

BEFORE THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: )  
)  
ENVIRONMENTAL PROTECTION ) OPA-09-2018-00002  
AGENCY, )  
)  
Complainant, ) Administrative Law Judge  
v. ) Susan L. Biro  
)  
VSS INTERNATIONAL, INC., )  
)  
Respondent. )

Phillip Burton Federal  
Building and United States  
Courthouse  
Courtroom 15, 18th Floor  
450 Golden Gate Ave  
San Francisco, California  
Thursday,  
May 16, 2019

The above-entitled matter came on for hearing,  
pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE SUSAN L. BIRO  
Chief Administrative Law Judge

APPEARANCES:

On Behalf of the Complainant:

J. ANDREW HELMLINGER, Esquire  
REBECCA SUGERMAN, Esquire  
REBECCA REYNOLDS, Esquire  
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For the Complainant:

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APPEARANCES: (Cont'd.)  
On Behalf of the Respondent:  
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1 PROCEEDINGS  
2 (9:00 a.m.)  
3 JUDGE BIRO: We're going to go on the record  
4 in the matter of VSS International, docket number OPA-  
5 09-2018-0002. Good morning, everyone. I'm Susan  
6 Biro. I'm the chief administrative law judge of the  
7 U.S. Environmental Protection Agency, and I've been  
8 assigned to preside over the hearing in this matter.  
9 Counsel for the agency, could you identify  
10 yourself for the record?  
11 MS. SUGERMAN: I'm Rebecca Sugerman.  
12 THE COURT REPORTER: I'm sorry, Your Honor,  
13 could they speak into the mic?  
14 MS. SUGERMAN: I'm Rebecca Sugerman.  
15 JUDGE BIRO: Good morning, Ms. Sugerman.  
16 MR. HELMLINGER: And Andrew Helmlinger.  
17 Good morning.  
18 JUDGE BIRO: Good morning.  
19 MS. REYNOLDS: Rebecca Reynolds.  
20 JUDGE BIRO: Rebecca Reynolds, okay. Good  
21 morning.  
22 And counsel for the respondent?  
23 MR. McNEIL: Good morning, Your Honor. Rick  
24 McNeil and Jordan Ludwig, from Crowell Moring, for  
25 respondent.

1 JUDGE BIRO: Okay, great. Good morning.  
2 MR. LUDWIG: Good morning, Your Honor.  
3 JUDGE BIRO: Are there any preliminary  
4 matters before we begin the hearing?  
5 MR. HELMLINGER: A couple. I think this is  
6 -- fortunately, I think, we don't do this a lot, so  
7 just a few administrative things. If we could discuss  
8 where witnesses sit, I think there's some general  
9 understanding on preferences, but I think we also come  
10 to this with some different experiences. So, Judge, I  
11 wanted to make clear that we're -- you're happy with  
12 how we perform this. We've got experts that are  
13 allowed to sit in the courtroom through the whole  
14 hearing, is that correct?  
15 JUDGE BIRO: Yes.  
16 MR. HELMLINGER: And fact witnesses, do we  
17 have objections to them sitting in the courtroom?  
18 MR. McNEIL: We don't have any objection.  
19 JUDGE BIRO: Okay.  
20 MR. HELMLINGER: The respondents have put on  
21 their witness list one of our witnesses, Ms. Janice  
22 Witul, and I think we'd like to discuss sort of the  
23 order that she'd be called. I think we intend to call  
24 her as a witness, and she'd be available for cross  
25 examination by respondent. And I'm wondering if

1 there's anything that respondent -- if they could  
2 describe any scope that you wouldn't cover in that  
3 cross examination, so we can sort of assume that once  
4 she's testified and there'd be cross, and we resolve  
5 that, she's sort of done.  
6 JUDGE BIRO: You can release her?  
7 MR. HELMLINGER: If we need to, yes.  
8 JUDGE BIRO: Can you complete your direct  
9 examination of Ms. Witul for your purposes of your  
10 case on cross examination?  
11 MR. McNEIL: Your Honor, we -- I think that  
12 would be our preference. We're just -- obviously,  
13 because we haven't -- you know, the proceedings  
14 haven't begun, we wanted to have -- she's -- you know,  
15 she's a fact witness who's been involved in the case  
16 for a considerable period of time. And so, as we  
17 indicated in our prehearing exchange, we believe we  
18 have the right to call her as a witness independently.  
19 It may well be the case that we end up not  
20 having anything direct for her that we can't cover on  
21 cross, so I certainly would say that would be our --  
22 you know, that would be our preference if we can do  
23 that, but we've listed her, so --  
24 JUDGE BIRO: Okay. Well, that's --  
25 MR. McNEIL: -- I think we would have to

1 wait to see.

2 JUDGE BIRO: That's fine. I think you can

3 wait after she completes her direct testimony. I'd

4 give you wide latitude on cross examination. But you

5 can certainly wait to make that decision.

6 MR. HELMLINGER: Sure.

7 JUDGE BIRO: Okay.

8 MR. HELMLINGER: Fair enough, Your Honor.

9 And then finally, I think just -- again, to be clear

10 on standards and expectations, because this case

11 involves a fair bit of expert testimony, we may choose

12 or desire to have one of our experts reappear as a

13 rebuttal witness after the respondent s. Is that

14 appropriate? Can we agree on that?

15 JUDGE BIRO: As long as they're not raising

16 up a new issue that hasn't been raised before --

17 MR. HELMLINGER: Sure, I would not that --

18 yeah, I would not expect that to be the case.

19 JUDGE BIRO: -- that would be fine. You

20 can, you know, tell us whether you want to release the

21 witnesses or not after, and if they remain, then they

22 can testify in rebuttal if they're testifying actually

23 in rebuttal to some issue that was raised in the

24 respondent's case.

25 MR. HELMLINGER: Sure.

1 JUDGE BIRO: Okay.

2 MR. HELMLINGER: Thank you.

3 JUDGE BIRO: All right.

4 MR. HELMLINGER: That's all that we have.

5 JUDGE BIRO: Mr. McNeil, is there any other

6 issue that you'd like to raise?

7 MR. McNEIL: Nothing further, Your Honor.

8 JUDGE BIRO: Okay, thank you.

9 Mr. Helmlinger, would you like to make an

10 opening statement?

11 MR. HELMLINGER: I would, but I'm letting

12 Ms. Sugerman do it.

13 JUDGE BIRO: Okay.

14 MR. McNEIL: Your Honor, I apologize, and

15 not to interrupt Ms. Sugerman's opening but before she

16 starts, our understanding is we at least could request

17 the right to reserve our opening to the closing of the

18 case. We'd like to make that request.

19 JUDGE BIRO: Okay, that's fine.

20 MR. McNEIL: Okay, thank you.

21 MS. SUGERMAN: Good morning, Your Honor.

22 UNIDENTIFIED SPEAKER: Is that mic on?

23 MS. SUGERMAN: Is this mic on? You can tell

24 me. Yes? VSS International, the respondent in this

25 case, is a sophisticated company that stores millions

1 of gallons of oil just 200 feet from the Sacramento

2 River Deep Water Shipment Channel, navigable water of

3 the United States that flows year-round into the

4 Sacramento River, which flows year-round into the San

5 Francisco Bay and the Pacific Ocean. Yet VSS failed

6 to comply with the laws and regulations designed to

7 protect those waters. Evidence will show that it has

8 resisted compliance despite clear notifications from

9 federal regulators as far back as 2013, and that since

10 that time, the facility has added capacity of another

11 two million gallons of oil and still has not

12 demonstrated complete compliance with the oil spill

13 prevention regulations.

14 After the Exxon Valdez spilled over 11

15 million gallons of crude oil into the pristine waters

16 of Prince William Sound in Alaska in 1989, Congress

17 amended the Clean Water Act to strengthen provisions

18 pertaining to oil pollution. This environmental

19 disaster made clear that the United States lacked

20 adequate resources and mechanisms for addressing oil

21 spills. Pursuant to that new Oil Pollution Act, EPA

22 promulgated the oil pollution prevention regulations,

23 which require that owners and operators of the

24 facilities like VSS take steps to prevent oil spills.

25 These facilities must prepare and implement a Spill

1 Prevention, Control, and Countermeasures, or SPCC,

2 plan, and the plan must include specific content as

3 set out in the regulations, including details

4 regarding oil handling operations; spill prevention

5 practices; and the personnel, equipment, and resources

6 at the facility that are used to prevent oil spills

7 from reaching navigable water or adjoining shorelines.

8 A subset of the facilities subject to SPCC

9 requirements, those that store over a million gallons

10 of oil and meet certain other criteria, must also

11 maintain and implement a Facility Response Plan, or

12 FRP. The FRP requirements are designed to ensure that

13 these facilities storing larger quantities of oil have

14 more robust oil spill prevention and response

15 capabilities to reflect the increased risks associated

16 with storing those larger quantities.

17 The region's complaint alleged five

18 violations of the oil pollution prevention

19 regulations. Four related to the adequacy of

20 respondent's SPCC plans and one related to

21 respondent's failure to maintain and implement a

22 Facility Response Plan. Your order on EPA's motion

23 for accelerated decision established that as a matter

24 of law, respondent is subject to the oil pollution

25 prevention regulations. The order also established

1 that respondent is liable for Count 1, that VSSI's  
 2 2012 SPCC plan was deficient.  
 3 As for the remaining four violations, the  
 4 facts in this matter are largely uncontested, and the  
 5 law is also very clear. Through witness testimony and  
 6 documentary evidence, we will show that the facts  
 7 support a finding of liability for the remaining  
 8 violations alleged in the complaint. We will show  
 9 that the law requires specific content for a  
 10 professional engineer's certification of an SPCC plan  
 11 and that VSSI's plans failed to meet this requirement.  
 12 We will show that adding 2.4 million gallons  
 13 of oil constitutes a material change within the  
 14 meaning of the regulations and that VSS failed to meet  
 15 the requirements to amend its SPCC plan within six  
 16 months of such a change. We will show that VSS was  
 17 required, pursuant to industry standards, to document  
 18 tank integrity testing at certain time intervals but  
 19 failed to do so. And we will show that VSS is  
 20 required to maintain and implement a compliant FRP,  
 21 but to the best of our knowledge to this date, has yet  
 22 to do so.  
 23 The Clean Water Act authorizes  
 24 administrative action and assessment of penalties and  
 25 sets forth statutory factors as a basis for

1 calculating the penalty. Determination of the penalty  
 2 is the purview of the presiding officer, taking into  
 3 account the statutory penalty factors. In the course  
 4 of this hearing, we will show through witness  
 5 testimony and documentary evidence that the facts  
 6 support the proposed penalty of the statutory maximum  
 7 allowed in an administrative proceeding of \$230,958.  
 8 Thank you.  
 9 JUDGE BIRO: Ms. Sugerma, can I ask you a  
 10 question?  
 11 MS. SUGERMAN: Certainly.  
 12 JUDGE BIRO: Is the EPA continuing to allege  
 13 that the respondent was required to have an FRP based  
 14 upon an inadequate secondary containment at its  
 15 facility?  
 16 MS. SUGERMAN: Yes, we are continuing to  
 17 allege that.  
 18 JUDGE BIRO: Okay, thank you.  
 19 Okay, Mr. McNeil, you said you wanted to  
 20 reserve your right to make opening?  
 21 MR. McNEIL: If I may, Your Honor.  
 22 JUDGE BIRO: Okay.  
 23 MR. McNEIL: Thank you.  
 24 JUDGE BIRO: Will the agency please call its  
 25 first witness?

1 MR. HELMLINGER: Yes, Your Honor. The EPA  
 2 calls Dan Meer.  
 3 JUDGE BIRO: Mr. Meer, could you please come  
 4 to the witness stand and let the court reporter swear  
 5 your testimony?  
 6 THE COURT REPORTER: Please raise your right  
 7 hand.  
 8 Whereupon,  
 9 DANIEL MEER  
 10 having first been duly sworn, was called as  
 11 a witness and was examined and testified as follows:  
 12 THE COURT REPORTER: Thank you. Please have  
 13 a seat. And for the record, would you please state  
 14 and spell your first and last name?  
 15 THE WITNESS: Daniel Meer, D-A-N-I-E-L, M as  
 16 in Michael, E as in Edward, E as in Edward, R as in  
 17 Richard.  
 18 THE COURT REPORTER: Thank you.  
 19 DIRECT EXAMINATION  
 20 BY MR. HELMLINGER:  
 21 Q Good morning, Mr. Meer.  
 22 A Good morning.  
 23 Q Would you state your current employer?  
 24 A The United States Environmental Protection  
 25 Agency, Pacific Southwest Region.

1 Q And what is your title at the United States  
 2 --  
 3 A Assistant Director in the Superfund  
 4 Division.  
 5 Q And how long have you been in that position?  
 6 A Since approximately 2001.  
 7 Q Could you describe some of the roles and  
 8 responsibilities generally in that position?  
 9 A Yes. My general responsibilities are to  
 10 manage and direct a branch in the Superfund Division  
 11 that's responsible for emergency response, emergency  
 12 planning and preparedness for oil discharges and  
 13 chemical releases.  
 14 Q Are you familiar with what might be known as  
 15 a Spill Prevention, Countermeasure and Control plan?  
 16 A Yes, in general.  
 17 Q And are you familiar with Facility Response  
 18 Plans?  
 19 A Yes, in general.  
 20 Q If I abbreviate those as SPCC or FRP, would  
 21 you know what I'm talking about?  
 22 A I would.  
 23 Q So how do those concepts or things regard to  
 24 the program that you supervise?  
 25 A So, in supervising a program that is

1 responsible for oil and chemical releases and  
2 preventing and preparing for those possibilities, SPCC  
3 and FRP plans are developed by facilities to ensure  
4 that -- a couple of things. One is that they have the  
5 appropriate mechanisms in place to prevent discharges  
6 and releases, and also to describe the actions that  
7 they would take if such a discharge should occur that  
8 impacts surface waters.

9 Q Can an SPCC or FRPs be important to your  
10 program's own responses?

11 A Absolutely.

12 Q And how so?

13 A So they describe a variety of strategies  
14 that a company might undertake to mitigate a  
15 discharge, and our responders would -- in a typical  
16 spill scenario, our responders are working with the  
17 companies' contractors or the companies' responders to  
18 make sure that the effects of the releases are  
19 minimized. And so the plan would inform those sorts  
20 of decision making in real time.

21 Q Are you familiar with what is known as the  
22 National Contingency Plan, or NCP?

23 A I am.

24 Q And what is that?

25 A The NCP is the regulatory requirements laid

1 out in 40 CFR Part 300 that describe EPA's  
2 responsibilities, Coast Guard's responsibilities and  
3 roles, and private industry's responsibilities and  
4 roles in the -- for planning, preparedness, and  
5 response to discharges.

6 Q Are you familiar with what is known as an  
7 Area Contingency Plan?

8 A I am.

9 Q And what is that?

10 A So an Area Contingency Plan is a plan  
11 developed by the Coast Guard for specific geographic  
12 districts in the marine zone. In California, it's  
13 along the California coast. And they are developed by  
14 an area committee under the direction of a federal on-  
15 scene coordinator, the captain of the port of the  
16 Coast Guard. And the plans, again, complement and  
17 align with a Facility Response Plan in terms of how  
18 the governments -- the local, state, and federal  
19 agencies, will respond to discharges.

20 Q Does EPA have a role in the creation of an  
21 ACP?

22 A Not a direct role. That's under the purview  
23 of the captain of the port. We certainly are familiar  
24 with the ACPs. We use the ACPs. But they are really  
25 under Coast Guard authority and jurisdiction.

1 Q What access does EPA have to ACPs?

2 A We have open access.

3 Q And how does EPA use an ACP?

4 A So, if we were either working in an area  
5 that was covered by an ACP -- oftentimes, there are  
6 sources that are in the inland zone, which is EPA's  
7 jurisdiction. And so we would look to the ACP for the  
8 strategies in the coastal zone that would have to be  
9 harmonized with EPA's strategies.

10 Q Does an ACP distinguish particular resources  
11 or other matters that might be relevant to a response  
12 in EPA's practice?

13 A Yes, absolutely. ACPs describe sensitive  
14 species and critical habitat that are prioritized for  
15 protection if a discharge should occur.

16 Q Are you familiar with the respondent's  
17 facility in West Sacramento?

18 A Yes, generally.

19 Q I'd like you to turn, if you would, to what  
20 is marked as CX-2 in the binders in front of you.  
21 Actually, before we get to CX-2, let's try CX-33 --  
22 33, please.

23 JUDGE BIRO: Did you say 33?

24 MR. HELMLINGER: Yes, Your Honor.

25 BY MR. HELMLINGER:

1 Q Could you take a moment and review CX-33?

2 A Okay.

3 Q Can you identify what CX-33 is?

4 A CX-33 is an area map of the San Francisco  
5 Bay and Delta with Geographic Response Areas broken  
6 out.

7 Q When you say Geographic Response Area, can I  
8 take it that's the abbreviation GRA --

9 A Yes.

10 Q -- that's noted several times in that?

11 A Numbered 1 to 8 [sic]. One to -- 1 to 10,  
12 excuse me.

13 Q Given your general familiarity with the  
14 location of the respondent's facility, can you  
15 identify where -- if there's a particular GR location  
16 that that facility would be in?

17 A Given that VSS is in Sacramento, they are  
18 located within GRA number 8.

19 Q Where does this map come from?

20 A This is the Area Contingency Plan that we  
21 described.

22 MR. HELMLINGER: I'd move to enter CX-33.

23 JUDGE BIRO: Is there any objection, Mr.  
24 McNeil?

25 MR. McNEIL: No objection, Your Honor.

1 JUDGE BIRO: Complainant's Exhibit 33 is  
 2 admitted into the record.  
 3 (The document referred to,  
 4 previously identified as  
 5 Complainant's Exhibit No. 33,  
 6 was received in evidence.)  
 7 BY MR. HELMLINGER:  
 8 Q If you could turn two pages in CX-33. This  
 9 appears to be an index for the different Geographic  
 10 Response Areas, is it not?  
 11 A Yes. Table of contents.  
 12 Q Yeah. Do you see GRA-8 in that index?  
 13 A I do.  
 14 Q What number is identified with GRA-8?  
 15 A 9848.  
 16 Q Thank you. Now if I could have you turn to  
 17 Respondent's Exhibit 83.  
 18 JUDGE BIRO: That's in the black volumes.  
 19 UNIDENTIFIED SPEAKER: Yes. Yes.  
 20 UNIDENTIFIED SPEAKER: Is her mic on?  
 21 UNIDENTIFIED SPEAKER: Yeah.  
 22 UNIDENTIFIED SPEAKER: You've got to speak  
 23 louder into the mic. It's over here.  
 24 UNIDENTIFIED SPEAKER: Oh, it's over here?  
 25 BY MR. HELMLINGER:

1 Q Do you have that in front of you?  
 2 A Yes.  
 3 Q Can you take a minute and review this  
 4 document and identify it if you can?  
 5 A This document is an area map. It's titled  
 6 Area Map ACP 2, Geographic Response Area 8, and it is  
 7 identifying environmental sensitive sites.  
 8 Q If you turn to page 2 of this exhibit, RX-  
 9 33, do you see at the top of the page the caption for  
 10 the section? Which section does this --  
 11 A Section 9848, GRA-8, North Delta.  
 12 Q So can you identify, then, what this  
 13 document is?  
 14 A This document is a table of contents of  
 15 Geographic Response Area 8 showing -- it looks like  
 16 ecologically sensitive and cultural and other  
 17 resources at risk.  
 18 Q If you turn back to page 1 of that -- the  
 19 cover page on that. Given your general understanding  
 20 of the location of the VSS facility in West  
 21 Sacramento, can you identify the Sacramento River Deep  
 22 Water Ship Channel on this map?  
 23 A I think I would have a little trouble doing  
 24 that.  
 25 Q All right.

1 A I could take a guess, but --  
 2 Q Well, I don't need you to guess. I can have  
 3 you turn to the next page. If you look down the index  
 4 listing ecologically sensitive sites, about halfway  
 5 down the page.  
 6 A 2-859 -- 2-859-B.  
 7 Q Thank you. With that code number, can you  
 8 find that on the map on the front page?  
 9 A I hope so. Yes.  
 10 Q That's marked with a red dot, maybe the --  
 11 two-thirds of the way up on the left side of the page?  
 12 A Yeah, it's -- forgive my spacial problems.  
 13 It's a very straight line compared to the river, so  
 14 it's easily identified, now that I see it, as the ship  
 15 channel.  
 16 Q Sure. And we're walking you through this a  
 17 little bit to -- we're creating a verbal record of  
 18 this as well as the exhibits.  
 19 MR. HELMLINGER: I'd move to admit  
 20 Respondent's Exhibit 83.  
 21 JUDGE BIRO: All of 83?  
 22 MR. HELMLINGER: I would be satisfied with  
 23 those first two pages.  
 24 MR. McNEIL: No objection, Your Honor.  
 25 JUDGE BIRO: Okay. The first two pages of

1 Respondent's Exhibit 83 is admitted into the record.  
 2 (The document referred to,  
 3 previously identified as the  
 4 first two pages of  
 5 Respondent's Exhibit No. 83,  
 6 was received in evidence.)  
 7 BY MR. HELMLINGER:  
 8 Q Now, Mr. Meer, if I could have you turn to  
 9 CX-2, and we're -- you're done with 33 and RX-83 if  
 10 you want to get those out of your way. All right, do  
 11 you have that in front of you, CX-2?  
 12 A CX-2.  
 13 Q Okay. Could you take a minute and review  
 14 CX-2 and, if you can, identify what it is.  
 15 A I'm sorry, CX-2 -- is it a tab?  
 16 Q It's tab number 2.  
 17 A Tab number 2.  
 18 Q Right. I'm sorry, you were thinking binder  
 19 number 2.  
 20 A I was thinking binder 2.  
 21 Q A lot of documents.  
 22 A Okay, CX-2 is a site summary of the  
 23 Sacramento River Deep Water Ship Channel, labeled 2-  
 24 859-B.  
 25 Q And that's the same code that we saw for the

1 Sacramento River Deep Water Ship Channel --  
 2 A Correct.  
 3 Q -- in the index for the Area Contingency  
 4 Plan, is that right?  
 5 A Correct.  
 6 Q And what -- so where does this document come  
 7 from?  
 8 A This is from the Area Contingency Plan.  
 9 Q May I have you look about a third of the way  
 10 down the page; the caption "Resources of Primary  
 11 Concern"? Could you read that for our record, please?  
 12 A Sure. "The site has marshy margins with  
 13 occasional shrub-scrub throughout its length.  
 14 Anadromous fish use the slough for upstream migration.  
 15 A large variety of water birds use this area. The  
 16 habitat is suitable for semiaquatic species including  
 17 beavers, muskrat, amphibians, et cetera. Salmon and  
 18 other migratory species concentrate in this channel  
 19 during migratory periods."  
 20 Q So how would EPA use this document in  
 21 conducting a response to the -- to any spill into the  
 22 Sacramento River Deep Water Ship Channel?  
 23 A So typically, what responders do is they  
 24 prioritize areas for protection, and they protect them  
 25 by doing things like placing a boom to prevent oil

1 from migrating into those areas. And the plan --  
 2 because it identifies the sensitive sites that are the  
 3 highest priority for protection because, as described,  
 4 they are used by fish and wildlife of all kinds, we  
 5 would design our response strategies to preferentially  
 6 protect those areas. And so having them described and  
 7 identified on maps is highly useful to a responder.  
 8 MR. HELMLINGER: I'd move to admit CX-2 into  
 9 the record.  
 10 JUDGE BIRO: Any objection?  
 11 MR. McNEIL: No objection, Your Honor.  
 12 JUDGE BIRO: Okay. CX-2 is admitted into  
 13 the record.  
 14 (The document referred to,  
 15 previously identified as  
 16 Complainant's Exhibit No. 2,  
 17 was received in evidence.)  
 18 BY MR. HELMLINGER:  
 19 Q Mr. Meer, I'm going to turn the subject just  
 20 a little bit back to Facility Response Plans in  
 21 general. What is the process for submitting an FRP to  
 22 EPA?  
 23 A So the facility that is covered under this  
 24 part of the statute and regulation develops a Facility  
 25 Response Plan, submits it to EPA, and it undergoes

1 updating every five years, I believe.  
 2 Q Does EPA approve Facility Response Plans?  
 3 A EPA reviews and approves Facility Response  
 4 Plans if the resources allow.  
 5 Q If EPA has not approved a Facility Response  
 6 Plan, what impact does that have on EPA's  
 7 expectations?  
 8 MR. McNEIL: Objection, Your Honor.  
 9 Hypothetical question.  
 10 JUDGE BIRO: Overruled.  
 11 Go ahead.  
 12 THE WITNESS: EPA's review and approval or  
 13 non-review and non-approval does not change the  
 14 facility's requirement to maintain and implement its  
 15 Facility Response Plan -- develop, maintain, and  
 16 implement, I should say.  
 17 MR. HELMLINGER: I have no more questions.  
 18 JUDGE BIRO: Thank you.  
 19 Mr. McNeil, would you like to conduct cross  
 20 examination?  
 21 MR. McNEIL: Yes, Your Honor, thank you.  
 22 JUDGE BIRO: Please proceed.  
 23 CROSS EXAMINATION  
 24 BY MR. McNEIL:  
 25 Q Good morning, Mr. Meer.

1 A Good morning.  
 2 Q How are you?  
 3 A I'm okay. How about you?  
 4 Q I'm fine, thank you. I'd like to ask you a  
 5 couple of questions about the exhibits that Mr.  
 6 Helmlinger showed you earlier. Would that be all  
 7 right?  
 8 A Sure.  
 9 Q Okay. The first one that I believe he  
 10 referenced and asked you to look at was CX-33, which  
 11 depicts GRA-8. Are you able to locate that exhibit  
 12 still?  
 13 A You're referring to the area map?  
 14 Q Correct.  
 15 A Yes.  
 16 Q Very good, thank you. And GRA-8, I believe  
 17 you testified, would be that area that, in your view,  
 18 would be -- would coincide with the physical location  
 19 of the VSS facility.  
 20 A I believe so, yes.  
 21 Q Okay. Sir, have you been to the VSS  
 22 facility?  
 23 A I have not.  
 24 Q Okay. Do you know precisely where it's  
 25 located?

1 A I believe I saw the address on Channel  
2 Drive, but I don't recall the number.

3 Q Okay. On this exhibit before you, CX-33,  
4 can you describe for me where within GRA-8 the VSS  
5 facility would generally be located within this  
6 roughly rectangular GRA-8 red-lined box? Do you see  
7 that box?

8 A Yes. No, I would not be able to do that.

9 Q Okay. And do you see the -- do you see on  
10 the -- on this CX-33 where the City of Sacramento is  
11 depicted?

12 A Yes.

13 Q Okay. And do you see that the boundary line  
14 -- I'm not -- I'm not stating this; I'm just asking  
15 you, but you tell me if you think it's otherwise. But  
16 the boundary line for GRA-8 appears to transect the  
17 physical word "Sacramento," at least a portion of it,  
18 depicted here. Do you see that?

19 A Yeah. The boundary line is pretty thick,  
20 and it cuts off the top of the S, I guess you'd say.

21 Q Based on your experience, a facility that is  
22 within -- that is within the borders of the red line,  
23 that would be within the GRA-8 zone, correct?

24 A Could you -- I'm not sure I understand that  
25 question.

1 Q Sure. So you see the red -- I'm going to  
2 call it roughly rectangular. It's a --

3 A So, yeah, the rectangular -- roughly  
4 rectangular box GRA-8.

5 Q Okay, so if something is -- if a facility is  
6 within the red line, then it's covered, right?

7 A In the -- in the -- in the perimeter of GRA-  
8 8, yes, it would be covered. Yeah.

9 Q And if it's outside the red line, it's not  
10 covered, right?

11 A Well, it's not covered under this ACP, but  
12 it would be covered under the Clean Water Act and OPA  
13 and the -- it's just a question of inland  
14 jurisdiction, inland zone versus coastal zone.

15 Q Right, and it wouldn't necessarily be, but  
16 it might be, is what you mean to say, right?

17 A No, no. I mean to say that the demarcation  
18 line between the inland zone and the coastal zone is  
19 established. That establishes Coast Guard versus EPA  
20 jurisdiction, and facilities fall within one of those  
21 jurisdictions, and then they fall within one of the  
22 area plan areas as defined.

23 Q Oh, okay. That's fine. And what if a  
24 facility is right on the red line? Where does it  
25 fall?

1 A If a facility's on the border between the  
2 demarcation line?

3 Q On the border.

4 A That is the demarcation line.

5 Q Is that in or out?

6 A So then it's a question of EPA and the Coast  
7 Guard deciding.

8 Q You're not here to testify about that today.

9 A No.

10 Q Okay. Would you take a look, please, at RX-  
11 83, which I think Mr. Helmlinger also asked you to  
12 take a look at earlier?

13 A That's your -- the respondent RX-83.

14 Q Correct.

15 A Sure.

16 THE WITNESS: Your Honor, is it all right if  
17 I stand up?

18 JUDGE BIRO: Of course.

19 THE WITNESS: Okay.

20 MR. McNEIL: Okay.

21 BY MR. McNEIL:

22 Q And do you recall that you had earlier  
23 identified for Mr. Helmlinger the area designated as  
24 2-859?

25 A Yes, I do.

1 Q And do you still see that?

2 A I do.

3 Q And do you see that it -- again, in your own  
4 words, that it's -- it roughly coincides with -- here,  
5 it's -- here, it's depicted as a -- kind of a bull's-  
6 eye, right? A red bull's-eye? Do you see that?

7 A Yes.

8 Q Okay. But the red bull's-eye is on the  
9 Sacramento River Deep Water Shipping Channel, correct?

10 A Yes, it appears to be.

11 Q Okay. So the red bull's-eye -- does it, in  
12 your experience, tell you the northerly or southerly  
13 boundaries of 2-859?

14 A Well, it's a circle, so --

15 Q Yes.

16 A -- I don't know if it would determine north-  
17 south, but I would say it generally locates that  
18 particular environmentally sensitive site, if I'm  
19 interpreting this correctly.

20 Q All right. And let me ask you to have a  
21 look now at the third exhibit that Mr. Helmlinger  
22 showed you. That was CX-2. Do you recall that or do  
23 you have that?

24 A Yes.

25 Q Go ahead and get that in front of you, if



1 you would.

