- A release contemplated by the regulations would not leave the facility and thus would not reach the Deep Water Channel;
- Even were it to do so, the Deep Water Channel is not covered by (f)(i)(2)(B);
- Even were the Channel to be covered by (f)(i)(2)(B), any discharge contemplated by the regulations could not reasonably be expected to cause injury to fish and wildlife and sensitive environments.
- By not calculating a planning distance, EPA did not follow its own regulations.
- EPA also erred in other respects vis-à-vis a calculation of whether an FRP for the VSSI facility was required.

Dated: January 11, 2019

Respectfully Submitted,



---

Richard J. McNeil  
Crowell & Moring LLP  
3 Park Plaza, 20<sup>th</sup> Floor  
Irvine, CA 92614  
Telephone Number: (949) 263-8400

**CERTIFICATE OF SERVICE**

I, Richard J. McNeil, hereby certify that on January 11, 2019, I caused to be served via overnight delivery the foregoing **TRIAL BRIEF OF RESPONDENT VSS INTERNATIONAL, INC.** with the Clerk of the Office of Administrative Law Judges, attention Mary Angeles at the Ronald Reagan Building, Room M1200, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

Additionally, I, Richard J. McNeil, hereby certify that on January 11, 2019, I served a true and correct copy of the foregoing via electronic mail to Rebekah Reynolds, attorney for Complainant, at [Reynolds.Rebekah@epa.gov](mailto:Reynolds.Rebekah@epa.gov).

Dated: January 11, 2019

Respectfully Submitted,



---

Richard J. McNeil  
Crowell & Moring LLP  
3 Park Plaza, 20<sup>th</sup> Floor  
Irvine, CA 92614  
Telephone Number: (949) 263-8400