2 A Okay.

3 Q Okay. So Mr. -- on page 1, Mr. Helmlinger

4 asked you about the "Resources of Primary Concern"

5 heading about a quarter of the way down on the page.

6 Do you recall that?

7 A Yes.

8 Q Okay. What I'd like you to do is take a

9 look at the next page, which is page 2 of 3 of CX-2,

10 and also about a quarter of the way down, ask you if

11 you see a heading called "Site Strategies."

12 A Yes, I do.

13 Q Okay. And do you see under "Site

14 Strategies" three subsections?

15 A I do.

16 Q And what are those -- what are those titled?

17 You can just give me the strategy number. You don't

18 have to give me the full title.

19 A Actually, I only see -- under Site

20 Strategies, I see Strategy 2.1, Strategy 2.2, and

21 Strategy 2.3

22 Q Okay. And would you look at the next page,

23 which is Exhibit CX-2, page 3 of 3, and if your set is

24 the same as mine, you should see an aerial photograph

25 that depicts a portion of the channel. Do you see

1 that?

2 A Yes, I do.

3 Q Okay. And do you see cross-hatched on that

4 exhibit, in black letters with a -- kind of a red

5 underline, any of the strategies from the prior page

6 that you just read from?

7 A 1 and 2.

8 Q Okay. Very good. Do you see number 3 on

9 this -- on this page?

10 A I don't see number 3 on this page.

11 Q Okay. Do you know where number 3 is

12 located?

13 A I'd have to look at it to see how it's

14 described.

15 Q Please, go ahead and take a look.

16 A Strategy is deploying a skimmer if oil

17 accumulates in skimmable quantities, and so it's

18 probably not -- it's not boom deployment, so it may

19 not be -- it's -- that strategy is determined based on

20 the conditions of a spill at the time, and so that's

21 why it may not be located on the -- on the map.

22 Q Okay. If I understand your testimony,

23 you're saying it -- the -- and again, I'm not trying

24 to -- I want your best view, but I believe what you

25 said is that the location can vary in the field

1 depending on the response necessary for a spill. Is

2 that -- is that fair?

3 A In terms of skimmers.

4 Q Yes, in terms of just strategy 3, right.

5 Which is skimmers, right?

6 A Strategy 2.859 -- 2-859 --

7 Q Point three.

8 A -- point three is oil recovery with

9 shoreside skimming.

10 Q That's what we're --

11 A Deploy skimming if oil accumulates in

12 skimmable quantities. Consult with the incident

13 commander prior to initiation of this strategy.

14 Q Okay, so then --

15 A So that -- the location of the skimmer will

16 be informed and dictated by where the skimmable

17 quantities of oil exist.

18 Q Okay, very good.

19 MR. McNEIL: I have no further questions,

20 Your Honor.

21 Thank you, Mr. Meer.

22 JUDGE BIRO: Is there redirect?

23 MR. HELMLINGER: There is redirect.

24 //

25 //

1 REDIRECT EXAMINATION

2 BY MR. HELMLINGER:

3 Q A few questions to follow up, Mr. Meer. If

4 I could have you turn to CX-2 -- it's the one you just

5 had out. Direct your attention to the very top of the

6 first page, which says "Site Description."

7 A Yes.

8 Q Could you read that paragraph under that

9 heading, Site Description?

10 A "Site extends from the Port of Sacramento to

11 its mouth on Cache Slough. This is an artificially

12 constructed deep channel for ships to access the port.

13 Although relatively narrow and artificial, the margin

14 is emergent the marsh -- and is emergent marsh along

15 its entire length with occasional shrub-scrub.

16 Conjoined to the west of the port facilities is the

17 remnant Lake Washington, which has several acres of

18 tule-cattail marsh."

19 Q What exclusions do you understand to be

20 stated in that site description?

21 A Exclusions? I don't understand any

22 exclusions.

23 Q If I could have you turn to the second page

24 of that, where you had the different site strategies.

25 A Yes.

1 Q As a supervisor for EPA's response teams, do  
2 you understand -- how do you understand these response  
3 strategies to affect your team's response decisions?

4 A These response strategies are designed to  
5 inform the responders about where they should be  
6 looking in an incident to deploy certain strategies to  
7 minimize the damage from an oil spill.

8 Q Do these response strategies apply in all  
9 situations, in any oil spill?

10 A No. The strategy -- it's a generalized  
11 strategy that's developed in advance because we're  
12 trying to anticipate. But wind conditions, tide,  
13 there's all kinds of conditions that might require a  
14 change in response strategy. So you have to look at  
15 -- that's the whole -- that's the job of the  
16 responders, is to assess the situation and then take a  
17 response strategy given the conditions that they face.

18 Q So how do these response strategies affect  
19 that responder's discretion?

20 A Well, they're talking about -- for example,  
21 when you set boom, they're talking about booming in  
22 certain places that will probably do two things. One  
23 is to direct the oil to a skimmable or a recoverable  
24 location, and also to protect the sensitive habitat  
25 and critical -- the critical habitat and sensitive

1 species that might be exposed.

2 MR. HELMLINGER: I think that's good. No  
3 further questions.

4 JUDGE BIRO: Okay.

5 Any recross, Mr. McNeil?

6 MR. McNEIL: Just a couple, Your Honor.

7 JUDGE BIRO: Of course.

8 MR. McNEIL: Thank you.

9 RECROSS EXAMINATION

10 BY MR. McNEIL:

11 Q Mr. Meer, so in your -- in your  
12 understanding, what precisely is the significance of  
13 the site strategy under the Area Contingency Plan?

14 A The site strategy is what describes how we  
15 believe -- or the plan developers believe will be the  
16 most effective means of mitigating the effects of a  
17 discharge.

18 Q Okay. And let me ask you this. If certain  
19 geographical areas are identified in a site strategy  
20 -- for example, Lake Washington -- but they weren't  
21 identified for other areas, what's your understanding  
22 of the significance of that? In other words, is that  
23 something that still has to be done -- still has to be  
24 completed, for the ACP to be complete?

25 A I'm not sure I understand that. Are you --

1 could you ask that -- so I'm not sure I understand  
2 that.

3 Q Okay. Well, let me ask you. Were you  
4 involved in developing the Area Contingency Plan that  
5 we're talking about here?

6 A I was not.

7 Q Okay. And do you know who was involved in  
8 developing it -- in authoring it?

9 A I know -- I don't know the people  
10 personally. I know that an Area Contingency Plan is  
11 done at the direction of the captain of the port.  
12 It's something that the area committee develops. And  
13 it is something that a variety of agencies and others  
14 participate in developing. They have an area  
15 committee. It meets periodically. One of their  
16 responsibilities is to develop and maintain the area  
17 plan, the Area Contingency Plan.

18 Q Okay, thank you. And are you, sir, a member  
19 of that committee?

20 A I am not.

21 Q Or have you been in the past?

22 A I have not. I have attended area committee  
23 meetings, but these are Coast Guard-driven efforts.

24 Q Okay. And I believe you testified earlier  
25 that EPA uses the plans, the ACPs, but I think you

1 used the word "indirectly." Is that correct?

2 A Yes. I used the word "indirectly." And by  
3 that I meant that EPA's interests, such as protection  
4 of marshes, protection of salmon, protection of water  
5 birds would be informed by things in the Area  
6 Contingency Plan.

7 Q Okay. But if you wanted to -- if you had a  
8 question about the interpretation of the ACP, who  
9 would you go to to ask?

10 A Well, one -- I would first go to the federal  
11 on-scene coordinators in my branch. I would then go  
12 to the federal on-scene coordinator at Sector San  
13 Francisco. And I'd probably also consult with  
14 District 14 people on the regional response team.

15 Q And would you consider them to be more  
16 authoritative in terms of the interpretation than you  
17 have in your own experience?

18 A Are you asking me if the Coast Guard is more  
19 authoritative about an ACP than EPA?

20 Q I mean, that's -- we can phrase that and  
21 then come back to the -- that's fine. Do you have an  
22 opinion about that? Do you have a view on that?

23 A I don't have a strong opinion about it. I  
24 -- well, what I can say is that ACPs are developed  
25 under Coast Guard direction by an area committee.

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1 Q All right. Do you consider yourself an  
 2 authority in the interpretation of an Area Contingency  
 3 Plan?  
 4 A I do not.  
 5 Q Okay.  
 6 MR. McNEIL: Nothing further. Thank you.  
 7 JUDGE BIRO: Mr. Helmlinger --  
 8 THE WITNESS: But I do --  
 9 JUDGE BIRO: Okay, please finish.  
 10 THE WITNESS: But I do consider myself  
 11 thoroughly familiar with the purpose and process and  
 12 development of an ACP, since we do analogous things in  
 13 the inland zone.  
 14 JUDGE BIRO: Mr. Meer, can I ask you a  
 15 couple of questions?  
 16 THE WITNESS: Oh, absolutely. How could I  
 17 turn you down?  
 18 JUDGE BIRO: To whom does the EPA  
 19 regulations assign responsibility for developing an  
 20 SPCC plan?  
 21 THE WITNESS: To the facility.  
 22 JUDGE BIRO: And who is assigned the  
 23 responsibility for determining if an SPCC plan should  
 24 be developed -- must be developed to be consistent  
 25 with law?

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1 THE WITNESS: I believe that's EPA's  
 2 interpretation of the Clean Water Act and OPA.  
 3 JUDGE BIRO: So it would be EPA's  
 4 responsibility to notify a facility that is covered by  
 5 the SPCC and that they need -- must develop a plan?  
 6 THE WITNESS: Now, I think it's the  
 7 facility's responsibility to know if they're subject.  
 8 They certainly ask us their opinion, but if I'm not  
 9 mistaken, a facility that stores 1320 gallons is  
 10 subject to SPCC and is obligated to develop a plan.  
 11 JUDGE BIRO: So it's the facility's  
 12 responsibility to make a determination if they are  
 13 subject to the SPCC plan requirements?  
 14 THE WITNESS: I believe so, but I'm not  
 15 sure.  
 16 JUDGE BIRO: Okay.  
 17 THE WITNESS: I'd have to ask my lawyer.  
 18 JUDGE BIRO: How about for an FRP? Who does  
 19 the regulations assign responsibility for making a  
 20 determination whether or not a facility is required to  
 21 create an FRP?  
 22 THE WITNESS: Well, the regulation sets out  
 23 certain criteria that, if met, subject the facility to  
 24 those regulations. And so, there can often be a  
 25 debate or a discussion between EPA and the facility

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1 about whether they are, in fact, subject, because, for  
 2 example, some of the criteria are -- do they represent  
 3 a substantial -- I'm forgetting the exact terminology  
 4 -- substantial threat to a --  
 5 JUDGE BIRO: Of harm.  
 6 THE WITNESS: -- to a navigable water, and  
 7 so are they within a certain distance, have they  
 8 calculated what is the likelihood of a spill reaching  
 9 a navigable water, et cetera. And so, we often get  
 10 into the sort of regulatory debate because obviously  
 11 if facilities can avoid being subject, they would  
 12 prefer that. They wouldn't have to spend that effort  
 13 to develop the FRP. But I believe we have the final  
 14 -- we have the final say, or we take it to you.  
 15 JUDGE BIRO: If a facility believes that  
 16 it's not subject to the FRP, is it required to notify  
 17 EPA to that effect?  
 18 THE WITNESS: I'm not sure.  
 19 MR. HELMLINGER: Your Honor, if I may, our  
 20 very next witness, I think, can give the -- can answer  
 21 these questions. He's our headquarters coordinator  
 22 for this program.  
 23 JUDGE BIRO: Okay. Thank you.  
 24 Can I ask you one more thing? If you look  
 25 at Complainant's Exhibit 3 [sic] and the map --

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1 UNIDENTIFIED SPEAKER: It s CX-2.  
 2 JUDGE BIRO: Oh, CX-2, sorry, Complainant's  
 3 Exhibit 2.  
 4 THE WITNESS: Complainant's Exhibit 2.  
 5 JUDGE BIRO: In the white binders.  
 6 THE WITNESS: Oh. I'm sorry.  
 7 JUDGE BIRO: That's all right.  
 8 THE WITNESS: We're the complainant. 2 is  
 9 the -- is the site summary.  
 10 JUDGE BIRO: Yes.  
 11 THE WITNESS: Yes.  
 12 JUDGE BIRO: Okay. If you look at this map,  
 13 there's -- appear to me to be two lines starting at  
 14 the very bottom of the map heading north that are in  
 15 light yellow. The left line sort of veers off east,  
 16 and there's a number of facilities that appear on  
 17 here.  
 18 UNIDENTIFIED SPEAKER: It s too quiet.  
 19 You've got to speak up.  
 20 JUDGE BIRO: Do you see where it says --  
 21 appears Ryer Island?  
 22 THE WITNESS: Yes. Yes.  
 23 JUDGE BIRO: And then next to that, adjacent  
 24 to the left of that, there are -- there's sort of a  
 25 line going up from the bottom east?

1 THE WITNESS: Sort of diagonally --  
 2 JUDGE BIRO: Yes.  
 3 THE WITNESS: -- north-northeast?  
 4 JUDGE BIRO: Yes.  
 5 THE WITNESS: On the edge of the channel?  
 6 JUDGE BIRO: Yes.  
 7 THE WITNESS: Yes.  
 8 JUDGE BIRO: Okay. Is that the edge of the  
 9 channel?  
 10 THE WITNESS: It certainly looks like it's  
 11 defining the edge of the channel.  
 12 JUDGE BIRO: And that -- is that Channel  
 13 Road?  
 14 THE WITNESS: I don't know.  
 15 JUDGE BIRO: Okay. Do you know whether any  
 16 of the facilities identified on this map are the  
 17 respondent's facility?  
 18 THE WITNESS: I don't know.  
 19 JUDGE BIRO: Okay. Thank you. You may step  
 20 down.  
 21 THE WITNESS: Thank you.  
 22 JUDGE BIRO: Do you want to retain the right  
 23 to recall Mr. Meer?  
 24 MR. HELMLINGER: We would release Mr. Meer.  
 25 JUDGE BIRO: Mr. McNeil?

1 MR. McNEIL: That's fine with respondent.  
 2 Thank you.  
 3 JUDGE BIRO: Okay.  
 4 Thank you, Mr. Meer. You're released.  
 5 MR. HELMLINGER: Our next witness would be  
 6 Mr. Troy Swackhammer.  
 7 JUDGE BIRO: Madam Reporter, would you  
 8 please swear the witness.  
 9 THE COURT REPORTER: Yes.  
 10 Please raise your right hand -- stand and  
 11 raise your right hand.  
 12 Whereupon,  
 13 JOSEPH SWACKHAMMER  
 14 having first been duly sworn, was called as  
 15 a witness and was examined and testified as follows:  
 16 THE COURT REPORTER: Thank you. Would you  
 17 please have a seat? And for the record, state and  
 18 spell your first and last name.  
 19 THE WITNESS: My name is Joseph Swackhammer,  
 20 J-O-S-E-P-H, Swackhammer, S-W-A-C-K-H-A-M-M-E-R.  
 21 THE COURT REPORTER: Thank you.  
 22 MR. HELMLINGER: Your Honor, how would you  
 23 prefer I deal with some demonstratives? These are in  
 24 the prehearing exchange, and these are marked. Should  
 25 I put them up first and then just refer to them as I

1 get to them, or do you want me to pull them up as they  
 2 come up in testimony?  
 3 JUDGE BIRO: You can put them up. I don't  
 4 think we'll be confused. Do you want to mark them for  
 5 exhibits?  
 6 MR. HELMLINGER: I thought they had been,  
 7 but maybe these -- yes, this says 53, and this one  
 8 says CX-1. It's just black script on a dark -- make  
 9 sure.  
 10 JUDGE BIRO: So they're both complainant's  
 11 exhibits, 53 --  
 12 MR. HELMLINGER: Yes. Yes.  
 13 JUDGE BIRO: -- and 1?  
 14 MR. HELMLINGER: CX-53 and CX-1.  
 15 JUDGE BIRO: Okay. And we all agree that  
 16 those are exact copies of those exhibits?  
 17 MR. HELMLINGER: I can give you more time to  
 18 look at them if you'd like. We represent they are.  
 19 MR. McNEIL: We'll accept counsel's  
 20 representation.  
 21 JUDGE BIRO: Okay. Thank you, Mr. McNeil.  
 22 MR. HELMLINGER: These all might be smarter  
 23 than me. Does that sort of work for everybody?  
 24 JUDGE BIRO: Works for me. Do you intend to  
 25 have Mr. Swackhammer modify these exhibits in any way?

1 MR. HELMLINGER: No, I do not.  
 2 JUDGE BIRO: Okay.  
 3 MR. HELMLINGER: I think next time we're  
 4 going to go with a video presentation.  
 5 UNIDENTIFIED SPEAKER: Okay.  
 6 MR. HELMLINGER: Okay.  
 7 DIRECT EXAMINATION  
 8 BY MR. HELMLINGER:  
 9 Q Good morning, Mr. Swackhammer.  
 10 A Good morning.  
 11 Q Would you state for the record where you are  
 12 employed?  
 13 A I'm employed at the U.S. Environmental  
 14 Protection Agency in Washington, D.C., Office of  
 15 Emergency Management, Regulations and Implementation  
 16 Division.  
 17 Q And what is your title with EPA?  
 18 A My title is chemical engineer.  
 19 Q And how long have you been with the EPA?  
 20 A Been with the EPA since 1997.  
 21 Q What is your background before coming to  
 22 EPA?  
 23 A Background before coming to EPA, I would say  
 24 chemical engineer in prior roles and environmental  
 25 consulting, and also an environmental engineer at the

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1 Metropolitan Washington Airports Authority. That  
2 manages National and Dulles Airports in the  
3 Washington, D.C. area.  
4 Q And what are your responsibilities with the  
5 EPA at present?  
6 A My responsibilities include national lead on  
7 Facility Response Plan coordination with the regions  
8 and the regulated community.  
9 Q How long have you had this role?  
10 A Since about 2006.  
11 Q What role do you have in creating  
12 regulations for EPA, if any?  
13 A I've been involved in regulatory development  
14 at EPA both in terms of the Pulp and Paper Cluster  
15 Rule prior to joining the oil program, and with the  
16 oil program development of the amendments to the SPCC  
17 rule.  
18 Q What role do you have, if any, in generating  
19 any guidance within EPA for this program?  
20 A I'm part of the team that developed the SPCC  
21 guidance document, both the existing document and the  
22 prior document as well.  
23 Q How does your role interact with the 10  
24 regions within EPA?  
25 A I interact on a daily basis with the 10

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1 regions, depending -- as appropriate and as needed.  
2 My role is coordination of national FRP policy and  
3 regulation and interpretation of the regulations,  
4 interpretation of the related PREP guidelines, so that  
5 my role is kind of on a daily basis, as well as  
6 routine monthly calls with the regions, both on SPCC  
7 and the FRP regulation.  
8 Q Sure. If you could help us be so clear, why  
9 is that coordination important to you?  
10 A Coordination's important for national  
11 consistency, to make sure that, you know, the FRP rule  
12 is implemented consistently across the nation.  
13 Q I know with EPA we may fall into jargon a  
14 little bit. You used the phrase PREP guidance. Could  
15 you explain PREP guidance?  
16 A The National Preparedness for Response  
17 Exercise Program is a national set of guidelines that  
18 are developed by EPA, U.S. Coast Guard, Department of  
19 the Interior, and the DOT.  
20 Q In your role, do you work with agencies on  
21 responses?  
22 A Not particularly, but I do coordinate  
23 through the PREP committee. We coordinate -- the four  
24 agencies coordinate to ensure consistency with  
25 preparedness through the exercise programs.

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1 Q What experience do you have, either  
2 observing or coordinating, on responses at all?  
3 A I typically -- as time allows, I attend tag-  
4 alongs, as I call them; attend regional unannounced  
5 exercises, Government-initiated unannounced exercises;  
6 to stay current with current procedures, to get eyes  
7 on and stay, you know, sharp and also to ensure  
8 consistency with the exercise requirements.  
9 Q And in that experience, have you had  
10 opportunity to get eyes on, for example, oil spills  
11 into a river?  
12 A Not particularly, but I get eyes on in terms  
13 of response strategies, as Mr. Meer was talking about,  
14 as related to small discharge planning level under the  
15 FRP rule.  
16 Q How about photographs, if not eyes on?  
17 A Certainly, photographs, and I'm also part of  
18 a team, you know, within the Office of Emergency  
19 Management. I get daily updates in the EOC, Emergency  
20 Operations Center, on oil discharges that are reported  
21 to the National Response Center.  
22 Q And how about enforcement, different than  
23 response? How do you coordinate with the regions on  
24 enforcement?  
25 A I coordinate both at headquarters -- there's

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1 a headquarters enforcement person on the FRP and SPCC  
2 to coordinate, and also through this person's monthly  
3 calls. There's a call with the regionals -- offices  
4 on enforcement to coordinate nationally and to answer  
5 questions that may arise during the court case  
6 development.  
7 Q How is training part of your coordination?  
8 A Training is an important part of our  
9 coordination. To train our oil inspectors, we have a  
10 40-hour course that -- where we teach our respective  
11 oil inspectors on SPCC and FRP requirements. I've  
12 instructed more than one dozen of those courses since  
13 my -- since joining the oil program.  
14 Q And I'm sorry if I missed it. Did you  
15 mention training within EPA? But how about training  
16 for non-EPA personnel?  
17 A Sure. As requested by outside parties, like  
18 National Institute of Storage Tank Management and the  
19 American Petroleum Institute, have requested short  
20 courses -- SPCC and FRP short courses, typically four  
21 hours in length each. I teach -- I've taught over a  
22 dozen of those FRP short courses, both for the Storage  
23 Tank Institute as well as the American Petroleum  
24 Institute.  
25 Q Assisting EPA's regions in its coordination

1 role, about how many FRP Facility Response Plans have  
2 you had an opportunity to review?

3 A As needed, maybe couple of dozen, maybe  
4 more. It just depends on what's -- in terms of  
5 enforcement cases and particular issues that may arise  
6 where I requested a copy of the FRP from the regional  
7 offices.

8 Q And are you familiar with what might be  
9 called a comparable alternative analysis?

10 A In what context?

11 Q For FRP applicability?

12 A Sure. There's a provision that would allow  
13 a owner or operator to consider an alternative  
14 formula, if that's what you're referring to, in terms  
15 of Appendix C applicability evaluations.

16 Q How familiar have you become in your role  
17 with asphalt storage facilities?

18 A I've definitely become very familiar with  
19 those facilities. We -- occasionally regions  
20 encounter them in terms of SPCC inspections as well as  
21 evaluating the need for their -- for a Facility  
22 Response Plan for these facilities.

23 Q What difference does it make in your program  
24 whether an asphalt material is termed asphaltic cement  
25 or hot mix asphalt?

1 A We make the distinction in our SPCC guidance  
2 between hot mix asphalt, which is exempt under the  
3 SPCC rule and thus the FRP rule, versus asphalt cement  
4 and asphalt emulsions. We talk about that in section  
5 2 of our SPCC guidance.

6 Q How is asphalt characterized in the oil  
7 pollution prevention regulations, in your experience?

8 A It's considered an oil under the oil  
9 pollution prevention and preparedness regulations.

10 Q Have you had opportunities to observe,  
11 either eyes on or by photos, asphalt releases --

12 A Yes.

13 Q -- that are not hot mix asphalt?

14 A Yes.

15 Q And could you describe generally, in your  
16 experience, how asphalt releases when it interacts  
17 with water?

18 A Typically, it's a thermoplastic material,  
19 meaning that it needs to be heated in order to flow.  
20 Once it encounters a water body, it will then start to  
21 cool, and because it's denser than water, it'll start  
22 to sink in the water column and congeal. And so thus  
23 the reason why there are separate requirements,  
24 differentiating requirements, in Appendix E of our FRP  
25 rule for asphalt or group 5 type oils, such as asphalt

1 cement.

2 Q Have you observed an oil sheen? Are you  
3 familiar with the concept of an oil sheen?

4 A Yes.

5 Q Could you describe generally, just for our  
6 record, what an oil sheen might look like?

7 A Typically, floating on top of the water  
8 column and will provide an effervescence, a coloration  
9 per se, that you can -- it's observable by the -- by  
10 the eye.

11 Q Is it fair, just sort of in a common  
12 parlance, to characterize that as like the rainbow you  
13 might see in a parking lot on a rainy morning?

14 A Correct.

15 Q In your experience, had you observed asphalt  
16 to create a sheen when it interacts with water?

17 A We've done some recent research that yes,  
18 that can take place because of the very nature of  
19 asphalt cement. You've got lighter ends that will  
20 essentially float to the surface once it encounters  
21 the water column, versus the more denser components of  
22 asphalt cement, which would start to sink in the water  
23 column.

24 Q Have you had an opportunity to become  
25 familiar with the respondent's facility in West

1 Sacramento?

2 A Yes.

3 Q I would like to show you what is marked as  
4 CX-1. Take a moment and look at that illustration,  
5 and if you could identify for me what you believe it  
6 to be.

7 A That is the VSS Emultech facility in  
8 Sacramento -- West Sacramento, California.

9 Q And how do you personally know this?

10 A Was approached by Ms. Witul after the SPCC  
11 inspection and was asked a series of questions. So  
12 one of the first things that I do is get eyes on, do  
13 an aerial view as it -- as I've exhibited here.

14 MR. HELMLINGER: So since there's no  
15 objection, I'll go ahead and admit this, if I don't  
16 have a full foundation of this witness for this, but  
17 are we going to have an objection to admitting CX-1  
18 now? Or I can do it later.

19 MR. McNEIL: We wouldn't object.

20 MR. HELMLINGER: All right.  
21 Admit CX-1?

22 MR. McNEIL: No objection, Your Honor.

23 MR. HELMLINGER: Thank you.

24 JUDGE BIRO: Okay. CX-1 is admitted into  
25 the record.

1 (The document referred to,  
2 previously identified as  
3 Complainant's Exhibit No. 1,  
4 was received in evidence.)

5 UNIDENTIFIED SPEAKER: You have to repeat  
6 that into the mic.

7 JUDGE BIRO: CX-1 is admitted into the  
8 record.

9 BY MR. HELMLINGER:

10 Q I'd like to discuss with you, Mr.  
11 Swackhammer, the FRP regulations that are central to  
12 your role with EPA. So generally state what is an  
13 FRP? How do you explain it at a cocktail party?

14 A Yeah. Shorthand is it's basically an oil  
15 spill response plan. It's a play book, guidebook, per  
16 se, for an owner or operator to guide them in an oil  
17 spill once it reaches a navigable water.

18 Q You were in the courtroom. You may have  
19 heard Your Honor ask about who determines whether an  
20 FRP is applicable. Can you answer that question?

21 A Sure. There are self-identification  
22 criteria in the regulation, in 112.20(f)(1), that  
23 enables the owner or operator of a facility that's  
24 subject to the SPCC rule to make a determination  
25 whether they're also subject to the FRP rule.

1 Q And what criteria determine whether a  
2 facility is subject to the FRP regulations?

3 A Sure. The first criteria is if a facility  
4 stores 42,000 gallons or more and transfers to or from  
5 a vessel. The second one is if a facility stores one  
6 million gallons or more and meets one or more of the  
7 four harm factors under the one million gallon  
8 criteria.

9 Q And what would those four harm factors be?

10 A If the facility doesn't have adequate  
11 containment for any given aboveground storage tank  
12 area; if a discharge from the facility could impact or  
13 cause injury to fish and wildlife and sensitive  
14 environments downstream or within a planning distance  
15 of the facility. Third criteria is if a discharge  
16 along that same planning distance could shut down a  
17 drinking water intake with -- as a result of the  
18 discharge; and if a facility has experienced a spill  
19 of 10,000 gallons or more to a navigable water within  
20 the last five years.

21 Q I'd like to turn you to what is marked as  
22 CX-53. We have the demonstrative here, and you could  
23 find it in your binder.

24 MR. HELMLINGER: Can everybody see that okay  
25 if I move this up?

1 BY MR. HELMLINGER:

2 Q Can you see this okay, Mr. Swackhammer?

3 A Yes.

4 Q Can you take a moment and familiarize  
5 yourself with CX-53 and, if you can, identify what it  
6 is?

7 A This exhibit is Figure C-1 from Attachment  
8 C-3 within Appendix C.

9 Q Other than the caption at the top or the CX  
10 nomination at the bottom, is this different, in your  
11 experience, from what appears in the regulations?

12 A No, it is not. This is the same Figure C-1  
13 in the regulation.

14 MR. HELMLINGER: Move to admit CX-53.

15 JUDGE BIRO: Is there any objection?

16 MR. McNEIL: No objection.

17 BY MR. HELMLINGER:

18 Q So you mentioned planning distance.

19 JUDGE BIRO: Wait. CX-53 is admitted into  
20 the record.

21 (The document referred to,  
22 previously identified as  
23 Complainant's Exhibit No. 53,  
24 was received in evidence.)

25 MR. HELMLINGER: Thank you, Your Honor. I'm

1 sorry. I'm very eager to talk about planning  
2 distances.

3 JUDGE BIRO: We all are.

4 THE WITNESS: I usually don't get that.

5 BY MR. HELMLINGER:

6 Q You mentioned the planning distance earlier.  
7 Could you explain how this illustration is useful to  
8 considering or contemplating planning distance as the  
9 regulations lay them out?

10 A Sure. The role of this illustration is to  
11 provide a guidebook, so to speak, and it would -- to  
12 determine whether the facility is FRP subject. The  
13 first planning distance, D-1, is the distance from the  
14 nearest opportunity of discharge, say, X-1, that tank.  
15 And within this consideration you could -- you would  
16 exclude any kind of secondary containment or dike  
17 around the tank, so that line around those four tanks  
18 would not be considered to be there in the evaluation.  
19 So the evaluation has to exclude secondary  
20 containment.

21 The release then occurs from the tank, goes  
22 planning distance D-1 to the storm drain, and then D-2  
23 is the storm drain to the navigable water. And then  
24 planning distance D-3 -- that's what we typically  
25 refer to in terms of the main planning distance, D-3,

1 and once it reaches the navigable water, going to shut  
2 down a drinking water intake, and/or impact or cause  
3 injury to fish and wildlife and sensitive  
4 environments.

5 Q Sure. So it is stipulated in this case, and  
6 the Court just ruled, that the Sacramento River Deep  
7 Water Ship Channel is navigable water, so can we -- so  
8 that would be, then, what's titled here, if we were  
9 going to apply this to the facts in this case, the  
10 navigable water on the right side of the illustration.  
11 Is that fair?

12 A Yes.

13 Q So you were in the courtroom earlier and  
14 heard the testimony of Mr. Meer, and you heard him  
15 address the Area Contingency Plan and the sensitive  
16 environment species represented therein. How does  
17 that description in that Area Contingency Plan impact  
18 your understanding of this illustration? Where would  
19 -- might that fit in anywhere?

20 A Yes, it does. It fits in within the fish  
21 and wildlife and sensitive environments, and then what  
22 is in the non-public facing would be the drinking  
23 water intakes, too, that might be impacted. But in  
24 the public facing, typically you will see, as Mr. Meer  
25 talked about, the identification of fish and wildlife

1 and sensitive environments along the applicable  
2 navigable water. So in the -- in those two criteria  
3 under the one million gallon criterion, you would  
4 consider the planning distance, and then in terms of  
5 identifying the fish and wildlife and sensitive  
6 environments, consult the -- you know, the applicable  
7 ACP to further inform that decision-making.

8 Q And without regard to the VSS facility, in  
9 your experience, how do Area Contingency Plans -- how  
10 are they typically used for these reviews of planning  
11 distances?

12 A They're used to determine -- for the owner  
13 or operator of the facility to determine applicability  
14 and then, of course, used for plan and development in  
15 terms of plan implementation, response strategies, and  
16 so forth that Mr. Meer talked about.

17 Q So in your experience, how determinative is  
18 an Area Contingency Plan for analyzing the fish and  
19 wildlife and sensitive environment?

20 A It's certainly important. It's not  
21 necessarily the end-all. There are also NOAA  
22 resources, environmental sensitivity index maps that  
23 can also be used to consult as well.

24 Q Are those exclusive resources or  
25 supplementary resources, if you understand?

1 A I would say that they're supplementary and  
2 complementary at times, depending on the information.

3 Q All right. If a sensitive environment is  
4 identified in an Area Contingency Plan, do you need to  
5 look at other supplementary materials?

6 A You could, but that would be the primary  
7 source of information.

8 Q Would that be sufficient?

9 A It should be.

10 Q So could you explain -- you explained D-1,  
11 D-2, and D-3. Could you explain for us D-4, what it  
12 is on the illustration?

13 A Sure. D-4 is also part of the applicability  
14 evaluation. The primary evaluation is whether oil  
15 can, in fact, reach navigable water and cause injury  
16 or shut down a drinking water intake. The secondary  
17 evaluation has a substantial harm facility versus just  
18 an SPCC-only facility is an evaluation of a oil  
19 discharge or portions of a worst-case discharge  
20 impacting fish and wildlife and sensitive environments  
21 not bordering a navigable water. This might be a  
22 wetland and so forth that's not directly bordering a  
23 navigable water.

24 Q So if we could start to apply some facts  
25 that we know about the VSS facility to this

1 illustration -- kind of work with me here. So we've  
2 discussed that the navigable water down the right side  
3 of the illustration would be essentially the  
4 Sacramento River Deep Water Ship Channel, and looking  
5 at illustration CX-1, there's the rectangular form of  
6 the facility as we discussed it. Is it fair to assume  
7 that's the rectangular form with the four tanks and  
8 the two Xs in illustration CX-53?

9 A That's correct.

10 MR. McNEIL: Objection, Your Honor. I'm  
11 sorry. The question's vague and I don't understand  
12 the line of questioning. And just to get it out there  
13 in case this is where counsel is going, to the extent  
14 he's going to be asking this witness to make comments  
15 about VSS as based on CX --

16 JUDGE BIRO: Fifty-three.

17 MR. McNEIL: -- 53, I would lodge an  
18 objection. We have a facility map right next to it.  
19 It is the actual facility.

20 JUDGE BIRO: Sustained. Restate your  
21 question.

22 MR. HELMLINGER: Sure, Your Honor.

23 BY MR. HELMLINGER:

24 Q Mr. Swackhammer, I only mean to -- began to  
25 discuss the facility image that we have at CX-1 here



1 in the concepts that we have in CX-53 with the D-1, D-  
 2 2, D-3 sort of distances. Do you, in your  
 3 professional experience, have opportunity to use  
 4 Google Earth as a mapping platform?  
 5 A Yes, I do.  
 6 Q Do you routinely use it?  
 7 A Yes, I do.  
 8 Q Have you found it to be reliable?  
 9 A Yes, I have found it to be reliable.  
 10 Q If you look at the bottom of CX-1 -- maybe  
 11 it's cut off in your view, but -- in your binder, if  
 12 you can't see it, there's a 300-foot notation,  
 13 calibration notation. Would you understand that to be  
 14 a reliable representation from Google Earth?  
 15 A Typically, generally, yes.  
 16 Q And it's stipulated in this matter and the  
 17 Court has found that the facility boundary is  
 18 approximately 200 feet from the Sacramento River Deep  
 19 Water Ship Channel. So given that, I'd like to  
 20 discuss CX-1 with you with these concepts of D-1, D-2,  
 21 and D-3. So given the proximity of the facility  
 22 looking at CX-1 and understanding that that's within  
 23 200 feet of the Sacramento River Deep Water Ship  
 24 Channel -- it's the tongue twister of the day -- can  
 25 you state what you understand to be the Sacramento

1 River Deep Water Ship Channel in illustration CX-1?  
 2 A The water body that's depicted in lower  
 3 right-hand corner is the ship channel.  
 4 Q Right. It's the sort of uneven but  
 5 generally straight parallel line running from the  
 6 bottom middle to about a third high on the right.  
 7 That area is the water?  
 8 A That's correct.  
 9 Q Okay. So how do these concepts of D-1, D-2,  
 10 and D-3 in the Facility Response Planning  
 11 applicability regulations -- how do they, in your  
 12 experience, apply to a facility with this proximity  
 13 to, for example, the Sacramento River Deep Water Ship  
 14 Channel?  
 15 A Sure. Within Attachment C-3 in Appendix C,  
 16 there are four sets of calculations that an owner or  
 17 operator would look at. And in addition, they would  
 18 also consider overland transport of oil. In this  
 19 case, you'd be looking at the travel time of -- to  
 20 travel that planning distance D-3 along the Sacramento  
 21 Ship Channel, but in order for oil -- in the  
 22 evaluation of oil reaching the navigable water -- in  
 23 this case, the Sacramento Ship Channel -- you'd be  
 24 looking at both oil reaching a storm drain on site --  
 25 I understand there are storm drains at the facility --

1 as well as a direct overland transport from the  
 2 asphalt cement tanks, those larger tanks depicted in  
 3 the aerial view directly to the ship channel.  
 4 Q So what measurements would be relevant,  
 5 then, in terms of getting to a conclusion whether  
 6 Facility Response Planning applies under the  
 7 regulations?  
 8 A So within the consideration of oil transport  
 9 overland, a facility within one-half mile of a  
 10 navigable water must complete the planning distance D-  
 11 3 calculation. If a facility is greater than one-half  
 12 mile, the nearest opportunity for discharge is greater  
 13 than one-half mile, then the facility can consider  
 14 overland transport characteristics, excluding the  
 15 secondary containment structures, consider factors  
 16 such as man-made depressions, natural depressions, and  
 17 so forth that may hinder the flow of portions of a  
 18 worst-case discharge reaching a navigable water. If a  
 19 facility is located within that half mile demarcation  
 20 from the navigable water, they automatically must  
 21 complete the planning distance D-3 calculation using  
 22 the formulas in Attachment C-3 in Appendix C in the  
 23 regulation.  
 24 Q So D-3 then becomes really determinative --  
 25 A Yes.

1 Q -- if -- D-4 in that context -- you said it  
 2 would be assumed. Is that true for D-1 and 2 also if  
 3 you were to calculate the distance to storm drains?  
 4 Is the half mile relevant there?  
 5 A Yes, indeed.  
 6 Q How so?  
 7 A So in cases where a facility's located  
 8 within -- greater than that half mile from a navigable  
 9 water and the distance from, say, X-1, and the D-1  
 10 distance is within a half mile to that storm inlet,  
 11 then they would also be required to calculate D-3.  
 12 We're assuming that it's essentially an almost  
 13 negligible time but its overland flow to the storm  
 14 drain or from concrete -- open concrete channel that  
 15 would also flow to the navigable water in seeking an  
 16 exit (phonetic), but essentially a negligible amount  
 17 of time for that oil to travel under adverse weather  
 18 conditions.  
 19 Q I believe you used the phrase "we are  
 20 assuming." Do you mean the regulations make that  
 21 assumption?  
 22 A Yes. The FRP regulation, yes.  
 23 Q So understanding the navigable water at  
 24 issue, whether you're considering CX-53 or looking  
 25 directly at CX-1, navigable water is the Sacramento

1 River Deep Water Ship Channel. And you heard Mr.  
 2 Meer's testimony about how the Sacramento River Deep  
 3 Water Ship Channel is treated in the Area Contingency  
 4 Plan. How would you go about calculating that  
 5 distance, D-3?  
 6 A You would use the formula for moving  
 7 navigable water in Attachment C-3.  
 8 Q So if the Sacramento River Deep Water Ship  
 9 Channel is the navigable water and the fish and  
 10 wildlife and sensitive environment, what sort of  
 11 distance would you anticipate for D-3, in your  
 12 experience?  
 13 A Typically --  
 14 MR. McNEIL: Objection. Lack of foundation.  
 15 JUDGE BIRO: Overruled.  
 16 Go ahead.  
 17 THE WITNESS: Typically, the calculation  
 18 would involve the average surface velocity. We're  
 19 assuming that oil would travel on the top of the  
 20 water. And times, say default time T from Table 3 in  
 21 the regulation, times a coefficient. So in my  
 22 experience, a typical planning distance -- if you ask  
 23 me that question, a typical planning distance is  
 24 around 20 miles.  
 25 BY MR. HELMLINGER:

1 Q So let's just use this as a hypothetical, 20  
 2 miles as a planning distance. If that fish and  
 3 wildlife and sensitive environment is within that  
 4 typical planning distance, what impact does that have  
 5 on determining applicability of the FRP regulations?  
 6 A That would render the facility subject to  
 7 the FRP rule.  
 8 Q Once you've determined a facility is subject  
 9 to the FRP rule, would you still go ahead and  
 10 calculate the full extent of D-3 even if the fish and  
 11 wildlife and sensitive habitat -- sensitive  
 12 environment is closer than the ultimate distance?  
 13 A Yes, you typically would use the planning  
 14 distance for applicability evaluations, and then you  
 15 re-use that planning distance for the planning  
 16 development. It's an important component of what's  
 17 called the vulnerability analysis that's part of the  
 18 plan development.  
 19 Q So generally stated, is there any situation  
 20 where you're developing an FRP plan that you don't  
 21 calculate D-3?  
 22 A I can't see that, unless they were subject  
 23 to the rule based on lack of secondary containment or  
 24 they've had a spill within the last five years of  
 25 10,000 gallons or more. And you're necessarily

1 required to calculate the planning distance for  
 2 applicability purposes, but you certainly would need  
 3 that for plan development.  
 4 MR. HELMLINGER: Your Honor, I'd move that  
 5 Mr. Swackhammer be accepted as an expert on the point  
 6 of EPA's interpretation of the FRP applicability  
 7 regulations.  
 8 JUDGE BIRO: An expert on EPA's --  
 9 MR. HELMLINGER: Interpretation of the FRP  
 10 applicability standards.  
 11 JUDGE BIRO: Mr. McNeil?  
 12 MR. McNEIL: Yes, Your Honor. I would  
 13 respectfully object to that proposed expert  
 14 designation. I think, first and foremost, because I  
 15 -- if I understand the testimony and the proposed  
 16 designation, that's a matter of regulatory  
 17 interpretation from our view, and not an area as to  
 18 which an expert would -- I believe that's the province  
 19 of the Court. So this -- that's the first and most  
 20 importantly.  
 21 The -- secondarily, I don't think that EPA's  
 22 opinion on interpretation is relevant. There's a  
 23 relatively complicated regulatory scheme in place that  
 24 demarcates what EPA's ability to regulate under the  
 25 FRP program is. This witness has testified to that,

1 to some degree, but it -- it's a matter of regulatory  
 2 and statutory interpretation, not expert testimony.  
 3 Thank you.  
 4 MR. HELMLINGER: May I respond, Your Honor?  
 5 JUDGE BIRO: Sure.  
 6 MR. HELMLINGER: The purpose of an expert,  
 7 obviously, is not to be correct every time. It is  
 8 certainly your province to determine whether the FRP  
 9 requirements apply here. That's the basis of our  
 10 Count 5. But I -- it's really hard to imagine anybody  
 11 with more experience reading, reviewing, and providing  
 12 guidance on these regulations in a manner that would  
 13 be helpful to the Court, and that's all we're looking  
 14 to do, is to give the Court a more helpful  
 15 understanding.  
 16 JUDGE BIRO: Well, in our proceedings, we  
 17 don't give any deference to EPA's own interpretation,  
 18 because --  
 19 MR. HELMLINGER: Absolutely not.  
 20 JUDGE BIRO: -- we're not --  
 21 MR. HELMLINGER: We're not asking for that.  
 22 JUDGE BIRO: -- the federal court and  
 23 Chevron doesn't apply in that regard.  
 24 MR. HELMLINGER: Right. Sure.  
 25 JUDGE BIRO: But I'll let him give me his

1 opinion as to what he believes is how they're  
 2 applicable --  
 3 MR. HELMLINGER: Sure. That's all we're  
 4 asking for, Your Honor.  
 5 JUDGE BIRO: -- based on his experience and  
 6 training. So, overruled.  
 7 BY MR. HELMLINGER:  
 8 Q So, Mr. Swackhammer, given the distance of  
 9 the VSS facility to the Sacramento River Deep Water  
 10 Ship Channel and other things you've heard and  
 11 testified to today, do you believe the FRP regulations  
 12 apply to the VSS facility?  
 13 A Yes, I do.  
 14 Q I'm going to turn to CX-34, if I may. Could  
 15 you take a moment and familiarize yourself with it?  
 16 And then explain for the record, if you have an  
 17 opinion, what it is.  
 18 A It's the SPCC guidance for regional  
 19 inspectors dated December 16, 2013.  
 20 Q How are you familiar with this guidance?  
 21 A I helped author the first edition in 2005,  
 22 and then the revised edition here in 2013.  
 23 Q Do you recognize this to be an accurate  
 24 version of the 2013 SPCC guidance?  
 25 A Yes, it would appear so.

1 MR. HELMLINGER: I'd move to admit CX-34  
 2 into the record.  
 3 JUDGE BIRO: Is there any objection, Mr.  
 4 McNeil?  
 5 MR. McNEIL: No objection, Your Honor.  
 6 JUDGE BIRO: Okay. CX-34 is admitted into  
 7 the record.  
 8 (The document referred to,  
 9 previously identified as  
 10 Complainant's Exhibit No. 34,  
 11 was received in evidence.)  
 12 BY MR. HELMLINGER:  
 13 Q If I could have you turn now RX-87 -- so  
 14 it's a different binder. Respondent's Exhibit 87.  
 15 A Eighty-seven, is --  
 16 Q Eighty-seven.  
 17 A Okay.  
 18 Q I think it --  
 19 A Okay.  
 20 Q Do you have that in front of you?  
 21 A Yes, I do.  
 22 Q Can you take a moment and familiarize  
 23 yourself with that?  
 24 A Okay.  
 25 Q Could you state for the record if you have

1 an opinion what it is?  
 2 A It's the Compliance Assistance Guide to help  
 3 owner or operators determine whether they're subject  
 4 to the FRP rules, the Facility Response Plan guidance.  
 5 Q And have you had any involvement to become  
 6 familiar with this document in a meaningful way?  
 7 A Yes.  
 8 Q And what is that opportunity?  
 9 A I didn't write the document, but I am  
 10 familiar with the document.  
 11 Q Do you use this guidance in any of your  
 12 trainings for the -- within or without EPA?  
 13 A Yes, we refer to it, and it is on our  
 14 public-facing website.  
 15 Q Do you accept this as an accurate copy of  
 16 the guidance?  
 17 A Yes.  
 18 MR. HELMLINGER: Move to admit RX-87 into  
 19 the record, if I may.  
 20 JUDGE BIRO: Mr. McNeil?  
 21 MR. McNEIL: No objection, Your Honor.  
 22 JUDGE BIRO: RX-87 is admitted into the  
 23 record.  
 24 //  
 25 //

1 (The document referred to,  
 2 previously identified as  
 3 Respondent's Exhibit No. 87,  
 4 was received in evidence.)  
 5 BY MR. HELMLINGER:  
 6 Q Thank you, Mr. Swackhammer. That's all with  
 7 that document.  
 8 A Okay.  
 9 Q The SPCC regulations that you testified that  
 10 you work with require amendments when there is a  
 11 change in design, construction, operation, or  
 12 maintenance that may have a, and I'll quote, "material  
 13 effect on the potential for a discharge." Do you  
 14 understand that to be true?  
 15 A Yes.  
 16 Q Could you describe in your experience what a  
 17 material effect -- like what are those circumstances  
 18 that might cause that material effect?  
 19 A When a facility, you know, adds a tank or  
 20 deletes tanks from the facility, they're required to  
 21 amend their plan.  
 22 Q Might the size of the tank matter in that  
 23 regard?  
 24 A Certainly.  
 25 Q If you're adding a five-gallon tank, would

1 that have a material impact, in your experience?  
 2 A That tank would not be subject to the rule.  
 3 Our threshold is 50,000 -- 50 gallons or more.  
 4 Q Okay. So a 55-gallon tank, if that were  
 5 added, would that be a material --  
 6 A Right, 55 gallons, sorry.  
 7 Q So do you have experience considering  
 8 whether a two million gallon tank of asphaltic cement  
 9 may cause a material effect --  
 10 A Yes.  
 11 Q -- on the potential for discharge? And  
 12 could you describe any of those experiences?  
 13 A There are situations where if they add a  
 14 tank, they may then become subject to the FRP rule in  
 15 addition to a material change to the -- you know, to  
 16 the facility's configuration.  
 17 Q I'm looking for some help on your  
 18 understanding of the word "material." Is it material  
 19 -- can you describe the impact on the costs, or  
 20 response, or anything that occurs to you, from your  
 21 experience, as relevant to helping us understand  
 22 what's a material change?  
 23 A Sure. A material change as described this  
 24 morning is, you know, the addition of an over two-  
 25 million-gallon tank. That would be a material change

1 to the facility's configuration that would trigger,  
 2 you know, an amendment to the SPCC plan and also would  
 3 be considered -- you know, determination of whether,  
 4 you know, the containment -- secondary containment's  
 5 adequate now with the addition of the tank, with --  
 6 particularly if it's co-located in the same secondary  
 7 containment structure, would also then trigger  
 8 additional tank inspection requirements.  
 9 Q How might it affect the potential for a  
 10 response, for example, burden on response resources?  
 11 A That would -- in terms of triggering the FRP  
 12 rule, would that capacity -- would -- if they're  
 13 subject to the FRP rule, that would trigger an  
 14 evaluation of the appropriate response resources under  
 15 Appendix D of the -- of the FRP regulation.  
 16 Q How might it affect local governmental  
 17 response resources, the addition to a two-million-  
 18 gallon tank?  
 19 A It could -- particularly if a facility has  
 20 -- unfortunately suffers a fire incident, and then  
 21 they would have to determine the local firefighting  
 22 resources and the -- and also coordination with the  
 23 local emergency planning committee in terms of now you  
 24 have quite a bit more oil stored at the facility.  
 25 Q Does your experience change in that regard

1 if we substitute your word "oil" there for "asphaltic  
 2 cement?"  
 3 A No.  
 4 Q You testified that you are experienced with  
 5 API and STI standards, is that correct? Did I have  
 6 that right?  
 7 A That's correct.  
 8 Q Could you explain those experiences with API  
 9 standards, how it might be relevant to the VSS  
 10 facility?  
 11 A In the development of Chapter 7 in the SPCC  
 12 guidance, we've helped author that chapter on tank  
 13 integrity testing, which would include an API 653  
 14 inspection standard as well as Steel Tank Institute's  
 15 SP001 inspection standard. I also participated in a  
 16 consensus standards committee set up by Steel Tank  
 17 Institute for the development of the revisions to the  
 18 SP001 tank inspection standard.  
 19 Q Could I have you turn to CX-25? Take a  
 20 moment and familiarize yourself with this document  
 21 and, if you can, explain to us what it is.  
 22 A Okay. It's a API 653 tank inspection,  
 23 repair, alteration, and reconstruction standard dated  
 24 September 2003.  
 25 Q How is -- how would this standard be

1 relevant to the VSS facility, in your experience?  
 2 A This would typically be used for the  
 3 inspection of field-erected tanks, which would be  
 4 those two large tanks in the secondary containment  
 5 structure in that exhibit --  
 6 Q That exhibit meaning CX-1.  
 7 A CX-1, yes. Those are typically field-  
 8 erected tanks, in my experience, and thus can be  
 9 inspected via the API 653 inspection standard, both in  
 10 terms of a monthly inspection by owner and operator,  
 11 as well as formal inspection procedures, external  
 12 inspection as well as the internal inspection  
 13 procedures outlined in API 653.  
 14 Q If I could have you turn to the third page  
 15 of CX-25 --  
 16 A Are you referring to the table of contents?  
 17 Q I think mine printed funny. I meant the --  
 18 maybe the cover sheet. If you go from the -- there's  
 19 that first fully in-color, if you have it that way,  
 20 certification, you're going to have a blank page  
 21 labeled CX-2 of 114, and then there's page 3 of 114 --  
 22 A Okay.  
 23 Q -- that really is a cover page. Do you see  
 24 that?  
 25 A Yes, I do.

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1 Q All right.

2 MR. HELMLINGER: Your Honor, am I -- do you

3 have the same page as us?

4 JUDGE BIRO: Yes, I do.

5 BY MR. HELMLINGER:

6 Q Do you see a date on this document?

7 A Yes, Addendum 1, September 2003.

8 Q Do you know this standard to be the one that

9 had -- that would have been relevant for API's

10 inspection in 2012?

11 A Yes, it can be. There also was an addition

12 in 2012 as well.

13 MR. HELMLINGER: Move to admit CX-25.

14 MR. McNEIL: No objection, Your Honor.

15 JUDGE BIRO: Okay, CX-25 is admitted into

16 the record.

17 (The document referred to,

18 previously identified as

19 Complainant's Exhibit No. 25,

20 was received in evidence.)

21 BY MR. HELMLINGER:

22 Q If you can turn to CX-26. Take a moment and

23 familiarize yourself with CX-26 and, if you can, state

24 your thoughts on what this document is.

25 A Appears to be a delegation of authority for

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1 Region 9.

2 Q Maybe we have a different 26. Can you go a

3 tab right? Is the binder off?

4 JUDGE BIRO: You're looking at 27.

5 MR. HELMLINGER: May I approach, Your Honor?

6 JUDGE BIRO: Yes, you may.

7 (Pause.)

8 JUDGE BIRO: Mr. Swackhammer, here, have my

9 copy.

10 MR. HELMLINGER: Oh, I have a copy here. I

11 can --

12 JUDGE BIRO: Oh, okay.

13 MR. HELMLINGER: We can trade back.

14 JUDGE BIRO: Yeah.

15 MR. HELMLINGER: It looks like the witness's

16 binder had a skip on 26.

17 JUDGE BIRO: Okay.

18 MR. HELMLINGER: Apologize for that.

19 Counsel, what do you have for 26? All

20 right, you have the same. Okay.

21 BY MR. HELMLINGER:

22 Q So would you familiarize yourself with this

23 document and tell us what you think it is?

24 A Yes, this document is the Steel Tank

25 Institute's standard for inspection of aboveground

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1 storage tanks dated September of 2011, fifth edition.

2 Q And what experiences do you have with this

3 document?

4 A I was part of the consensus committee in the

5 development of this document.

6 Q And how would this document be used relative

7 to the VSS facility?

8 A Typically be used to form the basis for

9 inspection and testing of shop-built tanks at the

10 facility.

11 MR. HELMLINGER: Move to admit CX-26.

12 MR. McNEIL: No objection, Your Honor.

13 JUDGE BIRO: Complainant's Exhibit 26 is

14 admitted into the record.

15 (The document referred to,

16 previously identified as

17 Complainant's Exhibit No. 26,

18 was received in evidence.)

19 BY MR. HELMLINGER:

20 Q CX-25, the API tank inspection standards

21 that we looked at briefly -- do you understand the

22 concept of an API certification?

23 A Yes, for the formal inspection procedures

24 under the 653.

25 Q Good. And could you describe generally your

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1 understanding of what that API certification

2 authorizes?

3 A It authorizes the personnel to perform the

4 requisite inspections that are outlined in 653, the

5 formal external and the formal internal inspections.

6 Q How does the standard regard inspections

7 when there is no API-certified inspector?

8 A Those inspections would not be valid for the

9 formal inspection procedures.

10 Q In your experience, what are appropriate

11 inspection protocol for an insulated tank?

12 A Typically, that -- for an external

13 inspection, that would be removal of a piece -- of

14 portions of the insulation to determine the primary

15 wall thickness, and then -- that would be part of the

16 external inspection, as well as looking at the valves

17 and piping associated with the tank and other aspects

18 -- the roof of the tank and so forth. So it's a

19 comprehensive evaluation on the external.

20 The internal would be taking the tank out of

21 service, cleaning it out, entering it, and then doing

22 a formal inspection of the interior of the -- of the

23 tank.

24 Q Could that inspection occur without an API

25 certification?

1 A No, it should not.

2 Q I'd like to turn you to three documents we  
3 can pull up. CX-22 we'll start with, and then we'll  
4 follow with 46 and 47. Well, fingers crossed we have  
5 the same document. Does your document start with the  
6 caption "Renewal of Information Collection Request"?

7 A Yes, it does.

8 Q Thank you. And take a moment and review  
9 that document, familiarize yourself with it, and then,  
10 if you can, explain what that document is.

11 A So this is a supporting statement for the  
12 renewal of the information collection request, or ICR,  
13 for implementation of the FRP regulation under the Oil  
14 Pollution Act.

15 Q What involvement have you had with this  
16 document?

17 A I have been maintaining the ICR renewals,  
18 and so I authored this document.

19 Q What is the purpose of an ICR renewal?

20 A In order to require the owner or operators  
21 of facilities to prepare and submit FRPs, you have to  
22 have a valid OMB control number.

23 Q OMB -- is that the Office of Management and  
24 Budget?

25 A Correct.

1 Q When you say burden, is that the cost of  
2 compliance burden on the regulated community?

3 A The burden takes the form of the burden  
4 estimate for determining whether you're subject to the  
5 FRP rule, and then once you're -- if you determine  
6 you're subject, the burden associated with plan  
7 development.

8 Q How do you determine these costs to go into  
9 these documents of the burden?

10 A This -- the burden estimates is based on  
11 best professional judgment, and from past -- I  
12 inherited the work from my prior colleague who was the  
13 FRP lead. And so I bear the mantle of carrying it  
14 forward and also for making sure that the burden  
15 estimates are correct.

16 Q Sure. Are these burden estimates based on  
17 specific facilities or averages? Could you explain  
18 sort of any composition of them?

19 A Yes, we differentiate on types of  
20 facilities, production facilities versus onshore  
21 facilities, tunneling (phonetic) facilities, soybean,  
22 oilseed processors, asphalt cement facilities, and so  
23 forth. So a variety of facilities are part of the  
24 review process.

25 Q Right. On a spectrum of conservative to not

1 Q Can you turn to CX-46? Do you have that in  
2 front of you?

3 A Yes, I do.

4 Q Can you take a moment and familiarize  
5 yourself with that document and explain, if you can,  
6 what it is?

7 A It's also the supporting -- renewal  
8 supporting statement for the renewal of the ICR.

9 Q And if you turn to 47, take a moment, review  
10 that, and explain for us, if you can, what it is.

11 A It looks like a very -- a similar document.  
12 I've got the supporting statement for the renewal of  
13 the ICR; ICR numbers 16 to 30.13.

14 Q Can you state your involvement with these  
15 documents, 46 and 47?

16 A I authored the documents.

17 Q And for what purpose?

18 A To support the renewal of the ICR with OMB.

19 Q So what goes into preparing these documents,  
20 46 and 47?

21 A An update of the prior supporting statement  
22 to get -- with current labor rates. Also, I reach out  
23 to -- up to nine plan orders to inform whether their  
24 burden estimates are correct or up to date within the  
25 ICR supporting statement.

1 conservative, could you describe how you think these  
2 burdens represent -- are represented to any specific  
3 facility across the country?

4 A As you might imagine, we're trying to  
5 provide a national level estimate, so we don't get  
6 into the detail on the complexity of the facilities, a  
7 refinery versus a facility of this size, similar to  
8 the VSS facility. They're national level estimates,  
9 so we try to make them as -- you know, to be  
10 conservative, so they're representative. But  
11 certainly, a larger facility would have potentially  
12 more burden versus a smaller facility.

13 MR. HELMLINGER: Move to admit CX-42 [sic]  
14 -- or, I'm sorry, 22, 46, and 47.

15 MR. McNEIL: No objection, Your Honor.

16 JUDGE BIRO: Complainant's Exhibits 22, 46,  
17 and 47 are admitted into the record.

18 (The documents referred to,  
19 previously identified as  
20 Complainant's Exhibits No.  
21 22, 46, and 47, were received  
22 in evidence.)

23 MR. HELMLINGER: Thank you. Your Honor, 10  
24 seconds, if I may.

25 JUDGE BIRO: You may.

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1 MR. HELMLINGER: No further questions, Your  
 2 Honor.  
 3 JUDGE BIRO: Thank you.  
 4 Any cross?  
 5 MR. McNEIL: May I have just a moment?  
 6 JUDGE BIRO: Sure, of course. Would you --  
 7 would you like to take a 10-minute break?  
 8 MR. McNEIL: That would -- that would be  
 9 ideal.  
 10 JUDGE BIRO: Okay, we'll stand in recess for  
 11 10 minutes.  
 12 Mr. Swackhammer, please don't discuss your  
 13 testimony with anybody while we're on break.  
 14 THE WITNESS: Yes, Your Honor.  
 15 JUDGE BIRO: Even with counsel. Okay.  
 16 (Whereupon, at 10:48 a.m., the hearing in  
 17 the above-entitled matter adjourned, to reconvene at  
 18 11:02 a.m. the same day, May 16, 2019.)  
 19 JUDGE BIRO: Please be seated. We'll wait  
 20 on Mr. McNeil. We'll give him another five minutes,  
 21 and then we'll assume he's conceding and we'll move  
 22 on.  
 23 MR. HELMLINGER: I think they left their  
 24 computers behind. They'll be back.  
 25 JUDGE BIRO: You're just that intimidating,

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1 Mr. Helmlinger.  
 2 MR. HELMLINGER: Right. Sorry your trip out  
 3 here is with the rain. It's not usually our rainy  
 4 season now.  
 5 JUDGE BIRO: I know. I'm sad, too. Cold  
 6 and rainy --  
 7 MR. HELMLINGER: Right.  
 8 JUDGE BIRO: -- just seems very unfair.  
 9 UNIDENTIFIED SPEAKER: Yeah.  
 10 UNIDENTIFIED SPEAKER: Yeah, when it's sunny  
 11 back in D.C., yeah.  
 12 MR. HELMLINGER: We usually come from the  
 13 East Coast to get away from all that.  
 14 UNIDENTIFIED SPEAKER: Right, right.  
 15 UNIDENTIFIED SPEAKER: It's very  
 16 unseasonable, as they say.  
 17 MR. HELMLINGER: My daughter's on a week-  
 18 long school camp-out right now.  
 19 (Pause.)  
 20 JUDGE BIRO: Do you not have watches? What  
 21 are we doing here?  
 22 MR. McNEIL: Right, right, my apologies.  
 23 JUDGE BIRO: Please proceed.  
 24 //  
 25 //

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1 CROSS EXAMINATION  
 2 BY MR. McNEIL:  
 3 Q Good morning, Mr. Swackhammer.  
 4 A Good morning.  
 5 Q I just have a few questions following up on  
 6 Mr. Helmlinger's questions that he asked you. If I  
 7 heard correctly, did you state that you authored a  
 8 portion of the SPCC regulations?  
 9 A Of the amendments -- the 2008 and 2009  
 10 amendments, that's correct.  
 11 Q Okay. I wanted to ask you, if you recall,  
 12 what portions you authored.  
 13 A The pesticide equipment exemption, container  
 14 exemption, and the tanks associated with the nuclear  
 15 facilities exemption, and in general participated in  
 16 development of the regulatory impact analysis  
 17 alongside our economist, and in general just, you  
 18 know, provided technical assistance as an engineer in  
 19 the group.  
 20 Q All right, thank you. And then if I  
 21 understood, you have reviewed aerial or satellite  
 22 photographs of the facility but have not actually been  
 23 to the facility. Is that correct?  
 24 A That's correct.  
 25 Q Okay. And you mentioned earlier in one of

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1 the questions that Mr. Helmlinger posed to you a  
 2 reference to excluding secondary containment. Do you  
 3 recall that?  
 4 A Yes, in the applicability evaluation, which  
 5 is required both for SPCC applicability as well as for  
 6 FRP applicability determinations.  
 7 Q Right, and could you -- could you please  
 8 explain for me what you were referring to here, if you  
 9 recall that question?  
 10 A Sure. So if you're a facility, and you  
 11 store oil, as Mr. Meer mentioned, over 1320 gallons,  
 12 starting -- counting at 55 gallons, and you have a  
 13 reasonable expectation of a discharge to a navigable  
 14 water, you're then subject to the SPCC rule. And in  
 15 that evaluation of reasonable expectation, you have to  
 16 exclude the presence of secondary containment.  
 17 Q Okay. And does that also apply in the FRP  
 18 context?  
 19 A Yes, it does.  
 20 Q Okay. And what's your understanding of how  
 21 the exclusion for secondary containment applies within  
 22 the FRP applicability analysis?  
 23 A So specifically, when -- as an example, when  
 24 you're considering oil transport over land to  
 25 navigable water, you would -- it's written in the

1 regulation in Section 5 of Attachment C-3 --  
 2 Q 5.0.  
 3 A -- right, right --  
 4 Q Okay.  
 5 A -- to exclude secondary containment. You  
 6 can consider man-made depressions and man-made  
 7 structures beyond containment that may restrain or  
 8 hinder portions of a worst-case discharge reaching  
 9 navigable waters, and that's for a facility that would  
 10 -- if they're subject to an FRP rule, would be  
 11 considered as a substantial harm facility. So we  
 12 differentiated between an SPCC facility versus a  
 13 substantial harm facility. So there's a bit more of a  
 14 barrier to entry, so to speak, to be considered a  
 15 substantial harm facility.  
 16 Q And just so I'm 100 percent clear, what do  
 17 you consider to be secondary containment? What would  
 18 be some examples?  
 19 A Secondary containment could take the form of  
 20 a containment dike, a engineered structure surrounding  
 21 the tanks, and then with sufficient freeboard for a  
 22 ring and sufficiently impervious would be considered  
 23 adequate containment, so to speak. You can also have  
 24 remote impounding, and that would also satisfy  
 25 containment as well.

1 Q In your experience and your understanding of  
 2 the regulations, is it possible to encounter a  
 3 situation in which you have both a man-made depression  
 4 and secondary containment in the same location? Have  
 5 you ever seen that?  
 6 A Sure, there could be situations where that  
 7 man-made or natural depression may be, you know,  
 8 outside of containment and would be considered -- be  
 9 -- would potentially be in the flow path of portions  
 10 of a worst-case discharge.  
 11 Q And could it be inside the containment?  
 12 A It could be inside the containment, yeah.  
 13 It could be.  
 14 Q Okay. And then I do want to ask you about  
 15 -- sorry, I think it's CX-53, is the one closer to  
 16 you, the planning distance flow chart.  
 17 A Yes.  
 18 Q Yeah, okay. Just a couple of questions. I  
 19 think you had testified earlier something to the  
 20 effect of an assumption in the regulation about a  
 21 "negligible time" for a discharge to reach a navigable  
 22 water. Do you recall that?  
 23 A Yes, that s language in the regulation in  
 24 Attachment C.  
 25 Q Right, and what's your understanding of what

1 that applies to?  
 2 A Typically, once material reaches the storm  
 3 drain, it's assumed that there's a negligible amount  
 4 of time for that material to reach navigable waters.  
 5 Q Okay, and the assumption is with --  
 6 contained within the regulations, is that right?  
 7 A That's right.  
 8 Q Okay. So in other words, and correct me if  
 9 I'm wrong, but you don't have any additional overlay  
 10 or interpretation that you personally are adding to  
 11 that language here today. You were more referring  
 12 just to the regulations itself.  
 13 A Yeah. There's also language about, you  
 14 know, travel time, both a low range and a high range,  
 15 both in terms of material in the storm drain and  
 16 material in an open concrete channel, as an example.  
 17 That's also discussed in that same section, Attachment  
 18 C-3. So there's some sort of upper bound and lower  
 19 bound in terms of velocities, and that would inform  
 20 travel time. And so the regulation speaks to a  
 21 negligible amount of time, but then it also provides  
 22 some detail that would guide the owner or operator to  
 23 -- in terms of the calculation within that time frame,  
 24 you know, of travel time per se.  
 25 Q And you also mentioned -- I believe you used

1 the word "automatically," and I believe you were  
 2 referring about facilities that are either within a  
 3 half a mile of a navigable water on the one hand, and  
 4 facilities that are a half mile or more away from the  
 5 navigable water. Do you recall that?  
 6 A Yes.  
 7 Q Okay. And when you were talking about --  
 8 when you were responding to Mr. Helmlinger, you --  
 9 when you used the word "automatically," I understood  
 10 your testimony -- but please, correct me if I've  
 11 misunderstood it. I understood your testimony to be  
 12 referring to the requirement to conduct the D-3  
 13 planning calculation, and not to the ultimate question  
 14 of the applicability of an FRP. Is that correct?  
 15 A Yeah. What I was referring to is the  
 16 applicability evaluation. So the language in  
 17 Attachment C-3 in Section 5.0, that talks about that  
 18 half-mile demarcation. Basically states that if a  
 19 facility is within a half mile of a navigable water,  
 20 the nearest point to a discharge to navigable water,  
 21 the owner or operator must calculate the planning  
 22 distance D-3.  
 23 Q Right, and just to refine that, you -- it  
 24 was not your testimony -- and again, correct me if I'm  
 25 wrong -- that any facility within a half mile of a



1 navigable water automatically has to prepare an FRP.  
 2 A Speaking straight from the regulatory  
 3 language, the language says, must prepare their  
 4 calculation D-3.  
 5 Q Yes, I'm sorry. Let me rephrase my  
 6 question. That's what I understood you to say, but  
 7 what I was asking was you were not saying that just  
 8 because a facility is within a half a mile, it must  
 9 conduct -- actually prepare an FRP.  
 10 A If a facility within the half mile needs to  
 11 do the evaluation, you know, calculate the planning  
 12 distance D-3, it is part of that evaluation of  
 13 planning distance. The calculation of D-3 -- then  
 14 determine whether an oil discharge from the facility  
 15 within that planning distance D-3 could shut down a  
 16 drinking water intake or impact or cause injury to  
 17 fish and wildlife and sensitive environments within  
 18 that planning distance D-3.  
 19 Q Right. In other words, if you're within a  
 20 half a mile, you're required to do the planning  
 21 distance, and doing the planning distance is part of  
 22 answering the ultimate question of whether an FRP is  
 23 required.  
 24 A That's correct.  
 25 Q Okay. One last question. Have you ever

1 seen a situation where a facility might be doing both  
 2 a 5.0 overland transport analysis and a D-3 navigable  
 3 water analysis as part of answering the ultimate  
 4 question of an FRP?  
 5 A Certainly, and that's part of the reason for  
 6 including Section 5.0 in consideration of oil  
 7 transport over land. So that's definitely envisioned.  
 8 Even though it's not depicted here in Figure C-1,  
 9 certainly the nearest opportunity, if there is no  
 10 storm drain within that particular flow path, then it  
 11 would be a oil transport over land flow path to the  
 12 navigable water, be it a sheet flow or via open  
 13 channel congruent flow, something along those lines.  
 14 Q Okay. Just one last question. When the  
 15 regulations say that something is assumed, like in the  
 16 case of the storm drain discharge we were talking  
 17 about. What does that mean to you, that it's assumed?  
 18 A In the regulation, it does say it assumes  
 19 that once it reaches a storm drain that it would --  
 20 you know, it would daylight into a navigable water. I  
 21 have had the experience where an FRP facility in  
 22 Minnesota -- where the storm inlets on site did not  
 23 drain to the Mississippi River. So it was a unique  
 24 configuration. I have seen that. So in my training  
 25 to our own inspectors, my advice to them is to not

1 necessarily assume, but verify that, indeed, the storm  
 2 drain does, you know, discharge to the navigable water  
 3 in your -- you know, in your evaluations.  
 4 Q Okay.  
 5 MR. McNEIL: I have no further questions,  
 6 Your Honor.  
 7 JUDGE BIRO: Is there any redirect?  
 8 MR. HELMLINGER: Short, Your Honor.  
 9 REDIRECT EXAMINATION  
 10 BY MR. HELMLINGER:  
 11 Q Since it's fresh in my mind, Mr.  
 12 Swackhammer, this Minnesota release, could you be  
 13 clear? I wasn't quite sure. The release to the storm  
 14 drain there -- did the storm drain itself sort of  
 15 blank off and not go to the navigable water, or did  
 16 the discharge not reach the navigable water? I was  
 17 unclear.  
 18 A It wasn't actually a discharge from the  
 19 facility. It was just an evaluation of whether any  
 20 discharge from the facility could reach the  
 21 Mississippi River. And so there was a question about  
 22 once it reached -- there were storm inlets on site,  
 23 and those storm inlets -- we weren't sure during the  
 24 site visit whether or not they daylighted to the  
 25 Mississippi River. And then the subsequent evaluation

1 with the local authorities verified that the actual  
 2 storm outlets basically went to the north of the  
 3 facility and not to the east to the Mississippi River.  
 4 It was an unusual configuration.  
 5 Q So in that instance, it was just physically  
 6 impossible for that storm drain to reach the water.  
 7 A To reach the Mississippi River, that was  
 8 correct.  
 9 Q Is that relevant to your understanding of  
 10 the FRP applicability to this facility -- the VSS  
 11 facility?  
 12 A It certainly would be relevant, yes.  
 13 Q How so?  
 14 A I believe there are storm drains at the  
 15 facility that drain to the Sacramento Ship Channel.  
 16 Q Right, and so it's the opposite, in fact.  
 17 If they do actually drain to the Sacramento River Deep  
 18 Water Ship Channel.  
 19 A That's correct. If that's the situation,  
 20 which I believe is the situation, then they drain to  
 21 the Sacramento Ship Channel.  
 22 Q You discussed with Mr. McNeil the idea of  
 23 man-made depressions -- this idea that man-made  
 24 depressions can be considered in your flow path or  
 25 flow pattern. How is that relevant to the half mile

1 assumption that you also discussed with Mr. McNeil?  
 2 A Sure. So excluding secondary containment --  
 3 let's just say, for instance, there is a failure of  
 4 one of the tanks, the asphalt cement tanks. Excluding  
 5 secondary containment, you are to do the evaluation of  
 6 where that oil would go, and portions of -- you know,  
 7 oil doesn't always go the way you think it does, but  
 8 there will be portions, you know, in a -- in a -- in a  
 9 catastrophic tank failure, with over two million  
 10 gallons of oil or, in this case, cement -- asphalt  
 11 cement, heated material, there will be a release and  
 12 then once it reached -- you know, it could be a radial  
 13 event, that portions of a worst-case discharge would  
 14 be expected to travel towards the Sacramento Ship  
 15 Channel.  
 16 And in that evaluation, you would consider  
 17 both any -- outside of containment, any man-made  
 18 depressions, man-made structures, as well as the  
 19 roughness, so to speak, of the ground between the  
 20 facility and the ship channel.  
 21 Q Sure. The coefficients of the ground and  
 22 man-made depressions like that, those are relevant to  
 23 the D-4 calculation, is that right?  
 24 A Of course, the flow calculations. Right.  
 25 Overland transport of oil.

1 Q Right. But if the facility is within a half  
 2 mile of a navigable water, do those same  
 3 considerations still apply?  
 4 A Typically, no. They would not apply because  
 5 according to the regulation, if you're within a half  
 6 mile of a navigable water, you have to -- you know,  
 7 you must calculate the planning distance D-3, because  
 8 it's assumed that given that location that oil will,  
 9 indeed, reach the navigable water.  
 10 Q Thank you.  
 11 MR. HELMLINGER: No other questions.  
 12 JUDGE BIRO: Any recross?  
 13 MR. McNEIL: No, Your Honor.  
 14 JUDGE BIRO: Mr. Swackhammer, can I just ask  
 15 a few questions?  
 16 THE WITNESS: Yes, Your Honor.  
 17 JUDGE BIRO: You used the term "daylighted."  
 18 What does that mean?  
 19 THE WITNESS: That means that the storm  
 20 drain empties into the water body.  
 21 JUDGE BIRO: Daylighted? That's the  
 22 definition of that term?  
 23 THE WITNESS: It's a term of art that  
 24 engineers use for daylighting of the storm drain to  
 25 either another culvert or to a water body, yes.

1 JUDGE BIRO: Okay. So if you look at  
 2 Complainant's Exhibit 53, assuming tank that's marked  
 3 X-1 catastrophically failed and all the oil in it was  
 4 released, for planning purposes with an FRP, do you  
 5 assume it's -- all the oil is being released in the  
 6 direction of the navigable water? Is that the  
 7 catastrophic scenario?  
 8 THE WITNESS: We use in the regulation the  
 9 term "portions" of a worst-case discharge leading from  
 10 the tank, and as you might imagine, oil will go in  
 11 multiple directions. So there may be a component from  
 12 X-1 following a D-1 pathway to a storm drain. There  
 13 also might be another component of portions of a  
 14 worst-case discharge traveling overland from X-1 to  
 15 the navigable water. So there could be multiple flow  
 16 paths of a worst-case discharge.  
 17 JUDGE BIRO: Okay. So if there were -- if  
 18 it's within a half a mile, do you actually do the D-1  
 19 and D-2 calculations assuming there's a storm drain,  
 20 or you just assume under the regulations that it  
 21 reaches from X-1 to the navigable water?  
 22 THE WITNESS: The regulations state that if  
 23 you're within a half mile of a navigable water, that  
 24 portions of a worst-case discharge will reach. It's  
 25 already -- it's assumed in the regulation that it

1 would reach --  
 2 JUDGE BIRO: Okay, so that's considered a  
 3 given.  
 4 THE WITNESS: Right.  
 5 JUDGE BIRO: It doesn't matter, really, what  
 6 the contours of the land is. If you're within a half  
 7 mile, that's all irrelevant.  
 8 THE WITNESS: It's assumed that oil would  
 9 reach navigable waters, right.  
 10 JUDGE BIRO: Okay. And if the termination  
 11 point of D-2 on the map, the far left -- the far right  
 12 line, is a sensitive environment, is within the ACP,  
 13 do you have to do the D-3 calculation?  
 14 THE WITNESS: You still would need to do the  
 15 D-3 calculation because even though the navigable  
 16 water itself may be considered a sensitive  
 17 environment, you would need the D-3 calculation for  
 18 plan development, in addition to applicability  
 19 evaluations. So you wouldn't necessarily just stop  
 20 right at the outflow there. You would need to  
 21 determine where that oil would go downstream and what  
 22 would be impacted. Particularly if it's going to  
 23 impact -- shut down a drinking water intake.  
 24 So that would be an additional harm factor.  
 25 So you would need the planning distance D-3. If you

1 already know that the navigable water is a sensitive  
2 environment per se, okay, so then you would check one  
3 of the questions "yes" in Attachment C-2. But you'd  
4 also want to know if there's a drinking water intake  
5 downstream. So it may not be immediately right next  
6 to the facility. There might be a drinking water  
7 intake downstream where you would need the planning  
8 distance to be able to determine whether you should  
9 check "yes" to that harm factor as well.

10 JUDGE BIRO: Okay. So for the purpose of  
11 determining whether you need to do an FRP, the D-3  
12 calculation wouldn't matter, but it would matter for  
13 the purpose of determining the harm and the scope of  
14 the harm, is that correct?

15 THE WITNESS: True. Determining whether the  
16 harm or injury to fish and wildlife and sensitive  
17 environments could occur, or shutting down of a  
18 drinking water intake could occur for applicability  
19 purposes. And then for plan development purposes, the  
20 -- to inform the development of the vulnerability  
21 analysis portion of the FRP.

22 JUDGE BIRO: Okay. If you're a facility and  
23 you do your analysis for FRP, and you determine that  
24 you are not subject to it, do you have to notify the  
25 agency?

1 THE WITNESS: If there was an alternative  
2 formula used in the evaluation that deviates from  
3 those formulas in Attachment C-3 in Appendix C, then  
4 yes, you would need to inform the regional office that  
5 yes, an alternative formula was used to determine the  
6 evaluation in Attachment C-2.

7 JUDGE BIRO: Okay. And is there a time  
8 frame for doing that?

9 THE WITNESS: No, I don't believe there is a  
10 specific time frame in the regulation for that.

11 JUDGE BIRO: Is there a form for doing that?

12 THE WITNESS: Yes. The Attachment C-2 form  
13 would be something -- typically, what happens in this  
14 process, the owner or operator would use the formulas  
15 in Appendix C as an example, Attachment C-3. If they  
16 check "no" to all the questions in Attachment C-2, and  
17 just -- you know, that's the F-1 criteria that I  
18 referred to earlier in my testimony, they check "no"  
19 to those questions, then they would put that in their  
20 SPCC plan and maintain that in their SPCC plan.

21 If they use the alternative formulas to  
22 arrive at a determination in Attachment C-2, they  
23 would need to inform the regional administrator that  
24 yes, they did that.

25 JUDGE BIRO: Okay.

1 Did my questions raise any questions for  
2 you?

3 MR. HELMLINGER: They did not. They did  
4 not.

5 JUDGE BIRO: Okay.  
6 Mr. McNeil?

7 MR. McNEIL: I do have one, Your Honor --

8 JUDGE BIRO: Please proceed.

9 RE CROSS EXAMINATION

10 BY MR. McNEIL:

11 Q Mr. Swackhammer, could I please ask you to  
12 look at Exhibit RX-86 at page 6? And this has to do  
13 with the issue we've been discussing about facilities  
14 are within a one-half mile distance of a navigable  
15 water.

16 JUDGE BIRO: I'm sorry, Mr. McNeil, what  
17 page?

18 MR. McNEIL: It's page 6 of 17 of RX-86.

19 MR. HELMLINGER: Page 6.

20 THE WITNESS: You're referring to Attachment  
21 C-3, is that correct?

22 MR. McNEIL: Yes. Section 1.0.

23 THE WITNESS: Okay.

24 BY MR. McNEIL:

25 Q Do you have that before you now?

1 A Yes, I do. Yeah.

2 Q Okay. Could you look at the last sentence  
3 of Section 1.3?

4 A Okay.

5 Q And read it. You can read it to yourself or  
6 you can read it out loud so that we're all on the same  
7 page, what we're talking about.

8 A The full paragraph, or --

9 Q No, no, no, just the last sentence.

10 A Okay. "For facilities that do not meet the  
11 substantial harm criteria for secondary containment or  
12 oil spill history as listed in the flow chart,  
13 calculation of a planning distance for a proximity to  
14 fish and wildlife and sensitive environments and  
15 public drinking water intake is required, unless it is  
16 clear without performing the calculation that these  
17 areas would be impacted."

18 Q Right, and there's a parenthetical there,  
19 you see, that says the facility's located in a  
20 wetland. Do you see that?

21 A Correct.

22 Q That's a -- the example that the regulations  
23 use -- is using to give -- for where it's clear that  
24 the substantial harm criteria is met. Do you see  
25 that?

1 A Yes.

2 Q Okay. So when you consider this section

3 juxtaposed with the half mile distance that we were

4 talking about earlier, I just wanted to be clear, is

5 there something in the regulations that you know about

6 specifically that says that it -- and I'm asking you

7 to exclude from your answer this situation where the

8 facility is in the wetlands. Pretend like we don't

9 have that, okay? That's not -- so the question is:

10 other than that, is there something in the regulations

11 that you're aware of that says that a facility has to

12 prepare a Facility Response Plan based solely on the

13 fact that it's within a half mile? Or do you then go

14 back to Section 5.0 and 5-3 -- or D-3 and do that

15 analysis?

16 A I think it might be helpful to refer to the

17 Attachment C-1 that's referenced in 1.3. Is that

18 contained in this copy of the --

19 Q That -- well, that -- I think that's CX-53.

20 A Well, I'm looking at this exhibit, 86,

21 right?

22 (Someone sneezes.)

23 THE WITNESS: Bless you.

24 BY MR. McNEIL:

25 Q Oh, you mean the other flow chart.

1 A Yeah, the Attachment C-3. Actually, there's

2 an attachment C-1 that's referenced here in 1.3 that

3 helps provide an overview of the applicability

4 evaluation. Is that included here in the exhibit?

5 MR. HELMLINGER: Is that page 4 on RX-86?

6 THE WITNESS: Okay. Yes, I see that. Okay.

7 So we have Attachment C-1 that's referred to in this

8 -- in paragraph 1.3, okay, and I think this helps to

9 inform the discussion.

10 MR. McNEIL: Okay.

11 THE WITNESS: So I know in my version, in my

12 copy here, it's a little hard to read, but it starts

13 out by saying, "Does the facility transfer over water

14 and have aggregate volume of 42,000 gallons or

15 greater?" And if the answer is yes, then you would

16 need to submit a response plan.

17 MR. HELMLINGER: If this is hard to read, I

18 have a clear copy --

19 JUDGE BIRO: That's all right.

20 UNIDENTIFIED SPEAKER: We have an exhibit

21 too.

22 JUDGE BIRO: I'm familiar with it. It's

23 okay.

24 THE WITNESS: Okay. So just following the

25 logic here, and then once -- if the facility stores

1 more than a million gallons, then you -- and if the

2 answer is yes to that -- a million gallons or more,

3 then if the answer is yes, then following the flow

4 chart, you would talk about does the facility lack

5 secondary containment. Then if the answer is yes,

6 then you would need to submit the response plan. If

7 no, then you would continue down and do the evaluation

8 of whether a -- could cause injury to fish and

9 wildlife and sensitive environments, and you would

10 need -- obviously need to the planning distance to

11 inform that evaluation. And so if the answer is yes

12 to that, then you would need to submit a response

13 plan. So following along the logic, if you met the

14 first criteria, then yes, the response plan would be

15 needed.

16 BY MR. McNEIL:

17 Q Sure, and I appreciate that, and all I'm

18 asking you is -- we've talked a couple times about the

19 half mile demarcation, and my question is really is:

20 there anything that you're aware of in the regulations

21 that says -- putting apart the situation where the

22 facility is in the wetlands, because it talks about

23 that. So putting that aside, that if you're within a

24 half mile of a navigable water, then in and of itself

25 that fact alone requires you to do an FRP? Can you --

1 is there any -- or do you have to do other -- take

2 other steps first?

3 A Well, it's part of the evaluation of -- for

4 the owner or operator to determine whether they are

5 FRP-subject, thus requiring the submission of a

6 response plan. It's not in itself the only criteria,

7 and that's why I refer you to the flow chart and kind

8 of looking at also Attachment C-2. In order to answer

9 the questions in Attachment C-2, then that's where

10 that half mile demarcation would play a role in

11 determining, you know, whether the facility must

12 calculate the planning distance D-3 or, if greater

13 than a half mile, also consider oil transport overland

14 considerations as well, in that overall evaluation.

15 Q Okay. Oh, so is it your testimony that 5.0

16 is not available in a situation where you're within a

17 half mile? If so, can you show me where that is?

18 A What -- I don't understand.

19 Q 5.0, the overland transport.

20 A Okay. Could you repeat your question? I'm

21 at the section now.

22 Q Sure. My understanding from your testimony

23 earlier was that certain facilities might do both a

24 5.0 overland transport analysis and a D-3 planning

25 distance calculation, which I understood. What I'm

1 asking now is, are you saying that you're not eligible  
2 to do a 5.0 overland transport if you're within a half  
3 a mile, or can you still do that as part of your  
4 analysis? That's the question.

5 A Yeah. I think it would be helpful to look  
6 at the language of Section 5.0. In 5.1, it says,  
7 "Facility owner or operators must evaluate the  
8 potential for oil to be transported overland to  
9 navigable waters of the United States. The owner or  
10 operator must evaluate the likelihood that portions of  
11 a worst-case discharge will reach navigable waters via  
12 open channel flow or from sheet flow across land or  
13 would be prevented from reaching navigable waters and  
14 be trapped in natural or man-made depressions,  
15 excluding secondary containment structures." So  
16 that's sort of the guiding language at front -- at the  
17 beginning of the section.

18 And then it talks -- speaks to, "As oil  
19 discharge -- as discharged oil travels over land, it  
20 may enter a storm drain or open channel intended to  
21 drain into navigable waters. It may -- it is assumed  
22 that once oil reaches an inlet, it will flow into the  
23 receiving water during a storm event, which is needed  
24 to be considered in the over -- in the evaluation as  
25 well. It is highly probable that the oil will either

1 flow into drainage structures or will follow the  
2 natural contours of land and flow into navigable  
3 water. Expected minimum and maximum velocities are  
4 provided as an example of open concrete channel and  
5 pipe flow. These ranges listed below reflect the  
6 minimum and maximum velocities." And then it goes on  
7 to talk about those.

8 And then it says, in 5.5 of this section, "A  
9 facility owner or operator whose nearest opportunity  
10 for discharge is located within a half mile of a  
11 navigable water must complete the planning distance  
12 calculation D-3 for the type of navigable water near  
13 the facility, or use a comparable formula."

14 Q Sure. And again, my question is simply, is  
15 there anything in Section 5 that precludes you from  
16 doing both the planning distance and the overland  
17 transport analyses as part of the ultimate  
18 applicability of the FRP question?

19 A So it goes on to say that, "A facility  
20 that's located greater than a half mile from a  
21 navigable water must also calculate the planning  
22 distance if it is in close proximity, D-1 is less than  
23 one half-mile, and other factors that are conducive to  
24 oil travel overland to storm drains that flow to  
25 navigable waters." And you can -- you can consider

1 oil transport overland to -- as consideration, you  
2 consider topography, drainage patterns, man-made  
3 barriers and soil distribution, and so forth.

4 So essentially, the demarcation is an  
5 important distinction in the regulation between 5.5  
6 and 5.6. But 5.5 says if your facility and your  
7 nearest opportunity for discharge is within a half  
8 mile of a navigable water, you must complete the  
9 planning distance D-3 for the type of navigable water  
10 near the facility. So that's -- I'm just speaking  
11 from the actual regulatory language.

12 Q Sure, and again, my question is just simply  
13 is there anything that you're aware of in 5.0 that  
14 prevents an owner from doing both an overland  
15 transport and a planning distance as part of their FRP  
16 analysis?

17 A I would figure that would fall into the  
18 guise of an alternative formula. If you were  
19 considering saying, "Okay, we think that we understand  
20 5.5, and so we're calculating the planning distance,  
21 but we're also going to use an alternative formula and  
22 that alternative formula may take the form of an oil  
23 transport overland evaluation."

24 Q Okay, and what's your basis for saying that  
25 if you do a 5.0 overland transport that that would

1 need to be a comparable formula?

2 A And there are some formulas within Section  
3 5.0 that talk about open concrete channel flow, and  
4 once it gets into a storm drain, there are default  
5 velocities and times depicted there. So if there were  
6 -- again, that's for open concrete channels and for  
7 storm drains. Even though on this Figure C-1 there  
8 isn't an open concrete channel depicted, but it is  
9 talked about here, and it is talked about in Section  
10 5.0 on overland transport. So even though the Figure  
11 C-1 does not depict an overland transport route to a  
12 navigable water, there might potentially be that  
13 route. But it's assumed that if you're within a half  
14 mile, that oil will travel to -- overland to a  
15 navigable water. That's the purpose of this language,  
16 5.5.

17 Q That's how you interpret 5.5.

18 A Yes. There's language earlier in the --  
19 that speaks to that.

20 Q And would -- sorry, where was that, the  
21 earlier language? Because there's certainly language  
22 in 1.3 that says that if you're in a wet -- if a  
23 facility's in a wetlands, then you have to do an FRP.  
24 That's in 1.3 that you read earlier.

25 A Yeah, so it talks about -- in Section 1.2,

1 it says, "EPA's formulas were designed to be simple to  
 2 use," obviously trying to apply nationally to a  
 3 variety of facilities. "However, facility owners or  
 4 operators may calculate planning distances using more  
 5 sophisticated formulas which take into account broader  
 6 scientific or engineering principles or local  
 7 conditions. Such comparable formulas may result in  
 8 different planning distances than EPA formulas. In  
 9 the event that an alternative formula that's  
 10 comparable to one contained in this appendix is used  
 11 to evaluate the criterion in 40 CFR 112.20(f)(1),"  
 12 these two criteria regarding -- "the owner or operator  
 13 shall attach documentation to the response plan cover  
 14 sheet that's contained in Appendix F to this part that  
 15 demonstrates the reliability and analytical soundness  
 16 of the alternative formula and shall notify the RA,  
 17 the Regional Administrator, in writing that an  
 18 alternative formula was used."  
 19 So there's a -- the ability for the owner or  
 20 operator to, you know, provide a -- an alternative, a  
 21 deviation, per se, in the typical process here in  
 22 Attachment C-3.  
 23 Q Sure, but --  
 24 A Similar to what you see in SPCC where you  
 25 talk -- we talk about environmental equivalents, you

1 know?  
 2 Q I understand that, and I appreciate that.  
 3 I'm just saying that's not required by -- simply by  
 4 virtue of the fact that you're within a half a mile,  
 5 correct?  
 6 A Could you restate the question?  
 7 Q The comparable formula -- it's not required  
 8 simply by virtue of the fact that you're within a half  
 9 mile.  
 10 A So, if you're within the half mile, the  
 11 language in the rule says you have to calculate the  
 12 planning distance, assuming that --  
 13 Q Yes.  
 14 A Yes, that's correct.  
 15 Q Okay, thank you.  
 16 JUDGE BIRO: Any more questions?  
 17 MR. McNEIL: No, Your Honor.  
 18 JUDGE BIRO: Okay, thank you.  
 19 Do you have any questions you want to ask?  
 20 MR. HELMLINGER: For Mr. Swackhammer, no.  
 21 JUDGE BIRO: Okay. All right.  
 22 Thank you, Mr. Swackhammer. You may step  
 23 down.  
 24 Are we going to release this witness?  
 25 MR. HELMLINGER: You know, I think that his

1 expertise and experience with these regulations may be  
 2 useful to have him hang around if the Court has  
 3 further questions as things come up.  
 4 JUDGE BIRO: Okay.  
 5 You're not released. Please remain.  
 6 It's 11:41. Could we break for lunch? How  
 7 long do you think you'll need for lunch? There's a  
 8 cafeteria in this building. Could we take a half  
 9 hour? Is that -- Mr. McNeil, can we really take a  
 10 half hour? Could we come back by 12:15-ish?  
 11 MR. McNEIL: Yes, Your Honor.  
 12 JUDGE BIRO: Okay. All right. We'll stand  
 13 in recess till 12:15.  
 14 MR. HELMLINGER: Thank you, Your Honor.  
 15 (Whereupon, at 11:42 a.m., the hearing in  
 16 the above-entitled matter adjourned, to reconvene at  
 17 12:16 p.m. the same day, May 16, 2019.)  
 18 //  
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 25 //

1 AFTERNOON SESSION  
 2 (12:16 p.m.)  
 3 JUDGE BIRO: Mr. Helmlinger, will you call  
 4 your next witness?  
 5 MS. SUGERMAN: Yes, Janice Witul, please.  
 6 MR. HELMLINGER: There's a pitcher of water  
 7 up there, right?  
 8 UNIDENTIFIED SPEAKER: Oh, yeah.  
 9 JUDGE BIRO: Yes.  
 10 MR. HELMLINGER: She's having some allergy  
 11 dry throat issues.  
 12 MS. SUGERMAN: And I'm having non-allergy  
 13 dry throat issues.  
 14 THE COURT REPORTER: Please raise your right  
 15 hand.  
 16 Whereupon,  
 17 JANICE WITUL  
 18 having first been duly sworn, was called as  
 19 a witness and was examined and testified as follows:  
 20 THE COURT REPORTER: Thank you. Please have  
 21 a seat. For the record, would you please state and  
 22 spell your first and last name?  
 23 THE WITNESS: Janice, J-A-N-I-C-E, Witul,  
 24 W-I-T-U-L, Whiskey, India, Tango, Uniform, Lima.  
 25 THE COURT REPORTER: Thank you.

1 MS. SUGERMAN: Thank you, Janice.  
 2 DIRECT EXAMINATION  
 3 BY MS. SUGERMAN:  
 4 Q Will you tell us, who do you work for?  
 5 A I work for U.S. EPA Region 9 in San  
 6 Francisco.  
 7 Q And how long have you been with EPA?  
 8 A I've been in EPA since 2003.  
 9 Q And what is your current position with EPA?  
 10 A I'm the oil -- an inspector with the oil  
 11 program in the enforcement division.  
 12 Q Okay. Will you please turn to CX-50? CX-50  
 13 in the binders?  
 14 A Five zero?  
 15 Q Five zero, yeah.  
 16 A Thank you. Okay.  
 17 Q Will you take a moment and describe this  
 18 document?  
 19 A This is my CV.  
 20 Q It's your r,sum,. Is it a true and correct  
 21 copy of your r,sum,?  
 22 A Yes, it appears to be.  
 23 Q Okay.  
 24 MS. SUGERMAN: I would like to enter into  
 25 evidence CX-50.

1 JUDGE BIRO: Is there any objection?  
 2 MR. McNEIL: No objection, Your Honor.  
 3 JUDGE BIRO: CX-50 is admitted into the  
 4 record.  
 5 (The document referred to,  
 6 previously identified as  
 7 Complainant's Exhibit No. 50,  
 8 was received in evidence.)  
 9 BY MS. SUGERMAN:  
 10 Q Where did you work before you worked at EPA?  
 11 A I was employed at SAIC, Science Applications  
 12 International Corporation --  
 13 Q And who was your main --  
 14 A -- in Middletown (phonetic).  
 15 Q In Middletown. And who was your main client  
 16 at SAIC?  
 17 A My main client there was EPA.  
 18 Q What was -- what were the main -- what's the  
 19 work -- main work you did for U.S. EPA?  
 20 A Mainly, I did inspections and some  
 21 enforcement work pertaining to Sections 302 through  
 22 312 of the Emergency Planning and Community Right-to-  
 23 Know Act; Section 103 of the CERCLA, the Comprehensive  
 24 Environmental Response, Compensation, and Liability  
 25 Act; and the Clean Air Act 112, our risk management

1 program.  
 2 Q Did you have any sort of training in order  
 3 to perform inspection for those programs?  
 4 A Yes, there was general training for  
 5 inspections and then specific program-related  
 6 training.  
 7 Q And how -- moving on to your time with EPA,  
 8 have you always been an oil program inspector in the  
 9 enforcement division at EPA?  
 10 A No, I started at EPA inspecting in the same  
 11 programs I had been with SAIC in the Superfund  
 12 Division.  
 13 Q Did you work in -- were you conducting  
 14 inspections as well while that was your job?  
 15 A Yes.  
 16 Q Okay. And do you remember sort of how long,  
 17 what the range of time was, that you were in that  
 18 program?  
 19 A I was there from February 2003 until October  
 20 2009.  
 21 Q And then what did you switch to in 2009?  
 22 A In 2009, I went to a different section of  
 23 the Superfund Division and worked as a civil  
 24 investigator and oil program inspector.  
 25 Q And how long did you hold that role?

1 A From 2000 -- I think it was October 2008 to  
 2 February 2013.  
 3 Q And then in 2013, where did you move to?  
 4 A The oil program inspectors were put into the  
 5 enforcement division, so I was no longer a civil  
 6 investigator. I concentrated on inspections and  
 7 enforcement for the oil program, the oil pollution  
 8 prevention regulations at 40 CFR 112.  
 9 Q Okay. So how would you describe your  
 10 current position?  
 11 A I am employed in the enforcement division.  
 12 I do a bit of compliance outreach, but mostly  
 13 inspections and enforcement cases, if necessary, of  
 14 facilities that are regulated under SPCC or FRP  
 15 regulations.  
 16 Q How does one become an inspector?  
 17 A At EPA, one becomes an inspector -- there's  
 18 some experience required, but there's quite a lot of  
 19 training, and there's an EPA order, 3500.1, that sets  
 20 out requirements for -- by program, what they -- what  
 21 the requirements are to obtain and maintain a  
 22 credential as an EPA inspector.  
 23 Q What does that mean to have a credential?  
 24 A It means you're federally credentialed to  
 25 perform inspections for a certain program. Do you

1 want me to --

2 Q That's fine for now. Are you a credentialed

3 federal inspector?

4 A Yes, I am.

5 Q And how long have you been a credentialed

6 federal inspector?

7 A I've been credentialed at EPA since I

8 started at EPA in 2003. I held a credential as a

9 consultant for EPA before that. For the oil program,

10 I finished my training for the oil program in 2009.

11 Q Can you recall what general courses you took

12 to become a credentialed inspector?

13 A There's a basic inspector course. I've also

14 had an advanced inspector course. For the oil

15 program, I had a 40-hour course. There are

16 requirements for regulatory self-study of the

17 regulations, of the Federal Register notices that

18 apply to the oil program regulations, study of the

19 SPCC inspector guidance, keeping updated with the

20 regulations, and then ongoing requirements for

21 training every year. We have four-hour refreshers

22 given several times a year for the oil program, and

23 then modules of the basic inspector training are also

24 required.

25 Q As part of these courses, did you cover

1 industry standards regarding oil tanks?

2 A Yes. I was familiar with industry standards

3 in my previous work, but the 40-hour training goes

4 over the most common industry standards, especially

5 API 653 and STI SP001, both the standards themselves

6 and reviewing reports that are based on those

7 standards.

8 Q You mentioned the SPCC inspector guidance.

9 Just to confirm, will you look at CX-34? This has

10 already been entered into evidence, but just to

11 confirm this is the same document you were referring

12 to. It's very easy to find. This is the 921-page

13 document that takes up most of the binder.

14 A That seems to be it.

15 Q That seems to be it, okay. So that CX-34 is

16 the same SPCC inspector guidance.

17 A Yes.

18 Q Will you please turn to RX-87? So in the

19 black binders now.

20 A The Facility Response Plan and guide?

21 MS. SUGERMAN: And I believe this also has

22 already been entered into evidence, RX-87? Andrew

23 admitted that.

24 JUDGE BIRO: Yes.

25 MS. SUGERMAN: Okay.

1 BY MS. SUGERMAN:

2 Q So just to confirm, this is the FRP

3 guidance. Is this something you use, you refer to, in

4 your practice?

5 A Occasionally, when facilities need

6 assistance with the Facility Response Plan

7 regulations.

8 Q Okay. Did you have to take any tests to get

9 your credential?

10 A The basic inspector training is online.

11 There are tests in there. And there is a test also

12 associated with the 40-hour course. There's also on-

13 the-job training which is working with a lead

14 inspector, and depending on whether or not you're

15 adjudged competent in there, I guess that could be

16 considered a test.

17 Q Okay. And you say working with a lead

18 inspector. Is that -- are you performing inspections

19 or you're following along on inspections?

20 A There's a minimum of three inspections where

21 you work with the inspector, kind of tagging along and

22 shadowing them, and then leading at least one

23 inspection and writing at least one report on your own

24 under their guidance.

25 Q And I think you mentioned this when you were

1 discussing your training, but is there something you

2 need to do to maintain your credentials?

3 A Yes. There's, of course, staying current

4 with the regulations and any developments pertaining

5 to the oil program. Also, taking at least one of the

6 four-hour refresher courses that are given by EPA

7 headquarters oil program. And then taking at least

8 one module of basic inspector training per year.

9 Also, in my job, maintaining the HAZWOPER, Hazardous

10 Waste Emergency Response certificate, by taking an

11 eight-hour refresher on that.

12 Q Okay. And you mentioned a four-hour

13 refresher training. Is that also annual?

14 A Yes, taking at least one of those four-hour

15 courses.

16 Q Okay. Since becoming an oil pollution

17 prevention inspector in 2009, could you estimate how

18 many SPCC inspections you've conducted?

19 A It's over 250.

20 Q And could you estimate how many FRP

21 inspections you've conducted?

22 A I think about 40 at this point.

23 Q In addition to performing inspections at FRP

24 facilities, do you participate in any response

25 exercises with the FRP facilities?



1 A I do participate sometimes on behalf of the  
2 EPA in a Government-initiated unannounced exercise  
3 that the Coast Guard might lead. It could be led by  
4 an EPA on-scene coordinator. I also participate in  
5 facility-led exercises, either tabletop exercises of  
6 their Facility Response Plan, where they literally sit  
7 at a table and go through what a response would be, or  
8 a facility-initiated drill where they invite agencies  
9 to participate, and that's like the -- somewhat like  
10 the Government-initiated unannounced exercise in that  
11 they're actually performing actions, making calls to  
12 NRC and the state stating that it's a drill, and then  
13 deploying their equipment.

14 Q Okay. The facility-led exercise drills, is  
15 that a requirement for FRP facilities?

16 A It's under the PREP guidelines, so yes, it  
17 is a requirement.

18 Q I know we did the PREP acronym earlier, but  
19 do you remember what the PREP stands for?

20 A That's the National --

21 Q No, all right.

22 A -- no, I -- Preparedness --

23 Q Response. And --

24 A -- Response Exercise Program, perhaps.

25 Q We can correct the record later if that does

1 not match the first one. And then do you have an  
2 estimate about how many requests a year the region  
3 gets to participate in those facility-led exercises?

4 A We probably get a dozen or more a year.  
5 Depending on the availability and our schedule, we're  
6 not able to participate. There are basically two  
7 inspectors at EPA at present who are qualified to  
8 participate in those, myself and a colleague.

9 Q So do you personally participate in any of  
10 those exercises?

11 A Yes.

12 Q Could you estimate how many per year you --  
13 or, you know, is there a way to estimate how many  
14 you've done?

15 A I try to get as many as I can, based on my  
16 availability. It's usually only about three a year,  
17 though.

18 Q Okay. You also mentioned Government-  
19 initiated unannounced exercises, which for the record  
20 I'll mention you also sometimes call GIUEs, I believe.  
21 Can you describe what that is for me?

22 A That's an exercise, as it implies,  
23 unannounced, where a federal on-scene coordinator,  
24 either EPA or Coast Guard, generally, will show up at  
25 a facility and tell the facility that they are having

1 a drill, give them the opportunity to -- well, they'll  
2 tell them what the scenario is, based on your Facility  
3 Response Plan -- it's one of the scenarios in there,  
4 non-worst-case, generally -- and then require the  
5 facility to go through the motions, as I said, calling  
6 the National Response Center and, depending on where  
7 they're located, the state or local agencies that  
8 would have to respond, filling out all the necessary  
9 incident command system forms, interacting with other  
10 agencies.

11 Often with the -- with those Government-  
12 initiated unannounced exercises, local and state  
13 agencies are invited to participate. And with the  
14 GIUEs, often we -- requirement is to actually engage  
15 their Oil Spill Response Organization. This is a --  
16 the OSRO is a contracted company that helps with  
17 response, everything from -- might help them filling  
18 out forms, but certainly helps them with equipment and  
19 response work.

20 And they're actually kind of graded on this.  
21 So if they don't perform all these actions  
22 satisfactorily, get -- if there's boom involved, they  
23 have to get out a certain amount of boom within a  
24 certain amount of time. They can fail and they can --  
25 and it can affect their standing with their Facility

1 Response Plan.

2 Q Could you summarize for me why it's  
3 important to -- that facilities go through these  
4 facility-led exercises and the GIUEs?

5 A If a facility isn't -- well, for one, they  
6 have to be trained in it, but if they're not familiar  
7 with how to operate in the case of a discharge and how  
8 to work with other responding agencies in the case of  
9 a discharge, whatever damage might happen with the oil  
10 discharge could be a lot greater because it would be  
11 -- it could get out of hand.

12 Q Do you -- as part of your job, do you see  
13 records regarding oil reports generally in the region?

14 A Yes. I -- daily, I look at the oil spill  
15 reports that come in to the reporting center at EPA  
16 through the National Response Center, and also for --  
17 from the California Office of Emergency Services.

18 Q Would there be --

19 A And those are just pertaining to the oil  
20 spills rather than the chemical releases.

21 Q Would you be able to estimate for me  
22 generally how many spill reports you think you've seen  
23 over the course of your time doing this job?

24 A At an average of 10 a day, for the amount of  
25 time I've been doing it, over 30,000.

1 Q Do you -- as part of your training, do you  
2 stay up with national issues and updates on the oil  
3 pollution prevention program?

4 A Yes, there's -- there are emails that come,  
5 but also there are a couple of different venues for  
6 staying up to date. We have a national call with EPA  
7 headquarters monthly, and then -- and that's the  
8 Office of Land and Emergency Management with -- Troy  
9 Swackhammer is one of those people. And then the --  
10 part of the Office of Enforcement and Compliance  
11 Assistance has an oil program call monthly.

12 Q Are there -- in addition to these internal  
13 EPA communications, do you attend conferences or  
14 meetings both -- either within EPA or with industry  
15 outside EPA?

16 A Yes. For the past several years, I've been  
17 attending and presenting training tracks at the  
18 California training workshop that's held for the  
19 Certified Unified Program managers in California,  
20 those agencies, and there's one specific track for oil  
21 regulations at the federal and state level. I also  
22 attend trainings for -- or conferences where trainings  
23 are given for oil spills, and also tank conferences  
24 and -- with trainings.

25 Q Do you, at the -- you said the Certified

1 Unified Program agencies. I'm going to use the  
2 acronym CUPA. Have you also been a presenter at CUPA  
3 workshops?

4 A Yes, I present. It's a week-long training  
5 or four-day training. I usually present at least four  
6 or five, six trainings there.

7 Q Are there any specific trainings that are --  
8 you more commonly present related to SPCC, the SPCC  
9 program?

10 A There's -- there are tracks that -- in the  
11 oil program that have to do with state regulations and  
12 federal regulations, so I would concentrate more on  
13 the federal, obviously, and one in particular that  
14 talks about the difference between the federal and  
15 state, and also I would give a federal update of  
16 various changes in the regulation or expected changes  
17 in the regulation.

18 Q You previously -- excuse me. You previously  
19 stated as part of your training to receive federal  
20 credentials that you learned about tank standards. I  
21 think you specifically said API 653 and STI SP001, is  
22 that right?

23 A That's correct.

24 Q Could you explain your understanding of the  
25 relationship between the oil pollution prevention

1 regulations and these industry standards?

2 A The oil pollution prevention regulations at  
3 40 CFR 112 require that inspections and testing be  
4 performed with consideration of industry standards.  
5 And those two that you mentioned are the most common  
6 industry standards for the inspections and testing of  
7 aboveground storage tanks.

8 Q Will you please turn to RX-50? That's in  
9 the black binders.

10 A Five zero?

11 Q Five oh. Can you just -- excuse me. Can  
12 you describe this document for me?

13 A This is a -- I guess I'd call it a fact  
14 sheet that was prepared by EPA concerning the  
15 inspections for bulk containers -- bulk storage  
16 containers.

17 Q Have you used this document?

18 A I have. I've also referred members of the  
19 regulated community to this.

20 Q Does this appear to be a true and accurate  
21 copy of this document?

22 A Yes, it does.

23 MS. SUGERMAN: I would like to move into  
24 evidence RX-50.

25 MR. McNEIL: No objection.

1 JUDGE BIRO: Okay. Respondent's Exhibit 50  
2 is admitted into the record.

3 (The document referred to,  
4 previously identified as  
5 Respondent's Exhibit No. 50,  
6 was received in evidence.)

7 BY MS. SUGERMAN:

8 Q What -- what's the purpose of tank integrity  
9 testing?

10 A Tank integrity testing, either the formal or  
11 the -- that is performed by certified inspectors, and  
12 the periodic inspections that are performed by  
13 facility personnel are important to judge the  
14 condition of tanks and also their fitness for  
15 continued service so that the tank won't fail and  
16 cause a discharge.

17 Q How would a facility know which type of  
18 integrity testing is appropriate for particular tanks  
19 at their facility?

20 A If the -- if a facility doesn't have  
21 information on a specific tank based on the  
22 manufacturer or on records at the facility from the --  
23 from when the tank was put into service, they would  
24 probably rely on the information in an SPCC plan that  
25 was determined by a professional engineer.

1 Q As part of your inspection generally, your  
2 investigations when you look at facilities, would you  
3 review tank reports that document the required tank  
4 testing?

5 A Yes.

6 Q And which standards are generally used in  
7 those reports?

8 A Generally, those are API 653, American  
9 Petroleum Institute 653; and the Steel Tank  
10 Institute's STI SP001.

11 Q Have you taken any training specific to  
12 those API standards?

13 A I have taken training that's been given at  
14 conferences and workshops. I'm -- I've also taken the  
15 Steel Tank Institute's SP001 training for inspections.

16 Q We've been sort of offhandedly talking about  
17 these industry standards. Who publishes the industry  
18 standards?

19 A The industry standards are published by the  
20 institutes, the American Petroleum Institute and the  
21 Steel Tank Institute.

22 Q Okay. And just -- I don't know that we need  
23 to flip to them, but these have already been entered  
24 into evidence. The CX-25 was API 653, and CX-26 was  
25 ST SP001.

1 MS. SUGERMAN: I would like to propose  
2 Janice as an expert for -- regarding EPA, SPCC and FRP  
3 inspections, and compliance, and in her knowledge of  
4 ASTs as it relates to SPCC requirements.

5 JUDGE BIRO: SPCC inspections and  
6 compliance, and then --

7 UNIDENTIFIED SPEAKER: Can you speak louder,  
8 Judge?

9 JUDGE BIRO: Sure, sorry. As an expert in  
10 SPCC inspections and compliance, and AST --

11 MS. SUGERMAN: I'm sorry, aboveground  
12 storage tanks as that relates to SPCC inspections.  
13 And as to the first part, it was SPCC and FRP  
14 inspections and compliance.

15 JUDGE BIRO: Is there any objection?

16 MR. McNEIL: Your Honor, respondent  
17 respectfully objects. We don't believe these are  
18 areas of expert testimony. She's an inspector.  
19 That's her job. She certainly can testify. We have  
20 no objection to her testifying about her job  
21 description or job duties or job performance. But we  
22 don't view that as anything that requires or warrants  
23 an expert designation.

24 JUDGE BIRO: Okay. It's overruled. I think  
25 that she certainly knows more than the average layman,

1 and more than me, by the basis of her training,  
2 education, and experience on inspections and  
3 compliance with SPCC and FRP requirements, and  
4 aboveground storage tanks, so I'll qualify her as an  
5 expert.

6 MS. SUGERMAN: Thank you.

7 BY MS. SUGERMAN:

8 Q I would like to discuss your general  
9 inspection format. So when you prepare for an  
10 inspection at a particular facility, do you typically  
11 contact the facility in advance?

12 A Yes.

13 Q And what do you -- do you have standard  
14 information that you ask of them up front?

15 A Yes, I send an email requesting -- once an  
16 inspection time and place and date is ironed out, I  
17 send a request by email asking them to have the  
18 relevant plans, SPCC and/or FRP plans, and then to  
19 have implementing information available, implementing  
20 records available for me to review. Those would be  
21 training records and tank inspection and testing  
22 reports.

23 Q And then aside from what you're asking the  
24 facility to prepare, do you -- prepare in advance, do  
25 you consult any other outside sources to gather

1 information?

2 A Yes, I review -- I search spill reports for  
3 any spills relevant to the facility and then look at  
4 aerial photographs or aerial images of the facility,  
5 getting an idea of the facility and the proximity to  
6 the water, and I sometimes contact local agencies  
7 regarding the facility.

8 Q Do you ever use Google Earth or something  
9 like that to gather information about a facility, look  
10 at satellite photos that way?

11 A Yes, I do.

12 Q Okay. In the course of your inspections,  
13 does one begin with an opening conference?

14 A Yes. When I arrive at the facility, there's  
15 an opening conference where I review the procedure for  
16 the day and present credentials.

17 Q And then what do you typically do after the  
18 opening conference?

19 A Some of their -- depending on the facility  
20 itself and their needs, it may go to a site walk  
21 immediately. Generally, I prefer to review the plan  
22 and the records a bit and look at the facility, take  
23 photographs and notes, and interview facility  
24 personnel, and then perhaps review the documents a  
25 little further, and then end with a out-briefing, and

1 we now use the -- or forms to document the inspection,  
2 a notice of inspection and any deficiencies that we ve  
3 noted.

4 Q You mentioned that one of the things you  
5 review is the plan. Is that the Spill Prevention,  
6 Control, and Countermeasures plan?

7 A Spill Prevention, Control, and  
8 Countermeasure plan, SPCC plan, and if it's a joint  
9 inspection at a facility that has a Facility Response  
10 Plan, then we'd be looking at the FRP also.

11 Q Great. So if you could turn to CX-1, which  
12 -- I believe that image is the same as CX-1 -- it's  
13 black on -- and I just don't recall if this has  
14 already been entered into evidence, but are you  
15 familiar with this image?

16 A Yes.

17 Q And what does this show?

18 A It's a fairly recent image of the VSS  
19 facility in West Sacramento.

20 Q Did you obtain this photo?

21 A I believe I did, from --

22 Q Do you --

23 A -- Google Earth.

24 Q Does that appear to be a true and accurate  
25 photo for the facility?

1 A It does.

2 Q Okay.

3 MS. SUGERMAN: If not already entered, my  
4 apologies, but if it has, I move to enter CX-1.

5 JUDGE BIRO: It's been admitted.

6 MS. SUGERMAN: Thank you.

7 BY MS. SUGERMAN:

8 Q How did you become familiar with the VSS  
9 facility?

10 A When I plan inspections in an area, I use  
11 the -- I start looking at the Facility Response Plan  
12 database at EPA, because those facilities are required  
13 to be inspected every so often, and then select at  
14 least one of those in the area I'm going to, and then  
15 usually reach out to local agencies to see if they  
16 have any suggestions or any facilities that they'd  
17 like help with, and invite them along on the  
18 inspection in most cases.

19 Q And in this instance, did you contact a  
20 local inspector?

21 A Yes. In this case, I had contacted Yolo  
22 County -- and I think it's Environmental Health, the  
23 Certified Unified Program Agency, and talked to  
24 Michael Sears, and he suggested one of the facilities  
25 I might want to visit is -- was VSS at the time --

1 this was in 2012 -- because they had a large tank that  
2 was not regulated by the state but would be regulated  
3 by EPA.

4 Q Okay. Can we -- can we take a minute and  
5 talk about that difference there? So you mentioned  
6 something might be regulated by the state that's not  
7 regulated by EPA. Can you tell me what that means?

8 A The state has jurisdiction under the  
9 Aboveground -- California's Aboveground Petroleum  
10 Storage Act. As the title of the statute implies,  
11 it's for petroleum products in aboveground storage.  
12 It's not tied to navigable water at all, and it also  
13 has exclusions for certain substances. One of those  
14 exclusions is thermoplastics. So, because asphaltic  
15 cement is a heated substance, it's not regulated by  
16 the state, so the local agency wouldn't have  
17 jurisdiction. The exclusion is materials, even  
18 petroleum oil materials, that are not liquid at  
19 ambient temperature are not regulated by the state.

20 Q In addition to -- so the Aboveground  
21 Petroleum Storage Act we often call APSA. In addition  
22 to APSA, does the state -- does Michael Sears also  
23 have authority to implement the federal oil pollution  
24 prevention program?

25 A APSA actually quotes the requirements under

1 40 CFR 112, but it's -- the oil pollution prevention  
2 regulations -- EPA's regulations, are not delegated.  
3 So the state has only the authority under the  
4 Aboveground Petroleum Storage Act. They don't have  
5 the authority to -- they don't have the authority to  
6 enforce any of the federal regulations other than  
7 having the SPCC plan in accordance with SPCC  
8 regulations.

9 Q So APSA requires an SPCC plan, and the  
10 federal program requires an SPCC plan. If a  
11 facility's in compliance with its APSA SPCC plan, does  
12 that necessarily mean it's also in compliance with the  
13 federal equivalent?

14 A No. They could -- as I said, they could  
15 have heated oils that aren't regulated under the APSA,  
16 Aboveground Petroleum Storage Act. They could have  
17 non-petroleum oils: animal fats; vegetable oils; nut  
18 and seed oils. So there's -- while there's  
19 overlapping, they could -- they could be in total  
20 compliance with the Aboveground Petroleum Storage Act  
21 and almost totally out of compliance with the federal  
22 regulations.

23 Q So if this facility had a compliant SPCC  
24 plan under APSA, then -- or is it true that this  
25 facility could have a compliant SPCC under APSA but

1 that SPCC plan would not even address the four-  
 2 million-gallon-plus tanks of asphalt cement here?  
 3 A That's correct.  
 4 Q Okay. Then you -- we talked about that  
 5 Michael Sears doesn't have authority under the federal  
 6 program. Does he have any sort of federal inspection  
 7 credentials for the EPA oil program?  
 8 A No.  
 9 Q Okay. When did you first inspect the VSS  
 10 facility?  
 11 A In November of 2012.  
 12 Q And we went over your typical process for  
 13 inspections. Did you follow your typical process when  
 14 you prepared for this inspection?  
 15 A Yes.  
 16 Q Okay. Can you -- I'd like you to walk me  
 17 through the day of the inspection. Do you know what  
 18 time it began?  
 19 A It was about 1 o'clock, 1 p.m.  
 20 Q And did you do an opening conference?  
 21 A Yes.  
 22 Q Do you recall if VSS provided you with the  
 23 documents you had requested?  
 24 A I believe they provided me with the SPCC  
 25 plan.

1 Q Are there other documents you normally  
 2 request?  
 3 A The training information. I'm not sure if  
 4 they had that. As far as inspections and tests,  
 5 there s seemed to have been a problem with the records  
 6 being missing.  
 7 Q Did they -- I think you just said you  
 8 reviewed the SPCC plan. Did they provide you with an  
 9 SPCC plan for this purpose, to review for this  
 10 inspection?  
 11 A Yes.  
 12 Q Will you please turn to CX-16, starting at  
 13 page 3?  
 14 A Okay.  
 15 Q Do you recognize this document?  
 16 A This is an SPCC plan that was prepared for  
 17 VSS by Condor.  
 18 Q Does this appear to be the plan that you  
 19 reviewed at that 2012 inspection?  
 20 A Yes, it does.  
 21 MS. SUGERMAN: I would like to move into  
 22 evidence CX-16.  
 23 MR. McNEIL: No objection, Your Honor.  
 24 JUDGE BIRO: Complainant's Exhibit 16 is  
 25 admitted into the record.

1 (The document referred to,  
 2 previously identified as  
 3 Complainant's Exhibit No. 16,  
 4 was received in evidence.)  
 5 BY MS. SUGERMAN:  
 6 Q After you reviewed the SPCC plan, did you  
 7 conduct a walk-through of the site?  
 8 A Yes.  
 9 Q And did you record your observations?  
 10 A Yes.  
 11 Q Will you please turn to CX-5? Do you  
 12 recognize this document?  
 13 A These are photos -- a photo log of the  
 14 images I took at the inspection.  
 15 Q And just to confirm what you just said, you  
 16 took these photographs yourself?  
 17 A Yes, I did.  
 18 Q Did you also prepare this log after the  
 19 inspection?  
 20 A Yes.  
 21 Q Do you -- did you edit the photos at all as  
 22 part of preparing the log?  
 23 A Oh, no. There's -- we've got a -- EPA has a  
 24 digital camera policy that requires that any  
 25 manipulation of photos be documented, and I didn't, so

1 there's no documentation to that effect.  
 2 Q Okay. Does CX-5 appear to be a true and  
 3 accurate copy of your photo log?  
 4 A It does.  
 5 MS. SUGERMAN: I would like to move into  
 6 evidence CX-5.  
 7 MR. McNEIL: No objection.  
 8 JUDGE BIRO: Complainant's Exhibit 5 is  
 9 admitted into the record.  
 10 (The document referred to,  
 11 previously identified as  
 12 Complainant's Exhibit No. 5,  
 13 was received in evidence.)  
 14 BY MS. SUGERMAN:  
 15 Q During your 2012 inspection, did you observe  
 16 two 2.4-million-gallon tanks?  
 17 A Yes.  
 18 Q And is there anything in these photos that  
 19 represent what you saw?  
 20 A Photo 1 shows the two large tanks, yes.  
 21 Q What was your understanding during the  
 22 inspection as to whether these tanks were in service?  
 23 A It was my understanding that the uninsulated  
 24 tank was not complete and not in service, and the  
 25 insulated tank, which in this picture is the tank in

1 the -- to the right, in the background more, was in  
2 operation, in service.

3 Q And why did you believe at the time of that  
4 inspection that Tank 2001 was in service?

5 A Judging from the appearance, it was  
6 insulated, and there was piping there, but I mostly  
7 relied on the evidence of the facility personnel, who  
8 said it had been in service for several months.

9 Q Was there anything associated -- anything  
10 else associated with the tank that was new and related  
11 to the tank? Like did you observe rail lines or rail  
12 guards?

13 A There is no a photograph that clearly shows  
14 it, but there were rail lines -- railroad tracks and  
15 -- let me see if the -- also, the lines running from  
16 the tracks to the -- or from the -- from that area to  
17 the area of the tanks.

18 Q When you say lines, is that piping,  
19 essentially?

20 A Piping.

21 Q Do you need a minute?

22 JUDGE BIRO: Yeah.

23 MS. SUGERMAN: Have a drink --

24 JUDGE BIRO: Ms. Witul, do you want to take  
25 a break?

1 THE WITNESS: I think I'm good.

2 JUDGE BIRO: Okay.

3 Andrea, can we get Ms. Witul some more  
4 water?

5 UNIDENTIFIED SPEAKER: Yeah.

6 JUDGE BIRO: Okay.

7 BY MS. SUGERMAN:

8 Q Did you observe transfer racks associated  
9 with the tank?

10 A I believe I did. I mean, I don't see a  
11 photograph of them, but I believe there were transfer  
12 racks. There are certainly transfer racks at other  
13 places at the facility.

14 Q Okay. Did you have a closing conference?

15 A Yes.

16 Q Do you recall any potential areas of  
17 noncompliance that you communicated during the closing  
18 conference?

19 A The areas that I communicated were the fact  
20 that the SPCC plan did not address testing -- or  
21 inspections and testing of any of the tanks, and the  
22 fact that the two point -- this says 2.5 -- 2.38-  
23 million-gallon tank that was in service was not  
24 included in the plan. The plan did state that at the  
25 time the plan was prepared the tanks were under

1 construction, and the tanks, the rail lines, the  
2 railcars, the transfer racks were not included in the  
3 plan, but I was doing an inspection in November. The  
4 plan was dated April, actually around the time that  
5 one of the tanks reportedly went into service, so the  
6 tank should have -- the SPCC plan should have been  
7 updated by then.

8 I also noted that if the tank -- if the  
9 large tank held asphaltic cement rather than hot mix  
10 asphalt, that a Facility Response Plan would be  
11 required for the facility.

12 Q Did you make any formal determination of  
13 violations at that inspection?

14 A No. Violations are something that are  
15 determined by enforcement and ORC management.

16 Q Do you have the authority to make a  
17 determination of violation?

18 A No. We -- I can point out areas of  
19 noncompliance and deficiencies, but not violations.

20 Q Okay. Will you please turn to CX-10?

21 A Okay.

22 Q That was fast. Can you describe this  
23 document?

24 A This is a letter that was sent to VSS from  
25 EPA. It's a fairly standard letter asking for -- an

1 information request asking for more information  
2 following up on the inspection and questions that were  
3 unanswered by reviewing the plan and at the  
4 inspection.

5 Q Did you prepare the questions that are part  
6 of this letter?

7 A I prepared facility-specific questions, yes.

8 Q And do you -- did you sign this letter?

9 A No. This letter goes out from management,  
10 actually. It was signed by the enforcement division  
11 director, or assistant director.

12 Q Did you prepare the rest of the language of  
13 the letter? You prepared some of the questions. Did  
14 you prepare the rest of the language?

15 A A lot of it is standard language for an  
16 information request and legal language.

17 Q Does this appear to be a true and accurate  
18 copy of the information request that was sent to the  
19 VSS?

20 A Yes.

21 Q Okay.

22 MS. SUGERMAN: I move to have CX-10 entered  
23 into evidence.

24 MR. McNEIL: No objection.

25 JUDGE BIRO: Complainant's Exhibit 10 is

1 admitted into the record.  
 2 (The document referred to,  
 3 previously identified as  
 4 Complainant's Exhibit No. 10,  
 5 was received in evidence.)  
 6 BY MS. SUGERMAN:  
 7 Q Do you recall if you received a response to  
 8 this information request?  
 9 A I did receive a response. It was not  
 10 exactly within the time specified. I believe there  
 11 were extensions given, but yes, we did receive a  
 12 response.  
 13 Q Will you please turn to RX-2?  
 14 A I have it.  
 15 Q Do you recognize this document?  
 16 A Yes, this appears to be the response to the  
 17 information request.  
 18 Q Do you recall if you reviewed this response  
 19 when it came in?  
 20 A Yes.  
 21 Q Does this appear to be a true and accurate  
 22 copy of the information response?  
 23 A It does.  
 24 Q Okay.  
 25 MS. SUGERMAN: I move to have RX-2 entered

1 into evidence.  
 2 MR. McNEIL: No objection.  
 3 JUDGE BIRO: RX-2 is admitted into the  
 4 record.  
 5 (The document referred to,  
 6 previously identified as  
 7 Respondent's Exhibit No. 2,  
 8 was received in evidence.)  
 9 BY MS. SUGERMAN:  
 10 Q Based on your observations during the  
 11 inspection and your review of the information request  
 12 response, did you believe the facility was subject to  
 13 the FRP requirements?  
 14 A Based on their response, I wouldn't say, but  
 15 based on my inspection and the regulatory  
 16 requirements, I believed them -- that they should have  
 17 a Facility Response Plan.  
 18 Q Just to confirm I heard that correctly, you  
 19 felt that based on your observations and the  
 20 regulations, they should -- it should apply.  
 21 A Yes, and partially based on their response  
 22 in that the tank had been in service, was in service,  
 23 had been in service, and that it contained asphaltic  
 24 cement.  
 25 Q And why did you believe the facility was

1 subject to FRP? What were the specific factors?  
 2 A Actually, in this plan, and then the plan  
 3 that I reviewed, the Condor plan, there was a  
 4 statement that there was insufficient secondary  
 5 containment, so that would be one of the requirements.  
 6 Obviously, this facility doesn't transfer over water,  
 7 but it has over a million gallons. It had inadequate  
 8 secondary containment, according to the plan, and then  
 9 was situated in an area that could cause injury to  
 10 fish, wildlife, and sensitive environment.  
 11 Q Just to confirm your perspective on the  
 12 facility, what's the closest water to the facility?  
 13 A The Sacramento River Deep Water Ship  
 14 Channel.  
 15 Q And how did you determine that the channel  
 16 was also a fish and wildlife and sensitive  
 17 environment?  
 18 A Looking at a couple of different documents.  
 19 One was the Area Contingency Plan, and then another  
 20 was a document published by NOAA that has to do with  
 21 sensitive environments.  
 22 Q Did you rely on the ACP in making your  
 23 determination, that Area Contingency Plan?  
 24 A To a large degree, yes.  
 25 Q Since you determined that the facility is

1 within 200 feet of the Sacramento River Deep Water  
 2 Shipping [sic] Channel, did you calculate a planning  
 3 distance?  
 4 A I did not. It's up to the facility to  
 5 calculate a planning distance.  
 6 Q Had the facility calculated a planning  
 7 distance?  
 8 A No.  
 9 Q So without that, and without even having  
 10 calculated one, how did you make the determination  
 11 that they were required to have an FRP?  
 12 A The fact that the water was visible from the  
 13 facility, and I also relied on the statement at -- I  
 14 believe it's Attachment C that was gone over in Mr.  
 15 Swackhammer's testimony, that if the -- if it's clear  
 16 that the -- if it's clear that fish, wildlife, and  
 17 sensitive environment could be affected, a planning  
 18 distance calculation isn't necessary.  
 19 Q Okay. Please turn to CX-4.  
 20 A Okay.  
 21 Q Okay. Can you describe this document for  
 22 me?  
 23 A I'm sorry, I was looking at R exhibits.  
 24 Q CX.  
 25 A This is a SPCC field inspection plan review

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1 checklist and serves as a report after an SPCC  
 2 inspection.

3 Q What's the date that this checklist was  
 4 completed?

5 A This was finalized in September 2013.

6 Q And did you complete this checklist?

7 A Yes.

8 Q Does this appear to be a true and accurate  
 9 copy of the -- of your inspection checklist?

10 A Yes, it does.

11 MS. SUGERMAN: I intend to move into  
 12 evidence CX-4.

13 MR. McNEIL: No objection.

14 JUDGE BIRO: Complainant's Exhibit 4 is  
 15 admitted into the record.

16 (The document referred to,  
 17 previously identified as  
 18 Complainant's Exhibit No. 4,  
 19 was received in evidence.)

20 BY MS. SUGERMAN:

21 Q Where does the template for this checklist  
 22 come from?

23 A It's found -- it -- well, there's a newer  
 24 version, so this one isn't online, but the inspector  
 25 guidance, the SPCC inspector guidance -- one of the

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1 attachments is the -- this SPCC checklist. As I said,  
 2 this one's been superseded by a newer one.

3 Q So this form or the more recent version is  
 4 used nationally during SPCC inspections?

5 A Yes.

6 Q Can you look -- starting with the main  
 7 content here, explain to me how the checklist is  
 8 organized?

9 A After the first substantial page, which  
 10 would be page 2, CX-4, page 2, after that it goes  
 11 through the regulatory citation provisions  
 12 sequentially, and then it starts out just with the  
 13 plan requirements, the plan itself, with a yes, no, or  
 14 an N/A checklist with the spaces in between to -- for  
 15 comments, and then later it goes into both the field  
 16 and plan columns. So you can -- if the plan was --  
 17 covered an area but it wasn't implemented in the  
 18 field, there -- that could be indicated. Again, it  
 19 has yes, no, or not applicable; areas for comments;  
 20 and then at the end, going through the various  
 21 citation, or the various provisions of 20 CFR 112,  
 22 there's an area for additional comments and fill in  
 23 all of the information.

24 Q So in addition to -- in addition to  
 25 completing the checkmarked boxes, did you also have --

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1 put some of the information in these comment boxes?

2 A Yes.

3 Q Did you complete this checklist during the  
 4 inspection?

5 A During the inspection, I would have had a  
 6 copy that took notes on.

7 Q If you would turn to page 5 of 26 here, can  
 8 you explain --

9 A I'm --

10 Q Oh, sorry. 5 of 17, sorry.

11 A Thank you.

12 Q Actually, it's CX 5 of 18, to make it even  
 13 more confusing. And it is the page that starts at  
 14 top, "Amendment of SPCC Plan by Regional  
 15 Administrator." Is that -- are we on the same page,  
 16 CX-4, page --

17 A Yes.

18 Q -- 5 of 18? Okay.

19 A Yes.

20 Q I see that there is text in the comment box.  
 21 Can you take a look at that text and explain that  
 22 concern to me?

23 A So the comment box at the bottom states that  
 24 regarding 40 CFR 112.5(a) that the facility had put  
 25 one 2.5-million-gallon tank and the transfer rack into

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1 service, which were not covered in the plan. Also,  
 2 that the five-year review was addressed and there had  
 3 been a 2007 plan, so that part was in compliance.

4 Q And just to clarify, this section  
 5 specifically, 112.5, what is the requirement of 112.5  
 6 at issue here?

7 A 112.5(a) requires if there's a change at the  
 8 facility that materially affects the potential for  
 9 discharge that the plan needs to be amended within six  
 10 months.

11 Q I'm moving on. If you would look at CX-4  
 12 page 8. Same thing, if you could take a look at the  
 13 comments you have in the comment box, and you have  
 14 some relating to transfer racks. Can you explain  
 15 those for me?

16 A The last comment?

17 Q Yes.

18 A (Clears throat.) Excuse me. This is under  
 19 -- pertaining to 112.7(c), that the rack for railcars  
 20 is not specifically addressed as having sized  
 21 containment.

22 Q And what does that mean? What's the concern  
 23 there?

24 A The requirement for bulk storage containers  
 25 and transfer racks is that they have sized containment



1 in order -- in other words, they have to have  
 2 containment that would be able to hold the contents of  
 3 the largest container. So in this case, it would be  
 4 -- at a rail transfer rack, it would be one railroad  
 5 car. And that wasn't addressed at the -- in the plan.  
 6 The rack actually wasn't -- and the railcars weren't  
 7 addressed at all. But if there is not sized  
 8 containment, then the contents of a railcar could be  
 9 discharged and leave the facility and go into the  
 10 navigable water.

11 Q And just to clarify, we're talking about  
 12 containment as shorthand for the secondary containment  
 13 requirement --

14 A That's correct.

15 Q Is that correct?

16 A Yes.

17 Q Okay. Can you tell me more about the  
 18 loading rack? What was this used for?

19 A There are several loading racks throughout  
 20 the facility in various areas, but this one is  
 21 specific to the railcars. And so a loading rack is --  
 22 there's -- it's described in the regulations as a  
 23 transfer area that has a mechanical -- I believe  
 24 mechanical arm or something other than a hose in order  
 25 to -- for the delivery of material, oil.

1 Q And was it your understanding that VSS built  
 2 the railcar loading specifically to use with the new  
 3 2.4-million-gallon asphalt tanks?

4 A Yes, according to the plan, and that was --  
 5 that was my understanding, and that's been indicated  
 6 in the subsequent plans.

7 Q Okay. Will you please turn to CX-52? We'll  
 8 give everyone else a second to get there.

9 A Digital images?

10 Q What's that?

11 A These are digital images.

12 Q Okay. We're just going to look at page 1  
 13 for a moment. So you describe this exhibit as digital  
 14 images. What's it an image of?

15 A This is a Google Earth image of the VSS  
 16 facility. The imagery date is 5/19/2012. It shows  
 17 the -- there has been an addition to this image. I  
 18 indicated in red a certain tank. Otherwise, I didn't  
 19 manipulate this at all. It shows the tanks at the  
 20 facility, specifically the two large ones. The one on  
 21 the left is an insulated tank that has piping. The  
 22 rail lines are shown to the left of that tank. And it  
 23 looks like nine railcars are visible there along the  
 24 tracks.

25 Q Did you obtain this photo?

1 A Yes, but --

2 Q Can you tell me how you obtained this photo?

3 A I obtained this photo within the past year  
 4 using the historical portion of Google Earth. This is  
 5 not -- I didn't take this at -- I didn't capture this  
 6 at the time of the inspection.

7 Q Is Google Earth publicly available  
 8 information?

9 A Yes, it is.

10 Q And it's -- I think you mentioned this  
 11 earlier, but looking at Google Earth images is  
 12 something you do regularly as part of your facility  
 13 investigations, generally?

14 A Yes, I use either Google Earth or  
 15 DigitalGlobe.

16 Q Okay.

17 MS. SUGERMAN: I would like to admit CX-52  
 18 into evidence.

19 MR. McNEIL: Your Honor, we object. There's  
 20 a lack of foundation. I understand that the witness  
 21 has testified that she downloaded it within the past  
 22 year, but it purports to reflect site conditions --  
 23 all we have is a legend that shows a date from May  
 24 2012. These are not conditions she observed. She's  
 25 testified that her first visit to the site was six

1 months later. You know, Wikipedia or Google Earth --  
 2 I mean, that anybody can download doesn't mean they  
 3 represent the site conditions. Lack of foundation.

4 MS. SUGERMAN: May I make one responsive  
 5 comment there?

6 JUDGE BIRO: Yes.

7 MS. SUGERMAN: There is the possibility that  
 8 given the technology in the room, we can provide a  
 9 demonstration at some point of somebody accessing  
 10 Google Earth and using the historical feature to  
 11 document how that feature works and how this shows the  
 12 2012 conditions.

13 JUDGE BIRO: But let me just clarify.

14 You didn't take this photograph.

15 THE WITNESS: That's correct.

16 JUDGE BIRO: Okay. And does this image on  
 17 this photograph reflect what you saw at the time you  
 18 conducted the inspection or another time that you were  
 19 at the VSS facility?

20 THE WITNESS: It appears to. I wasn't in a  
 21 position that I could see from above, but it does  
 22 appear like the general conditions.

23 JUDGE BIRO: Where the tanks were present?

24 THE WITNESS: That's correct.

25 JUDGE BIRO: And the pipes were present?

1 THE WITNESS: Yes.  
 2 JUDGE BIRO: How about the railroad cars?  
 3 THE WITNESS: I don't --  
 4 JUDGE BIRO: Did you --  
 5 THE WITNESS: I can't remember if there were  
 6 railroad cars on the day I was there. The racks were  
 7 there.  
 8 JUDGE BIRO: Okay.  
 9 I'm going to admit the exhibit. I think it  
 10 fairly and accurately depicts what she saw on the day,  
 11 so I'm going to overrule the objection.  
 12 (The document referred to,  
 13 previously identified as  
 14 Complainant's Exhibit No. 52,  
 15 was received in evidence.)  
 16 BY MS. SUGERMAN:  
 17 Q Is there anything in this photo that informs  
 18 your thoughts about whether Tank 2001 was in  
 19 operation?  
 20 A There are several things. The fact that  
 21 there is piping to the tank, the fact that the tank is  
 22 insulated, then most importantly the tank that there  
 23 are -- the fact that there are several railcars there.  
 24 Q Okay. Rather than necessarily going through  
 25 each page of the inspection report, I wonder if you

1 would be willing to adopt this checklist as your  
 2 testimony regarding your observations and conclusions  
 3 at the 2012 inspection.  
 4 A I would be willing to.  
 5 MR. McNEIL: We -- objection, Your Honor.  
 6 JUDGE BIRO: Yes?  
 7 MR. McNEIL: We object that she be allowed  
 8 to -- that she be permitted to adopt the wholesale a  
 9 document as her -- Your Honor, we respectfully object  
 10 that the witness be permitted to adopt an entire, I  
 11 believe, 18-page document as her testimony. We  
 12 believe if there are matters in the document that  
 13 pertain to the allegations that complainant has  
 14 alleged, those need to be elicited from the witness  
 15 while she's here.  
 16 JUDGE BIRO: And what document are we  
 17 referring to exactly, now?  
 18 MS. SUGERMAN: So -- sorry, CX-4 is the  
 19 inspection checklist that she completed. It shows her  
 20 observations and conclusions for the 2012 inspection.  
 21 JUDGE BIRO: So why do we need to adopt it,  
 22 exactly?  
 23 MS. SUGERMAN: No, and just to be clear, I  
 24 would say anything she adopts would be available for  
 25 cross exam, but the -- and I -- in place of adopting

1 it, I can walk through it page by page and have her  
 2 discuss each of her findings.  
 3 JUDGE BIRO: Mm-hmm.  
 4 MS. SUGERMAN: And we thought it would save  
 5 time just to adopt the checklist rather than doing  
 6 that.  
 7 JUDGE BIRO: And do you object to that?  
 8 MR. McNEIL: We strenuously object to that,  
 9 Your Honor. This is an 18-page document that was  
 10 created years ago, and I don't know what her testimony  
 11 is. I don't know what she saw and what she didn't  
 12 see. If she want -- if they want to actually use that  
 13 as evidence, she needs to back it up.  
 14 JUDGE BIRO: Well, I think our rules allow  
 15 for the admission of written testimony in lieu of oral  
 16 testimony if the witness adopts it at the hearing.  
 17 MR. McNEIL: Well, I guess we just don't  
 18 know what she's, you know -- they're trying to  
 19 establish liability based on a document, when they  
 20 have a live witness here. She's saying -- I mean,  
 21 it's kind of the same point as the Google Earth, you  
 22 know, which -- she wasn't even there for that.  
 23 I understand -- I respect Your Honor's  
 24 ruling, but at the same time, she's here. So if she's  
 25 going to corroborate an allegation about a violation

1 that they're seeking a penalty for, like it seems to  
 2 me if she was there and she saw it, we need that  
 3 testimony, as opposed to the wholesale adoption of an  
 4 18-page inspection report that's six, seven years --  
 5 six or seven, depending on when she -- she's saying  
 6 she took the notes in 2012, but she didn't write the  
 7 document until 2013. I mean, it's --  
 8 JUDGE BIRO: Right, I understand your  
 9 objection. Okay. I'm going to overrule your  
 10 objection. I think it's consistent with our Rule 22-  
 11 22 Section C providing for written testimony, that we  
 12 may admit into the record in lieu of oral testimony if  
 13 it's prepared by the witness, and you're -- she's  
 14 subject to cross examination on every part of it. So  
 15 we're going to admit it with her affirmation that this  
 16 is the document that she completed.  
 17 MS. SUGERMAN: As I'm not familiar with the  
 18 process, do I then need to make some sort of statement  
 19 about entering it as her testimony?  
 20 JUDGE BIRO: I think we're going to admit  
 21 the document into the record. We already did,  
 22 actually.  
 23 MS. SUGERMAN: You're right.  
 24 JUDGE BIRO: And she already testified that  
 25 this was what she completed, so no.

1 MS. SUGERMAN: Okay. Thank you.  
 2 BY MS. SUGERMAN:  
 3 Q And will you please turn to the exhibit  
 4 marked RX-6? So in the black binders.  
 5 A I have it.  
 6 Q We'll give everyone else a moment to get  
 7 there.  
 8 JUDGE BIRO: Sorry. One day we'll move to  
 9 electronic documents --  
 10 MS. SUGERMAN: Yeah.  
 11 JUDGE BIRO: -- and it won't be nearly this  
 12 bad.  
 13 MS. SUGERMAN: Maybe.  
 14 JUDGE BIRO: Okay.  
 15 MS. SUGERMAN: Okay.  
 16 BY MS. SUGERMAN:  
 17 Q So RX-6, please. Do you recognize this  
 18 document?  
 19 A Yes.  
 20 Q And can you describe this document for me?  
 21 A This is a letter to VSS from the EPA, and we  
 22 call this, informally, a show cause letter. It states  
 23 that the -- that EPA believes there were violations  
 24 after the inspection and reviewing the information  
 25 from the information request that VSS replied to. And

1 it gives the facility the opportunity to engage in  
 2 settlement discussions.  
 3 Q Did you help prepare this letter?  
 4 A Yes.  
 5 Q Did you sign this letter?  
 6 A No. It's sent by the enforcement division  
 7 manager.  
 8 Q Does this appear to be a true and accurate  
 9 copy of the letter?  
 10 A It does.  
 11 MS. SUGERMAN: I would like to move into  
 12 evidence RX-6.  
 13 JUDGE BIRO: Is there objection?  
 14 MR. McNEIL: No objection.  
 15 JUDGE BIRO: No objection. Respondent's  
 16 Exhibit 6 is admitted into the record.  
 17 (The document referred to,  
 18 previously identified as  
 19 Respondent's Exhibit No. 6,  
 20 was received in evidence.)  
 21 MR. McNEIL: Pardon me?  
 22 JUDGE BIRO: We admitted it into the record.  
 23 MR. McNEIL: Yeah, I'm sorry, Your Honor, I  
 24 apologize. I couldn't hear you.  
 25 JUDGE BIRO: We admitted Respondent's

1 Exhibit 6 into the record.  
 2 MR. McNEIL: Oh, have we? Is that your  
 3 question?  
 4 JUDGE BIRO: We did.  
 5 MR. McNEIL: Oh, yes. It's fine with us,  
 6 yes.  
 7 JUDGE BIRO: Okay.  
 8 MR. McNEIL: I'm sorry for the confusion.  
 9 BY MS. SUGERMAN:  
 10 Q What were the two violations specifically  
 11 identified in the second paragraph of that letter?  
 12 A That the facility didn't conduct integrity  
 13 testing in accordance with the industry standards as  
 14 required by 40 CFR 112.8(c)(6), and that the facility  
 15 did not have -- had not prepared and implemented a  
 16 Facility Response Plan.  
 17 Q Was this a comprehensive list of the  
 18 concerns identified during your inspection and  
 19 subsequent investigation?  
 20 A No. The letter was accompanied by the  
 21 inspection checklist, which is CX-4, and that included  
 22 additional details about the noncompliance issues.  
 23 Q After the facility received the show cause  
 24 letter, do you know if they immediately addressed the  
 25 concerns that had been identified?

1 A I know that some of them were addressed. I  
 2 believe they tried to address the testing information  
 3 or the testing concerns.  
 4 Q When you say testing, is that the tank  
 5 integrity testing?  
 6 A Yes, I'm sorry, tank integrity testing.  
 7 Q And did they challenge any of the findings  
 8 in the show cause letter?  
 9 A They did contest the FRP requirement.  
 10 Q What did you understand their argument to be  
 11 as to why they were not subject to FRP?  
 12 A Partially, it was based on the  
 13 characteristics of asphaltic cement, the fact that it  
 14 is a heated material. Also, that they had the  
 15 secondary containment and didn't believe it would hit  
 16 the water. And I believe at that point they were also  
 17 questioning whether the Sacramento River Deep Water  
 18 Ship Channel was a sensitive environment.  
 19 Q Did they submit any documentation explaining  
 20 the basis for this argument?  
 21 A Yes.  
 22 Q Can you tell me what they submitted?  
 23 A I --  
 24 Q Or I can refresh your recollection, if that  
 25 helps. I can direct you to the document that will

1 refresh your -- refresh your --  
 2 A Okay. There was -- there was a report that  
 3 was --  
 4 Q Turn to CX-15, please.  
 5 A What you repeat the number?  
 6 Q One five.  
 7 A Thank you.  
 8 Q Fifteen.  
 9 A I have that.  
 10 Q Okay. Do you recall reviewing this report?  
 11 A Yes.  
 12 Q Did you agree with the conclusions in the  
 13 report?  
 14 A No.  
 15 Q Did you tell the facility at any point that  
 16 they would not have to prepare an FRP?  
 17 A No.  
 18 Q Did you consult with anybody, headquarters  
 19 or contractors, about the applicability of the FRP to  
 20 this facility?  
 21 A Yes. After reviewing the information in the  
 22 regulation and the guidance, I also contacted the FRP  
 23 subject matter expert at headquarters, Troy  
 24 Swackhammer.  
 25 Q And did he communicate his opinion to you?

1 A Yes. His opinion was that the facility was  
 2 required to have a Facility Response Plan.  
 3 MS. SUGERMAN: Give me a moment, please.  
 4 BY MS. SUGERMAN:  
 5 Q Do you have an estimate of the quantity of  
 6 oil stored at VSS that is not heated? And I would  
 7 understand perfectly if you do not.  
 8 A Offhand, I don't.  
 9 Q Okay. But are there tanks -- of the many  
 10 tanks at the tank farms, do they all contain heated  
 11 oil?  
 12 A Yes, there are asphaltic emulsions that  
 13 might not be heated. I know there's diesel. I  
 14 believe that one of the -- at least one of the spills  
 15 was diesel. So yes, there are -- there are several  
 16 uninsulated, unheated tanks at the facility.  
 17 Q Okay. I am going to move on to the  
 18 September 2016 inspection. Can you -- let's see. Can  
 19 we turn to CX -- I'll back up, sorry. And in the fall  
 20 of 2016, did you reinspect the facility?  
 21 A Yes.  
 22 Q And did you contact the facility in advance  
 23 of the inspection?  
 24 A I did.  
 25 Q Do you recall what steps you took preparing?

1 A I did the same things, going as far as  
 2 looking at spill reports. I had a -- an SPCC report  
 3 from 2014 which I -- in making the arrangements for  
 4 the inspection, I sent that report as an attachment to  
 5 Brian Orr with VSS, and asked if that was the most  
 6 recent SPCC plan. It was a consolidated plan that  
 7 included the SPCC portion. And at that point, Brian  
 8 replied that there was a later plan. So he sent me  
 9 the January 2016 SPCC plan in advance of the  
 10 inspection.  
 11 Q Okay. Will you please turn to CX-17?  
 12 A Okay.  
 13 Q Will you take a minute to look at that and  
 14 let me know if you think this is a copy of the 2014  
 15 plan you just referenced?  
 16 A It appears to be.  
 17 Q Okay. When you receive files from a  
 18 facility, do you have a standard practice for how you  
 19 maintain those records in your files?  
 20 A I maintain in my -- at my desk in file  
 21 cabinets, I maintained hard copies of the plans. If  
 22 they are -- if they come electronically, sometimes I  
 23 print them, but often I just maintain the electronic  
 24 copy on the media they were sent -- that they arrived  
 25 in.

1 Q Okay. You referred to this as a  
 2 consolidated plan. Can we take a minute and can you  
 3 explain what that means?  
 4 A This is a document that was prepared -- I'm  
 5 not sure exactly what firm prepared it, but it is a  
 6 consolidated plan to meet the hazardous material  
 7 business plan requirements at the local level, state  
 8 level, so the chemical inventory. It has a  
 9 contingency response plan that contains the SPCC plan,  
 10 as noted at the bottom, Spill Prevention, Control and  
 11 Countermeasure plan; and it says that it contains a  
 12 Facility Response Plan also.  
 13 Q Do you recall if this consolidated plan did  
 14 contain a Facility Response Plan?  
 15 A It contains a section that says it's created  
 16 in order to satisfy the requirements at 40 CFR 112,  
 17 Facility Response Plan requirements, but I reviewed  
 18 it, and it was not the proper format and didn't  
 19 include many of the required elements.  
 20 MS. SUGERMAN: I would like to move into  
 21 evidence CX-17.  
 22 JUDGE BIRO: So CX-17 doesn't seem to be, in  
 23 my book, what you say.  
 24 MS. SUGERMAN: Oh, really? Is it --  
 25 THE WITNESS: Your Honor, you're looking at

1 RX-17.  
 2 JUDGE BIRO: Oh.  
 3 UNIDENTIFIED SPEAKER: Oh.  
 4 JUDGE BIRO: Okay. Okay. Sorry.  
 5 MS. SUGERMAN: This is why joint exhibits  
 6 are so nice.  
 7 JUDGE BIRO: Okay.  
 8 Is there any objection, Mr. McNeil?  
 9 MR. McNEIL: No objection.  
 10 JUDGE BIRO: Okay. So CX-17 is admitted  
 11 into the record.  
 12 (The document referred to,  
 13 previously identified as  
 14 Complainant's Exhibit No. 17,  
 15 was received in evidence.)  
 16 BY MS. SUGERMAN:  
 17 Q You mentioned that the facility indicated  
 18 there was a more recent consolidated plan. Can you  
 19 turn to CX-17 [sic]? No, we were --  
 20 A I am at --  
 21 Q -- just at CX-17. Sorry, CX-18.  
 22 A Okay.  
 23 Q Do you recognize this document?  
 24 A Yes, this seems to be the document that was  
 25 provided to me by Brian Orr, and would have been the

1 document I also reviewed at the facility. And this is  
 2 a consolidated plan that includes the Spill  
 3 Prevention, Control, and Countermeasure plan. The  
 4 Facility Response Plan portion has been taken out.  
 5 Q I -- I'm going to go backwards just a second  
 6 to get a little more explanation about consolidated  
 7 plans. EPA -- does EPA accept consolidated plans as  
 8 acceptable for the SPCC plan or the FRP plan?  
 9 A As long as they meet all the regulatory  
 10 requirements, yes.  
 11 Q Okay. And does this appear to be a true and  
 12 accurate copy of the document you received, CX-18?  
 13 A It appears to be.  
 14 Q Okay.  
 15 MS. SUGERMAN: I would like to move into  
 16 evidence CX-18.  
 17 MR. McNEIL: No objection.  
 18 JUDGE BIRO: Complainant's Exhibit 18 is  
 19 admitted into the record.  
 20 (The document referred to,  
 21 previously identified as  
 22 Complainant's Exhibit No. 18,  
 23 was received in evidence.)  
 24 BY MS. SUGERMAN:  
 25 Q You mentioned that this combination plan did

1 not include an FRP plan. Did you receive a separate  
 2 FRP plan?  
 3 A Not at this time.  
 4 Q And when did you inspect the facility?  
 5 A September 30, 2016.  
 6 Q Did anyone else from EPA participate in the  
 7 inspection?  
 8 A Yes, Connor Adams.  
 9 Q And what was Connor's role in this  
 10 inspection?  
 11 A He has training for the oil program, and he  
 12 was along to help review records, and he took  
 13 photographs for the inspection also.  
 14 Q Did you review any documents at the  
 15 inspection, during the inspection?  
 16 A Yes. There were -- there was this document.  
 17 There were some training records, I believe, and there  
 18 were tank inspection records.  
 19 Q Did you kind of have to walk through the  
 20 facility during that inspection?  
 21 A Yes. Yes.  
 22 Q Do you recall if you observed a Tank 2002  
 23 during that inspection?  
 24 A Yes.  
 25 Q And to the best of your knowledge, was it in

1 service at that time?  
 2 A It was.  
 3 Q And what led you to believe that it was in  
 4 service?  
 5 A Again, the tank was insulated, as the first  
 6 tank had been during my first inspection. It was  
 7 insulated. Piping was complete. And also based on  
 8 the information from facility personnel, it was in  
 9 service.  
 10 Q Will you please turn to CX-9?  
 11 A (Non-verbal response).  
 12 Q Do you recognize this document?  
 13 A Yes.  
 14 Q Did you take these photos?  
 15 A I did not. These were taken by Connor  
 16 Adams.  
 17 Q Did you have any role in selecting what  
 18 photographs to take?  
 19 A These -- the photographs were taken  
 20 throughout the facility walk, and if there was  
 21 something I specifically wanted that Connor hadn't  
 22 taken an image of, I might have asked him to take that  
 23 also.  
 24 Q What happens to the photos on the camera  
 25 when you complete your inspection?

1 A These are digital cameras, so the images are  
 2 downloaded without manipulation.  
 3 Q Did you have a role in putting together this  
 4 photo log?  
 5 A My role in the photo log would have been to  
 6 -- on a peer review, to look at the captions and  
 7 images and make any additions or edits or corrections.  
 8 Q Does this appear to be a true and accurate  
 9 copy of the photo log?  
 10 A It does, yes.  
 11 MS. SUGERMAN: I would like to move into  
 12 evidence CX-9.  
 13 MR. McNEIL: No objection.  
 14 JUDGE BIRO: CX-9 is admitted into the  
 15 record.  
 16 (The document referred to,  
 17 previously identified as  
 18 Complainant's Exhibit No. 9,  
 19 was received in evidence.)  
 20 BY MS. SUGERMAN:  
 21 Q Please turn to CX-6.  
 22 A Okay.  
 23 Q Can you describe this document?  
 24 A This is the notice of inspection that's  
 25 given by EPA. In this case, it's a notice of FRP

1 inspection and notice of the SPCC inspection of the  
 2 deficiencies.  
 3 Q What's the purpose of these documents?  
 4 A They document that an inspection -- official  
 5 inspection, took place at the facility. In the case  
 6 of deficiencies, it also establishes a timeline for  
 7 immediate correction, the opportunity for immediate  
 8 correction of deficiencies, although it does state  
 9 that even with correction of deficiencies, it --  
 10 enforcement or inaction could --  
 11 Q Did you fill out this document?  
 12 A The EPA portion I filled out for the FRP  
 13 inspection. Connor did for the SPCC inspection  
 14 portion. And then they're signed by Randy Tilford a  
 15 VSS representative.  
 16 Q Were you present when Randy Tilford signed  
 17 the document?  
 18 A Yes.  
 19 Q Does this appear to be a true and accurate  
 20 copy of the notices of inspection?  
 21 A Yes.  
 22 MS. SUGERMAN: I would like to move into  
 23 evidence CX-6.  
 24 JUDGE BIRO: Is there any objection?  
 25 MR. McNEIL: No, no objection.

1 JUDGE BIRO: Okay. Complainant's Exhibit 6  
 2 is admitted into the record.  
 3 (The document referred to,  
 4 previously identified as  
 5 Complainant's Exhibit No. 6,  
 6 was received in evidence.)  
 7 BY MS. SUGERMAN:  
 8 Q And then please turn to CX-7. Do you  
 9 recognize this document?  
 10 A Yes, it's a checklist for the summary of the  
 11 SPCC deficiencies.  
 12 Q And what's the purpose of this document?  
 13 A This is to document deficiencies that are  
 14 noted either with the plan and/or in the field during  
 15 an SPCC inspection. So it's a preliminary  
 16 determination of noncompliance issues.  
 17 Q Do you -- did you record -- do you fill out  
 18 this form during the inspection?  
 19 A Yes. And this and the notice of inspection  
 20 documents are presented now at the -- at the out-  
 21 briefing. In the 2012 inspection, we weren't using  
 22 these forms.  
 23 Q Does this appear to be a true and accurate  
 24 copy of CX-7?  
 25 A Yes, it does.

1 MS. SUGERMAN: I'd like to move into  
 2 evidence CX-7.  
 3 MR. McNEIL: No objection, Your Honor.  
 4 JUDGE BIRO: CX-7 is admitted into the  
 5 record.  
 6 (The document referred to,  
 7 previously identified as  
 8 Complainant's Exhibit No. 7,  
 9 was received in evidence.)  
 10 BY MS. SUGERMAN:  
 11 Q Still looking at CX-7, did you identify any  
 12 deficiencies?  
 13 A Yes, quite a few. Do you want me to explain  
 14 them?  
 15 Q Not at this moment. I think you just had a  
 16 -- but did you have a closing conference at the end of  
 17 the inspection?  
 18 A Yes, that's when these forms would have been  
 19 completed, discussed, and signed in the case of the  
 20 notice of inspections.  
 21 Q And at that time, did you go over a time  
 22 frame for when you expected the facility to correct  
 23 the deficiencies?  
 24 A As noted on the inspection -- the notice of  
 25 inspection forms, if they -- if deficiencies can be

1 corrected within 30 days, EPA should be notified to  
2 make other arrangements, ongoing discussions or maybe  
3 a schedule, or an extension of -- a short extension,  
4 generally a 30-day extension for completion.

5 Q Okay. I'm going to head next into the  
6 inspection review checklist.

7 MS. SUGERMAN: Is -- do you need a break?  
8 How are you doing?

9 THE WITNESS: I'd appreciate a break.

10 JUDGE BIRO: Okay. It's 1:50. We'll stand  
11 in recess until 2:00.

12 UNIDENTIFIED SPEAKER: Certainly.

13 MS. SUGERMAN: I'm sorry, what was the time  
14 frame?

15 JUDGE BIRO: It's -- according to my clock,  
16 it says it's 1:50. We'll stand in recess until 2:00.

17 MS. SUGERMAN: Great, thank you.

18 JUDGE BIRO: Okay.

19 (Whereupon, at 1:51 p.m., the hearing in the  
20 above-entitled matter adjourned, to reconvene at 2:00  
21 p.m. the same day, May 16, 2019.)

22 JUDGE BIRO: Please be seated.

23 Ms. Sugerman.

24 BY MS. SUGERMAN:

25 Q Are you good?

1 There were -- there was a testing plan that had been  
2 developed separately from the SPCC plan. It was  
3 included with the plan. It had been developed by  
4 Fletcher Consultants. And the fact that the PE didn't  
5 attest that that was -- that those inspections and  
6 testing information hadn't been established, to me,  
7 that was no -- it didn't ensure that the PE had  
8 reviewed and approved of that testing plan.

9 Q So in the box above where your comments are,  
10 where it says 112.3(d), are those the five points that  
11 a PE is supposed to attest to?

12 A Right, that they're familiar with the  
13 requirements of the regulation, they visited or their  
14 agent has visited and examined the facility, and the  
15 PE -- the plan is prepared with good engineering  
16 practice, in accordance with good engineering  
17 practice. In this case, the ones that were left out  
18 were the ones concerning the procedures for inspection  
19 and testing, and also that the plan was adequate for  
20 the facility had not been attested.

21 Q And is this language just from this  
22 checklist? Or where does that language come from,  
23 those five points?

24 A That's language in the regulation at  
25 112.3(d).

1 A Yes.

2 Q Okay. Please turn to CX-8.

3 A Okay.

4 Q All right. Do you recognize this document?

5 A Yes, this is the SPCC checklist, and this is  
6 the report after the September 2016 inspection.

7 Q Did you prepare this document?

8 A Yes.

9 Q Does this appear to be a true and accurate  
10 copy of the checklist?

11 A It does.

12 Q And just because we've discussed a couple  
13 different versions of plans, do you know which plan  
14 this checklist was based on? I think it says it on  
15 page 3.

16 A It's based on the January 2016 consolidated  
17 plan that had the SPCC incorporated.

18 Q Okay. On page 3 of 26, in a comments box  
19 there, can you take a look at that and then explain  
20 the concern to me?

21 A Yes. This has to do with the PE  
22 certification. There are five points that require  
23 attestation. One of them is that the plan includes  
24 inspection and testing information established and  
25 based on -- these are based on industry standards.

1 Q Okay.

2 MS. SUGERMAN: One moment, please.

3 BY MS. SUGERMAN:

4 Q If you would turn to page 8 of the same  
5 exhibit. In the comment section there for 112.7(c),  
6 can you read what your comments were and explain that  
7 concern?

8 A On page 8, for 112.8?

9 Q 112.7(c). Am I not on page --

10 A I'm sorry, page 8?

11 Q Page 8.

12 A Oh, I'm looking at CX-8. Page 8. What it  
13 says there is Tank Number 8 needs an out of service  
14 date to be considered permanently closed in accordance  
15 with the regulatory definition. That is a  
16 typographical error, the tank number. And it should  
17 have been Tank Number 865.

18 Q And what's the -- what does a facility need  
19 to do to permanently close a tank?

20 A Per the regulatory definition, a tank needs  
21 to be empty. It needs to be -- the piping needs to be  
22 disconnected. The vents need to be closed, except for  
23 an emergency vent. And then the tank needs to be  
24 labeled in a way that's visible that the tank is  
25 permanently closed and the date that that happened.

1 Q Why does it matter if the tank isn't  
 2 permanently closed? If it hasn't met those pieces of  
 3 the definition?  
 4 A If a tank hasn't been permanently closed,  
 5 there's no documentary evidence that the tank is  
 6 empty, for example. And if it's not empty, there  
 7 could be a discharge. Also, if it's not -- if the  
 8 vents haven't been closed and for some reason the tank  
 9 is filled, there could be discharges that way. Or it  
 10 could just be put back into service if piping is still  
 11 there.  
 12 Q Okay. And as with the previous checklist, I  
 13 would like to ask you, are you willing to enter this  
 14 checklist as your -- as your testimony on your  
 15 observations and conclusions from that inspection, the  
 16 2016 inspection?  
 17 A I'm willing, yes.  
 18 JUDGE BIRO: Do you have the same objection,  
 19 Mr. McNeil?  
 20 MR. McNEIL: Your Honor, we renew the same  
 21 objection. Thank you.  
 22 JUDGE BIRO: Okay. And I'll overrule and  
 23 have you have a continuing objection, if you'd like.  
 24 MR. McNEIL: Thank you, Your Honor.  
 25 JUDGE BIRO: We're going to admit -- you're

1 offering for admission Complainant's Exhibit 8?  
 2 MS. SUGERMAN: Yes, CX-8.  
 3 JUDGE BIRO: Okay. Complainant's Exhibit 8  
 4 is admitted into the record.  
 5 (The document referred to,  
 6 previously identified as  
 7 Complainant's Exhibit No. 8,  
 8 was received in evidence.)  
 9 MS. SUGERMAN: Okay.  
 10 BY MS. SUGERMAN:  
 11 Q Please turn to CX-19. Can you -- do you  
 12 recognize this document?  
 13 A This is a Facility Response Plan prepared by  
 14 or for VSS.  
 15 Q Do you recall if you received this document  
 16 from the facility?  
 17 A Yes.  
 18 Q And did you review this document?  
 19 A Yes.  
 20 Q Does this appear to be a true and accurate  
 21 copy of the January 2017 FRP that you received?  
 22 A Yes.  
 23 MS. SUGERMAN: I would like to move into  
 24 evidence CX-19.  
 25 JUDGE BIRO: Is there any objection?

1 MR. McNEIL: No objection, Your Honor.  
 2 JUDGE BIRO: How many more of these  
 3 documents that nobody has an objection to do we have  
 4 to admit into evidence? Could we go a little faster  
 5 here?  
 6 MS. SUGERMAN: I'm open to suggestion. What  
 7 does that mean?  
 8 MR. McNEIL: If I may, Your Honor, we'd be  
 9 happy at the next break to sit down with counsel and  
 10 try to streamline that, because we -- there may be  
 11 some that we do, but I think the large majority we  
 12 won't.  
 13 JUDGE BIRO: Wow.  
 14 MR. McNEIL: At least from respondents.  
 15 JUDGE BIRO: That's great. Would have been  
 16 even better if we could have reached these kind of --  
 17 MS. SUGERMAN: We will try --  
 18 JUDGE BIRO: -- resolutions before hearing,  
 19 because this is a big waste of time. Okay.  
 20 MS. SUGERMAN: But I do think there are only  
 21 a few more. And I'm sorry, was that CX-19?  
 22 JUDGE BIRO: Yes.  
 23 MS. SUGERMAN: And then I move CX-19 into  
 24 evidence.  
 25 JUDGE BIRO: We're going to admit CX-19 --

1 MS. SUGERMAN: Okay.  
 2 JUDGE BIRO: -- into evidence --  
 3 MS. SUGERMAN: Thank you.  
 4 JUDGE BIRO: -- I think without objection.  
 5 (The document referred to,  
 6 previously identified as  
 7 Complainant's Exhibit No. 19,  
 8 was received in evidence.)  
 9 BY MS. SUGERMAN:  
 10 Q Please turn to CX-12.  
 11 JUDGE BIRO: How about CX-12, Mr. McNeil?  
 12 Do you have any objection to that?  
 13 MR. McNEIL: I do not, Your Honor.  
 14 JUDGE BIRO: Okay.  
 15 Do you want to offer that exhibit?  
 16 MS. SUGERMAN: Yes, please.  
 17 JUDGE BIRO: CX-12 is admitted into the  
 18 record.  
 19 (The document referred to,  
 20 previously identified as  
 21 Complainant's Exhibit No. 12,  
 22 was received in evidence.)  
 23 JUDGE BIRO: What's the next one?  
 24 MS. SUGERMAN: Well, actually, I have  
 25 questions about this one. Could I do that first?



1 JUDGE BIRO: Okay.

2 BY MS. SUGERMAN:

3 Q Did you document your concerns with the

4 January 2017 FRP in this checklist?

5 A Yes, I did.

6 Q I'd like to go through a few of those

7 concerns, if you would turn to page 3.

8 A Okay.

9 Q And you have made some comments in the

10 comment box there. Will you explain the concern

11 there?

12 A On page 3, I indicated that there was log

13 form for equipment testing and deployment but no

14 schedule in the plan for that testing and deployment

15 to actually happen.

16 Q And what's the harm of not having a testing

17 and deployment?

18 A Without deployment, it doesn't give the

19 facility personnel a chance to work with the

20 equipment, become familiar with it, and that's also

21 one of the times when they would inspect the equipment

22 to make sure it's working properly.

23 Q And if you can look through pages 5 through

24 9 generally, and look at your comment boxes there. So

25 on page 6, you have a comment about equipment. What's

1 the harm of not having proper equipment?

2 A Without the proper equipment, it's not

3 possible to effectively respond to a discharge.

4 Q And then on page 8 here of CX-12, what's the

5 concern there?

6 A The training that's required for the

7 response personnel -- there were no dates to show that

8 training had actually taken place. The response --

9 contractor response time -- it says "sown." It should

10 be "shown." And it's to be determined. That's

11 important to know when the Oil Spill Response

12 Organization -- what the time frame is for them to

13 show up, because before that happens, it's up to the

14 facility to deal with the response. And then the

15 response team information for the facility hadn't been

16 included in the plan.

17 Q Okay. As with the other checklist, are you

18 willing to adopt this checklist as your testimony

19 regarding your observations of the review of the 2017

20 FRP plan?

21 A Yes.

22 MS. SUGERMAN: And my next exhibit, Your

23 Honor, would be RX-23, which is just bringing that one

24 into evidence.

25 JUDGE BIRO: Mr. McNeil, do you have any

1 objection to RX-23?

2 MR. McNEIL: Which exhibit number?

3 JUDGE BIRO: Twenty-three.

4 MS. SUGERMAN: Sorry, it's a show cause

5 letter. It's --

6 MR. McNEIL: Oh, no objection. It's the May

7 22 --

8 MS. SUGERMAN: The May -- the March 2017,

9 yes, show cause letter.

10 MR. McNEIL: Oh, yeah. No objection, Your

11 Honor.

12 JUDGE BIRO: RX-23 is admitted into the

13 record.

14 (The document referred to,

15 previously identified as

16 Respondent's Exhibit No. 23,

17 was received in evidence.)

18 BY MS. SUGERMAN:

19 Q Janice, will you turn to RX-23?

20 A This is a show cause letter that was sent

21 after the September 2016 inspection.

22 Q Can you tell me what the two findings of

23 violation are identified there in the second

24 paragraph?

25 A A failure to have an adequate Facility

1 Response Plan, and the failure to conduct integrity

2 testing in accordance with industry standards.

3 Q Was that a comprehensive list of the

4 violations you observed?

5 A No. The -- there were two documents at

6 least that accompanied this, the SPCC compliance

7 inspection report and the FRP plan review checklist,

8 and the -- both of those would have included the other

9 areas of noncompliance.

10 Q Okay.

11 MS. SUGERMAN: My next document is CX-45,

12 which is the May 1, 2017 SPCC plan.

13 MR. McNEIL: No objection, Your Honor.

14 JUDGE BIRO: Complainant's Exhibit 45 is

15 admitted into the record.

16 (The document referred to,

17 previously identified as

18 Complainant's Exhibit No. 45,

19 was received in evidence.)

20 BY MS. SUGERMAN:

21 Q If you could turn to CX-45, please. Okay.

22 And did this May 27 SPCC plan address the violations

23 identified in the 2017 show cause?

24 A It did address it to some degree. There was

25 not conclusive information about testing of all tanks.

1 Q Sorry, so is that -- you have -- those are  
 2 concerns you still had after reviewing this one as  
 3 compared to the previous one?  
 4 A Yes.  
 5 Q And that -- was that regarding tank  
 6 integrity testing?  
 7 A Yes.  
 8 Q And have you received any documentation  
 9 regarding tank integrity testing for Tank 2001?  
 10 A No. There was a inspection required --  
 11 external inspection required, at five years and I have  
 12 not received any verification of that test.  
 13 Q Will you please turn to 20 or 21? I believe  
 14 they're identical. Can you just identify that  
 15 document for the record?  
 16 MS. SUGERMAN: And I would like to move it  
 17 into evidence.  
 18 THE WITNESS: This is a May 2017 Facility  
 19 Response Plan for VSS.  
 20 MS. SUGERMAN: May I move into evidence CX-  
 21 21?  
 22 JUDGE BIRO: CX-21 or CX-20?  
 23 MS. SUGERMAN: Sorry, what's -- what am I --  
 24 well, I'm sorry, they're identical.  
 25 JUDGE BIRO: They're -- 20 and 21 are both

1 the same?  
 2 MS. SUGERMAN: Yes, that was an error we  
 3 made, and we fixed it later. So I'll just pick one.  
 4 CX-20, please.  
 5 MR. McNEIL: No objection.  
 6 JUDGE BIRO: Okay.  
 7 Complainant's Exhibit 20 is admitted into  
 8 the record.  
 9 (The document referred to,  
 10 previously identified as  
 11 Complainant's Exhibit No. 20,  
 12 was received in evidence.)  
 13 BY MS. SUGERMAN:  
 14 Q I'm sorry, can you again identify this --  
 15 what this document is for me?  
 16 A It's a May 2017 FRP --  
 17 Q And did you --  
 18 A -- Facility Response Plan.  
 19 Q All right. Did you review this FRP plan as  
 20 well?  
 21 A Yes.  
 22 Q Do you remember if you completed a checklist  
 23 for this FRP plan?  
 24 A I recorded observations. I'm not sure if I  
 25 completed a checklist for it.

1 Q Now will you please turn to CX-24?  
 2 A That is a checklist for the review of the  
 3 plan.  
 4 Q Was that for the plan dated May 2017?  
 5 A Yes.  
 6 Q Okay.  
 7 MS. SUGERMAN: I would like to move this  
 8 into evidence, CX-24.  
 9 MR. McNEIL: No objection.  
 10 JUDGE BIRO: CX-24 is admitted into the  
 11 record.  
 12 (The document referred to,  
 13 previously identified as  
 14 Complainant's Exhibit No. 24,  
 15 was received in evidence.)  
 16 BY MS. SUGERMAN:  
 17 Q Did you document concerns on this checklist?  
 18 Did you have concerns with the May 2017 FRP?  
 19 A Yes.  
 20 Q And did VSS address some of the concerns  
 21 that you had already identified from the January 2017  
 22 FRP?  
 23 A Some of them, yes.  
 24 Q Do you -- did the facility provide  
 25 documentation of a response contract signed by a

1 response organization?  
 2 A I don't believe they did. It had been  
 3 executed by the facility but not the Oil Spill  
 4 Response Organization.  
 5 Q Did the facility provide documentation that  
 6 they had performed the required drills and exercises?  
 7 A No.  
 8 Q And did the facility provide documentation  
 9 that they had performed the required training of  
 10 facility personnel?  
 11 A No.  
 12 Q Are you willing to incorporate as your  
 13 testimony this checklist as your testimony regarding  
 14 your observations on the May 2017 FRP plan --  
 15 A Yes.  
 16 Q -- to adopt as your testimony? Okay. Will  
 17 you please turn to CX-13?  
 18 A Okay. Yes.  
 19 Q Will you describe this email for me?  
 20 A This is an email from Andrew Helmlinger to  
 21 Richard McNeil and VSS. I was CC'd on it. EPA was  
 22 asking for verification of items that were noted that  
 23 needed to be -- for compliance with the oil pollution  
 24 prevention regulations. Specifically, a fully  
 25 executed OSRO contract, one that was signed by the Oil

1 Spill Response Organization, and then asking for  
 2 specific training records. These were training  
 3 records that were shown -- or there was a schedule  
 4 that was included in the Facility Response Plan, the  
 5 May 2017 Facility Response Plan. So the training  
 6 records were requested for the trainings that should  
 7 have taken place by June, the date of the email.  
 8 Q So this email is dated June 2017. At that  
 9 time, you were still asking VSS for documentation of  
 10 compliance, is that what you're saying?  
 11 A That's correct.  
 12 Q To this date, have you received evidence of  
 13 compliance with these issues?  
 14 A Not fully complied, no.  
 15 Q What's the importance of the OSRO -- the  
 16 response contractor contract?  
 17 A Unless a facility has all the equipment and  
 18 all the personnel required to respond to a land  
 19 water discharge, they rely on the Oil Spill Response  
 20 Organization to help with the response or to take over  
 21 a lot of the response duty. And without a contract,  
 22 you can -- you might be calling the company and they  
 23 wouldn't necessarily respond or respond in a timely  
 24 manner.  
 25 Q Okay. I would like to ask you some

1 questions about the penalty calculation. How many  
 2 SPCC and/or FRP enforcement cases have you concluded  
 3 or helped to finalize?  
 4 A Roughly three dozen.  
 5 Q I'm sorry, I didn't hear that.  
 6 A Roughly three dozen.  
 7 Q Three dozen?  
 8 A Over 30, anyway.  
 9 Q And do you have experience calculating  
 10 penalties for SPCC or FRP cases?  
 11 A Yes.  
 12 Q Generally, how do -- how are penalties  
 13 calculated?  
 14 A With the oil program, we use a general  
 15 penalty policy, the Clean Water Act 311.  
 16 Q Okay. And is there a specific training for  
 17 assessing penalties?  
 18 A There's -- for that, there's some -- I've  
 19 taken computer-based modules. A lot of it is on-the-  
 20 job training, working with attorneys and other  
 21 enforcement personnel. For one specific part that's  
 22 added to that, economic benefit, I have had training  
 23 from EPA headquarters personnel.  
 24 Q Can you walk me through the process of when  
 25 you develop a penalty for an enforcement case?

1 A Based on the specific violations, the  
 2 penalty policy is used. It sets out ranges of  
 3 penalties based on the size of a company and the --  
 4 size being the storage capacity of the facility, the  
 5 seriousness of the violations, and the duration of the  
 6 violations, and then that -- those ranges are  
 7 established depending on various aspects of the -- of  
 8 the facility and the compliance of the facility after  
 9 the fact. There may be percentages added or  
 10 subtracted to that, and then finally an economic  
 11 benefit might be determined for the -- any economic  
 12 benefit the facility gained by not coming into  
 13 compliance earlier.  
 14 Q Okay. I have a demonstrative exhibit I'd  
 15 like to put -- so this exhibit is also a copy of  
 16 what's in the record as CX -- 54? Fifty-four. So you  
 17 make a penalty recommendation to your management. Do  
 18 they generally rely on your expertise, or what's their  
 19 role once you've recommended a penalty?  
 20 A So I calculate a penalty estimate. I work  
 21 with ORC to do that, Office of Regional Counsel, and  
 22 then management above the enforcement division in ORC  
 23 reviews that. Generally, the numbers I come up with  
 24 are accepted. There may be factors that would -- that  
 25 would necessitate changing that either for national

1 consistency or if there are other programs that are  
 2 taking enforcement actions at the same facility, but  
 3 in general, my estimate is accepted.  
 4 Q And over your years of calculating  
 5 penalties, would you -- would you say you've received  
 6 peer review training, working with your colleagues and  
 7 consulting with headquarters as a sort of on-the-job  
 8 training?  
 9 A Yes.  
 10 Q And do you have a role in ensuring other  
 11 regions' penalties are consistent?  
 12 A Yes, with the -- both the Office of  
 13 Compliance and the oil program headquarters monthly  
 14 calls, that's exactly that type of thing that's  
 15 discussed, cases that are going on in various regions,  
 16 to ensure national consistency.  
 17 MS. SUGERMAN: I would like to move to have  
 18 Janice recognized as an expert in assessing penalties  
 19 for oil pollution prevention program cases.  
 20 JUDGE BIRO: Mr. McNeil?  
 21 MR. McNEIL: Your Honor, we object. We  
 22 believe that's the Court's province. There's a Clean  
 23 Water Act statutory penalty document that is not  
 24 directly applicable to administrative actions. And  
 25 again, although Ms. Witul may have been, you know,

1 involved in making recommendations based on the  
 2 statutory factors and the guidance, that -- that's  
 3 just part of her duties. That doesn't make her an  
 4 expert in assessing penalties, from our viewpoint.  
 5 That's the province of this tribunal. Thank you.  
 6 JUDGE BIRO: Okay.  
 7 Well, determining the penalty in this case  
 8 is my province, but I think she has knowledge and  
 9 experience, and based on her qualifications, that make  
 10 her an expert. But this is really factual, so I'll  
 11 qualify her, but I really don't see how much opinion  
 12 gets involved in this. But go ahead.  
 13 MS. SUGERMAN: Okay.  
 14 BY MS. SUGERMAN:  
 15 Q Are you familiar with -- can you look at  
 16 Exhibit CX-54, please, which is also presented here on  
 17 this exhibit? And do you recognize these factors?  
 18 A Yes, I recognize these.  
 19 Q Does the --  
 20 A So --  
 21 Q Okay.  
 22 A This -- and these were factors that were  
 23 considered in the -- in determining this penalty.  
 24 Number 6 is not applicable because there was no  
 25 discharge in this case.

1 Q Did the region complete a penalty  
 2 calculation recommending a penalty in this case?  
 3 A Will you repeat the question?  
 4 Q Did the region complete a penalty  
 5 calculation -- a penalty recommendation, in this case?  
 6 A Yes.  
 7 Q And that recommendation, does that take into  
 8 account these statutory factors?  
 9 A Yes, it did.  
 10 Q Okay. Will you please turn to CX-48,  
 11 beginning on page 10?  
 12 A Okay.  
 13 Q Is that -- does this represent the region's  
 14 recommendation of a penalty for all five counts?  
 15 A Starting on page 10?  
 16 Q Starting on page 10.  
 17 A Yes.  
 18 MS. SUGERMAN: I would like to enter CX-48  
 19 into evidence.  
 20 JUDGE BIRO: Do you want to enter the whole  
 21 document or just page 10 to whatever?  
 22 MS. SUGERMAN: I do only need page 10 to 23.  
 23 JUDGE BIRO: Is there any objection?  
 24 MR. McNEIL: No, not with that modification.  
 25 JUDGE BIRO: Okay. CX-48, pages 10 to 23,

1 are admitted into the record.  
 2 (The document referred to,  
 3 previously identified as  
 4 pages 10 to 23 of  
 5 Complainant's Exhibit No. 48,  
 6 was received in evidence.)  
 7 BY MS. SUGERMAN:  
 8 Q Janice, one of the factors on the board here  
 9 is economic benefit to the violator. Does your  
 10 penalty calculation take this into account?  
 11 A There was an economic benefit calculated for  
 12 the Facility Response Plan portion.  
 13 Q And how did you determine what costs to use  
 14 when determining an economic benefit?  
 15 A We did not have information from VSS; EPA  
 16 didn't. So we used these figures from the  
 17 headquarters. I don't remember the exact title, but  
 18 the information request that goes out to FRP  
 19 facilities that Mr. Swackhammer had described earlier.  
 20 Q And from this memo, can you tell me the  
 21 total gravity plus economic benefit that was  
 22 calculated?  
 23 A For SPCC FRP and the FRP, beneficial or  
 24 economic benefit was \$257,154.  
 25 Q And what is the total penalty you are

1 proposing?  
 2 A The statutory maximum, which is \$230,958.  
 3 Q In all of your communications with  
 4 respondent over the years, has the respondent  
 5 submitted any documentation to support a claim that it  
 6 is unable to pay the proposed penalty?  
 7 A No.  
 8 Q Have you looked at their website to  
 9 determine generally the size of this company?  
 10 A The website shows them to be large company.  
 11 I looked at publicly available records, Reference USA,  
 12 that shows they have adequate means to -- would have  
 13 adequate means to pay the penalty.  
 14 Q So from all that you've seen, do you have  
 15 any reason to believe this company cannot pay the  
 16 proposed penalty?  
 17 A No, I don't.  
 18 Q Okay.  
 19 MS. SUGERMAN: Your Honor, I would like to  
 20 take a few minutes to confer with my colleagues, if I  
 21 may.  
 22 JUDGE BIRO: Of course.  
 23 MS. SUGERMAN: Your Honor, do we want to  
 24 take this opportunity to go through other exhibits and  
 25 -- to see if we can get buy-off entering them into

1 evidence, or do you want to continue the same -- I'm  
 2 done with this part, with Janice's direct, for now.  
 3 And to the extent there are other exhibits we can  
 4 agree on, do you want to take care of that now, or  
 5 should we just move along with the testimony?  
 6 JUDGE BIRO: Why don't we do that one at the  
 7 end of today?  
 8 MS. SUGERMAN: Okay.  
 9 JUDGE BIRO: And we'll just try to move  
 10 ahead with Ms. Witul's testimony.  
 11 MS. SUGERMAN: Okay. I'm done with direct.  
 12 JUDGE BIRO: Mr. McNeil, do you want to  
 13 proceed with cross examination?  
 14 MR. McNEIL: Yes, Your Honor.  
 15 JUDGE BIRO: Okay.  
 16 MR. McNEIL: May I proceed?  
 17 JUDGE BIRO: Please proceed.  
 18 CROSS EXAMINATION  
 19 BY MR. McNEIL:  
 20 Q Ms. Witul, good afternoon.  
 21 A Good afternoon.  
 22 Q Ms. Witul, you testified earlier, if you  
 23 recall, about the inspection that you participated in  
 24 on November 27, 2012 at VSS?  
 25 A Yes.

1 Q And you -- I believe you had indicated that  
 2 your SPCC violation formal documentation was completed  
 3 in -- on September 23rd of the following year, roughly  
 4 10 months later, is that correct?  
 5 A Yes.  
 6 Q Okay. However, I believe you also said that  
 7 you had taken some notes during your facility walk-  
 8 through, is that correct?  
 9 A Yes.  
 10 Q Okay. And have those notes -- are they part  
 11 of your file in your file cabinet that you described  
 12 earlier?  
 13 A Yes.  
 14 Q Okay. Were -- are those notes still  
 15 available?  
 16 A They should be, yes.  
 17 Q Okay. Do you know whether you provided  
 18 those notes of your inspection that day to your  
 19 attorneys?  
 20 A Which day?  
 21 Q November 27, 2012.  
 22 A No, I wouldn't have provided them to the  
 23 attorneys.  
 24 Q Okay. Do you have any reason to believe  
 25 that during that 10-month elapse of time you may have

1 had any difficulty remembering the exact events or the  
 2 exact site conditions that you observed on November  
 3 27, 2012?  
 4 A I don't believe so, and the information  
 5 request would have helped to clarify any questions I  
 6 had or anything I had trouble remembering.  
 7 Q And you were asked earlier about the May 22,  
 8 2014 show cause letter. Do you recall that?  
 9 A I remember being asked about it, yes.  
 10 Q Okay. And if I recall, you indicated there  
 11 were -- there were two general areas of deficiencies  
 12 identified. One had to do with a tank integrity  
 13 inspection and the other had to do with the Facility  
 14 Response Plan, is that right?  
 15 A Those were the two indicated in the letter,  
 16 and then the reports or report accompanying would have  
 17 indicated other areas of noncompliance.  
 18 Q Right. And insofar as the Facility Response  
 19 Plan was concerned, did you or, to your knowledge, had  
 20 anybody at EPA conducted a review of 40 CFR 112.20,  
 21 the section that applies when EPA is making a  
 22 determination of FRP applicability?  
 23 A I don't understand --  
 24 Q Okay, let me --  
 25 A -- the question.

1 Q Let me direct your attention -- would you be  
 2 able to turn to RX-85, Ms. Witul?  
 3 A Okay.  
 4 Q And when you have it in front of you, would  
 5 you please turn to page 3 of 11?  
 6 A Yes.  
 7 Q You have that?  
 8 A I do.  
 9 Q Okay. And would you please look at section  
 10 (b)(1)? Are you familiar with that section?  
 11 A Yes, I see that.  
 12 MS. SUGERMAN: Objection, Your Honor. This  
 13 is not part of the regulations at issue. It's  
 14 irrelevant.  
 15 JUDGE BIRO: Overruled.  
 16 Go ahead.  
 17 BY MR. McNEIL:  
 18 Q Do you have an -- have you ever -- have you  
 19 ever read this subsection before?  
 20 A Yes.  
 21 Q Okay. Have you ever used it as part of your  
 22 review of an FRP of a facility or any inspection or  
 23 enforcement actions that you've taken in connection  
 24 therewith?  
 25 A I'm not the regional administrator, so I

1 don't have authority for this.

2 Q Oh, okay. Is that your understanding of

3 this section?

4 A It does say that the regional administrator

5 of EPA, understood, may at any time require the owner

6 or operator of a non-transportation-related onshore

7 facility to prepare and submit a Facility Response

8 Plan under this section after considering the factors

9 in paragraph (f)(2) of this section. And I am not the

10 regional administrator.

11 Q Okay. And if you turn to section (f)(2),

12 which is at page 5. Do you see that? About two-

13 thirds of the way down?

14 A Yes, I do.

15 Q Okay. And do you see that there are --

16 within section (2)(i), there are subsections (A)

17 through (G). Do you see those?

18 A Right. This is more or less a restatement

19 of the substantial harm criteria.

20 Q And my question to you is, have you yourself

21 gone through these factors that are identified in (A)

22 through (G) and performed any analysis respecting the

23 VSS facility?

24 A Not in accordance with (f)(2). Again, I'm

25 not the regional administrator. However, the

1 substantial harm criteria I have gone through.

2 Q Okay, and -- all right, that's fine. And

3 when you -- when you say that you have gone through

4 the substantial harm criteria, just to clarify, what

5 are you referring to there?

6 A The criteria that if a facility that is

7 regulated under the Spill Prevention, Control, and

8 Countermeasure regulations has certain factors, being

9 transferring oil over water to and from a vessel over

10 42,000 gallons; if they have over a million gallons

11 and have inadequate secondary containment; if they're

12 located such that a discharge could affect fish,

13 wildlife, or sensitive environment; if they've had --

14 if a discharge could affect drinking water intake; and

15 then if they've had a discharge I believe over 10,000

16 gallons.

17 Q Okay. And just to follow up on that, if you

18 recall -- or do you recall that you signed a

19 declaration in this case last August, August 3rd of

20 2018? It's Exhibit RX-104. Would you mind taking a

21 look at that, RX-104? And I'm going to direct you to

22 page 8 of 16 when you've got it.

23 A Did you say 104? My volume 505 goes to 101.

24 Q Oh, you know what? I think this is

25 mismarked. I apologize. I'm going to -- Ms. Witul,

1 I'm going to -- I'm going to read to you from my copy

2 of your declaration that I will representing to you

3 was filed in this -- in this action, and we'll get a

4 copy -- it's not an RX or CX number. I think we have

5 a stipulation on it. But there's a -- in paragraph 18

6 -- oh, yeah.

7 MR. LUDWIG: Your Honor, may I approach the

8 witness?

9 JUDGE BIRO: You may.

10 MR. McNEIL: We have a copy for you.

11 THE WITNESS: Thank you.

12 JUDGE BIRO: Please proceed. I'm sorry.

13 I'm just trying to find my own copy, actually, but --

14 MR. LUDWIG: We have an extra copy if you --

15 JUDGE BIRO: That would be great.

16 MR. LUDWIG: May I approach?

17 JUDGE BIRO: Yes, please. Thank you for the

18 courtesy. Okay.

19 Thank you, Mr. McNeil.

20 MR. McNEIL: No, thank everybody for their

21 indulgence. My apologies.

22 BY MR. McNEIL:

23 Q Ms. Witul, do you -- do you have now in

24 front of you a copy --

25 A I do.

1 Q -- of the declaration?

2 A Yes.

3 Q Does that look familiar to you? Does that

4 appear to be the same document that you prepared and

5 signed in August of last year? Do you recall that?

6 A Yes, it does.

7 Q Okay. Does that appear on page -- of the

8 declaration itself, on page 14 -- does that appear to

9 be a true and correct copy of your signature?

10 A Yes, it does.

11 Q Okay. And now would you mind going back to

12 paragraph 18 and just walking through a couple of

13 things?

14 A I'm sorry, I don't have the -- can you

15 remind me what I'm looking at?

16 Q That same document.

17 A Oh, okay.

18 Q It's paragraph 18, which is --

19 A Okay.

20 Q -- on page 8.

21 JUDGE BIRO: Do you want to identify this by

22 number as an exhibit number?

23 MR. McNEIL: Yes. I think we had -- if

24 there's no objection --

25 JUDGE BIRO: Well, we're just going to mark

1 it for identification as --  
 2 MR. McNEIL: Yeah, just --  
 3 JUDGE BIRO: -- Respondent's Exhibit -- what  
 4 did you say, 104?  
 5 MR. McNEIL: Yes, 104.  
 6 (The document referred to was  
 7 marked for identification as  
 8 Respondent's Exhibit No.  
 9 104.)  
 10 BY MR. McNEIL:  
 11 Q So if you can let me know when you're --  
 12 A Yes, I see that.  
 13 Q Okay. So if you -- if you read -- I'll kind  
 14 of just read that. In paragraph 18, it says -- you  
 15 say, "Based on my November 2012 inspection and  
 16 subsequent review of respondent's documentation, I  
 17 determined that respondent's facility is subject to  
 18 FRP requirements because it meets the substantial harm  
 19 criteria in 40 CFR section 112.20(f)(1) (i.e., it has  
 20 over a million gallons of storage capacity and is  
 21 located at a distance such that a discharge from the  
 22 facility could cause injury to fish and wildlife and  
 23 sensitive environments)." And does that summarize  
 24 what you were saying a moment ago in terms of the  
 25 level of review that you had conducted in 2014 in

1 connection with the show cause letter?  
 2 A Yes.  
 3 Q Okay. And just so we're all on the same  
 4 page, I want to make sure that you also see that you  
 5 -- you also discussed the same issue in paragraph 14,  
 6 which is on page 6. And I'll ask you to look at it  
 7 and read -- you can just read to yourself -- paragraph  
 8 14.  
 9 A Okay.  
 10 Q Okay. And it -- is that likewise the  
 11 determination or the factors that you considered and  
 12 reviewed in making the determination that the facility  
 13 was subject to the FRP requirements as you presented  
 14 it to management?  
 15 A Yes.  
 16 Q Okay. And so my question for you is, is  
 17 there anything else in -- let me clarify, please. I'm  
 18 still asking you about the 2014 time frame, because we  
 19 know there's a report from 2016 from Mr. Michaud, so  
 20 I'm not asking you about that yet. I will, but as for  
 21 right now I want to ask you about the May 22nd show  
 22 cause letter. Was there anything else that you  
 23 considered other than these -- the statements that are  
 24 set forth here in your paragraphs 14 and 18 in 2014?  
 25 A Is your question anything I considered as

1 far as the FRP applicability?  
 2 Q Yeah. Yes. Other factors, other  
 3 information, other details that would have -- just all  
 4 of the --  
 5 A I still -- in my mind, there was a question  
 6 about the secondary containment, but I was not --  
 7 there had been information provided by the facility  
 8 that indicated their -- the secondary containment  
 9 concern I had was incorrect or that their -- actually,  
 10 that their earlier plan was incorrect. So I did not  
 11 consider lack of secondary containment in my FRP  
 12 determination -- in my FRP determination judgment, I  
 13 suppose.  
 14 Q Okay. That's a fair point, and actually, if  
 15 you don't mind, I'll ask you about that. But first,  
 16 let me just be sure. Besides that, which we'll -- I  
 17 promise you, we'll get to in just one second -- was  
 18 there anything other than as set forth in paragraphs  
 19 14 and 18 that you considered in 2014 in making your  
 20 FRP recommendation to management?  
 21 A Not that I recall.  
 22 Q Okay, and I believe that what you were  
 23 referring to a second ago -- and we can -- we can look  
 24 at the report, but there was some review of the  
 25 secondary containment that had been done and had been

1 submitted to EPA that indicated that Tank 865 was --  
 2 which you had mentioned earlier, there was a typo  
 3 where --  
 4 A Yes.  
 5 Q -- it was 8, not 865, that same tank, right?  
 6 A I believe so.  
 7 Q Same tank number.  
 8 A Same tank number. I'm not sure if that was  
 9 --  
 10 Q Okay.  
 11 A -- the reason, but --  
 12 Q And are you -- are you aware that VSS's  
 13 consultant, WHF, had subsequently advised EPA that  
 14 there had been a transpositional error and the tank  
 15 was actually empty and not full, and that that  
 16 affected the secondary containment calculations? Did  
 17 you ever hear that or see that?  
 18 A I believe that's what I was thinking of,  
 19 yes.  
 20 Q That -- I was going to ask you, was that the  
 21 -- okay, so --  
 22 A Mm-hmm.  
 23 Q So what you were saying earlier was pending  
 24 the resolution of that, you had not formally included  
 25 that in your 2014 analysis, correct?

1 A Correct.

2 Q Okay. Now, on that point, do you, as you

3 sit here today, have any views or opinions about

4 whether that correction by WHF's -- or by VSS's

5 consultant is accurate or inaccurate, or contradicted

6 by anything? Do you have any views one way or the

7 other on that?

8 A I would hesitate to say, because there have

9 been subsequent changes at the facility, so I don't

10 know the storage capacity and the secondary

11 containment capacity now.

12 Q Okay. You mean now, as in since the action

13 was --

14 A Present day.

15 Q Oh, today, okay. So is it -- is it fair to

16 say your answer is you don't have an opinion one way

17 or the other?

18 A I suppose that's fair to say.

19 Q Okay.

20 A I don't want to speculate.

21 Q Going back to your November 27, 2012

22 inspection -- and I'd like you to keep your

23 declaration close by there, because I'm going to ask

24 you about it -- something on page -- find it here.

25 This is on page 6, paragraph 13. Do you recall

1 earlier that you testified about the -- in general,

2 the question of whether Tank 2001 was, in fact, in

3 service on the date of your inspection in 2012?

4 A Yes.

5 Q Okay. And here in paragraph 13 of your

6 declaration, you state, "During my inspection, I

7 observed that one approximately 2,500,000-gallon AST

8 was in service (Tank Number 2001)." Do you see that?

9 A I do.

10 Q Okay. And just so I'm -- just so I'm clear

11 on what you observed and what your testimony is, I

12 believe what you had told Ms. Sugerma was you had

13 observed piping and insulation, and then also had been

14 told that the tank was active, is that correct?

15 A Right.

16 Q Okay. So when you say in your declaration,

17 "I observed that it was in service," what you really

18 mean is you observed piping and insulation in the

19 tank. But tell me if I'm wrong, you didn't -- you

20 didn't actually see indicia that the tank was being

21 used. Or did you see something more than that?

22 A It's not possible to see the inside of the

23 tank. So, no, I didn't see that it was in service.

24 Q Okay. And likewise, you didn't see any, you

25 know, operations where asphalt was being loaded into

1 the tank by a -- you know, a pipe or a hose or some

2 other conduit. You didn't see anything like that, did

3 you?

4 A No. And again, those are generally sealed

5 operations, but I did not observe that.

6 Q Okay. So you -- other than what you were

7 told, all you know is you saw piping and insulation

8 and a tank.

9 A That would hold true for all of the tanks.

10 Yes.

11 MR. McNEIL: I just request indulgence for a

12 second. Ms. Sugerma was quite detailed in her

13 direct, so I just want to make sure I don't miss

14 anything.

15 BY MR. McNEIL:

16 Q You -- I believe we looked at a Google Earth

17 photograph from May of 2012, or at least it's -- it

18 states that it was imaged May of 2012. Do you

19 remember that?

20 A I do.

21 Q We talked about that a little bit earlier.

22 A Yes.

23 Q Okay. And that depiction -- would you have

24 any understanding whether that was a satellite image

25 or some other sort of aerial image? What would you

1 say?

2 A I don't know. I'm not that familiar with

3 the Google images.

4 Q And you would have to admit, I think, right,

5 that the legend on the bottom could be -- just could

6 be a mistake. It might not have been that date,

7 right?

8 A I will admit that.

9 Q And the railcars, I think you counted 9 when

10 we looked at the photograph. I believe you said you

11 did not see any railcars when you were there in

12 November of '12, right?

13 A I don't remember if I saw any, correct. I

14 didn't -- I didn't record that.

15 Q Are you aware that the railroad tracks -- or

16 would it be fair, in your view, to call it a railroad

17 spur --

18 A Spurs, yeah.

19 Q Railroad spurs, that s the word.

20 A Mm-hmm.

21 Q Okay. That the railroad spur are within a

22 -- themselves within a depression, below grade, that

23 they're -- they exist in a below-grade state? Are you

24 -- or do you -- are you aware of that one way or the

25 other?



1 A I don't -- I don't know that --  
 2 Q Okay. If you --  
 3 A -- one way or the other.  
 4 Q Okay, that's fine. If you did know that,  
 5 could that possibly impact your conclusion that there  
 6 was not adequate secondary containment?  
 7 A It could.  
 8 Q Ms. Witul, did you -- are you aware of any  
 9 correspondence between VSS and EPA let's just say  
 10 within the last 12 months, since this action has  
 11 commenced, where VSS has provided a copy of the  
 12 executed OSRO contract and where VSS has provided some  
 13 of the drill and training exercise information that  
 14 you alluded to earlier? Have you seen anything like  
 15 that in the last --  
 16 A I've -- I have -- I know I've seen some  
 17 drill and training information.  
 18 Q Do you recall when that was, approximately?  
 19 A I don't recall.  
 20 Q Within the last year?  
 21 A Yes.  
 22 Q Two years?  
 23 A Yes.  
 24 Q More like one, more like two?  
 25 A Within the last year.

1 Q Okay, very good. And we looked earlier at  
 2 an FRP checklist that you prepared in September of  
 3 2017. Do you recall that? It was -- I believe it was  
 4 CX-24, but we can -- I'll pull that up for you.  
 5 A Okay, I have that.  
 6 MS. SUGERMAN: Sorry, counsel, can you  
 7 repeat what exhibit we're looking at?  
 8 JUDGE BIRO: Complainant's Exhibit 24.  
 9 MS. SUGERMAN: Twenty-four, okay.  
 10 BY MR. McNEIL:  
 11 Q Do you have that, CX-24?  
 12 A I do.  
 13 Q Okay. I wanted to ask you a couple of  
 14 questions. On the first page -- so this is, again,  
 15 CX-24, page 1 of 24.  
 16 A Okay.  
 17 Q Okay. So in the bottom right-hand corner,  
 18 there's a date. Do you see that?  
 19 A Yes.  
 20 Q And what's the date?  
 21 A 9/18/2017.  
 22 Q Okay. Does that -- does that correspond or  
 23 roughly correspond to the date that this document was  
 24 prepared?  
 25 A When it was finalized, yes.

1 Q When it was finalized. And am I to  
 2 understand that it was prepared by you?  
 3 A That's correct.  
 4 Q And if I look in the top box, very top under  
 5 the heading, where it says, "Activity Information,"  
 6 EPA inspector is J. Witul. That's you, correct?  
 7 A Yes.  
 8 Q Okay. And above that, the line above that,  
 9 "Activity Date," this indicates that this document,  
 10 CX-24, documents or memorializes your review of the  
 11 FRP plan of VSS dated May 1 of 2017, correct?  
 12 A That's correct.  
 13 Q Okay. And I was looking at this document to  
 14 -- and perhaps I missed it, but I was trying to  
 15 ascertain whether it had been -- in or about September  
 16 of 2017, whether it had been forwarded to VSS by you  
 17 or by your attorneys. Do you know that, whether it  
 18 was?  
 19 A I don't know that.  
 20 Q Okay. Do you see anything on the document  
 21 that I'm missing in terms of some kind of transmittal?  
 22 I don't see one, but --  
 23 A No, there -- there's not a section for  
 24 indicating that it's been transmitted.  
 25 Q Okay, thank you. Okay. If we may, I'd like

1 to ask you to look again at the -- do you recall the  
 2 -- a penalty calculation that you performed?  
 3 A Yes.  
 4 Q Yeah. I just have to find it.  
 5 JUDGE BIRO: That was Complainant's Exhibit  
 6 48.  
 7 MR. McNEIL: Forty-eight, okay. Thank you.  
 8 Okay.  
 9 BY MR. McNEIL:  
 10 Q And then beginning, as I think had been  
 11 stipulated, at page 10, if you don't mind, maybe we'll  
 12 just run through some of these. So did you actually  
 13 draft -- did you actually draft this? Do you see  
 14 where it says, "Complainant's Explanation of the  
 15 Proposed Penalty Assessment"?  
 16 A Yes, I see that.  
 17 Q Okay, yeah. Do you know how this document  
 18 was created? In other words, did you do a first draft  
 19 and then submit it to management or to counsel or  
 20 something? In other words, who actually -- if you  
 21 know, who actually prepared it in a draft for further  
 22 review?  
 23 A I would say this was a joint effort by ORC  
 24 and myself.  
 25 Q Okay. So if I ask you about some of the

1 text in here, you may know -- you may have some  
 2 information about how certain things were arrived at  
 3 or decided.  
 4 A Yes.  
 5 Q Okay. So let's -- sorry, mine is two-sided.  
 6 Okay, let's look at page 14 of 23, which is under the  
 7 heading, "Step One" -- or at the subheading, "Step  
 8 One: Seriousness."  
 9 A Yes.  
 10 Q And I'd like you to just, you know, kind of  
 11 refresh your recollection of what's in here under  
 12 subsection A, and just let me know once you've had a  
 13 minute to re-familiarize yourself.  
 14 A Okay.  
 15 Q Oh, okay. So under subparagraph A, the  
 16 second full paragraph -- if I -- if I understand the  
 17 penalty proposal here in CX-48, it's being proposed  
 18 that there be a base cumulative penalty of \$45,000 for  
 19 the combined alleged SPCC violations. Is that -- is  
 20 that how --  
 21 A Yes.  
 22 Q Am I reading that correctly? Is that right?  
 23 A Yes.  
 24 Q Okay. And is -- now, is that -- they -- Ms.  
 25 Sugerman had asked you about your experience, and the

1 Court qualified you, so may I ask you how that \$45,000  
 2 number was arrived at? Was it arrived at looking at,  
 3 for example, other settlements or other cases, ALJ  
 4 cases, EAB cases, where a penalty had been assessed  
 5 and sort of, by analogy, saying, "Well, in this case,  
 6 ABC happened, and they got \$30,000 per penalty, in  
 7 this case, we have ABCD, so it should be \$45-?" I  
 8 mean, can you -- can you give us a window at all into  
 9 how that \$45,000 number was arrived at?  
 10 A That number is within a range that's  
 11 determined by size of the facility. If -- I don't  
 12 know if you want to turn to a general penalty policy  
 13 to see that range.  
 14 Q Yeah, that would be helpful. That's in -- I  
 15 think that's in a different -- you -- do you mean the  
 16 -- what -- which one do you -- because we have --  
 17 A I'm unable to locate it at this point.  
 18 JUDGE BIRO: Why don't you look at Exhibit  
 19 39? Complainant's Exhibit 39?  
 20 MR. McNEIL: Thank you, Your Honor, CX-39.  
 21 JUDGE BIRO: And then it follows a second --  
 22 there's a second penalty policy at 40.  
 23 (Pause.)  
 24 THE WITNESS: It was \$45,000, and it was in  
 25 a range of \$20- to \$50,000.

1 BY MR. McNEIL:  
 2 Q Okay, we're -- are you in Exhibit 39?  
 3 A I'm actually looking at Exhibit 40.  
 4 Q Oh, Exhibit 40.  
 5 A On page 9 of 21.  
 6 Q Okay, so you're looking at the moderate  
 7 noncompliance and more than a million gallons storage  
 8 in the grid?  
 9 A That's correct.  
 10 Q Okay. And then the next -- the next  
 11 paragraph refers to an upward adjustment of 30 percent  
 12 for duration. How was that arrived at, just in  
 13 general terms?  
 14 A The -- there's a maximum on the extent or  
 15 the time. So this would have gone over the statute of  
 16 limitations, and you can only -- so the maximum there  
 17 is 30 percent.  
 18 Q Okay, so that's the maximum, the 30 percent.  
 19 A Yes.  
 20 Q Okay. And is the same true for the next  
 21 paragraph on the penalty increase for negligence as is  
 22 described in the last sentence in the next paragraph?  
 23 This is on page 15 of 23, right above where it says,  
 24 "Step Two."  
 25 A As noted on page 12 of 21, the culpability

1 can be increased. The amount from step one, the  
 2 \$45,000, can be increased by as much as 75 percent.  
 3 Q Okay. So this is -- in your view, this is  
 4 reflective of the level of culpability being at, as  
 5 stated here, essentially negligence? Is that right?  
 6 A Would you rephrase the question?  
 7 Q Yes. Have you -- I'm looking at the last  
 8 sentence where it says, "Complainant proposes a  
 9 penalty increase of 30 percent to reflect the degree  
 10 of negligent culpability, not rising toward higher  
 11 levels of culpability, as may be reflected by grossly  
 12 negligent or intentional --"  
 13 A Right.  
 14 Q "-- noncompliance."  
 15 A Correct.  
 16 Q Okay, and you still believe that's  
 17 appropriate.  
 18 A I do.  
 19 Q Okay. And this was proposed by -- I think  
 20 it was a joint effort that was proposed and was  
 21 approved by the necessary management --  
 22 A Yes.  
 23 Q -- within EPA.  
 24 A That's correct.  
 25 Q And if we look now just below that to, "Step

1 Two: Adjustments Based on Other Statutory Factors,"  
 2 and I believe this is where the section 311 general  
 3 factors come in, so there's no -- based on this,  
 4 there's no evidence, that EPA's aware of, of, "Prior  
 5 violations; the nature, extent, and degree of  
 6 successive efforts of the violator to minimize or  
 7 mitigate the effects of the discharge; the economic  
 8 impact of the penalty on the violator; and any other  
 9 matters as justice may require," is that right?  
 10 A That's correct.  
 11 Q And the -- your approach to developing the  
 12 penalty proposal along with your colleagues in -- for  
 13 the Facility Response Plan alleged violation was  
 14 essentially the -- the two are the same -- walking  
 15 through the same steps, is that correct?  
 16 A Yes, basically the same.  
 17 Q Okay. And then there is -- there is one  
 18 other adjustment that was proposed for economic  
 19 benefit, is that right?  
 20 A That's correct.  
 21 Q Okay. And I -- there's a -- I think there's  
 22 a worksheet that's attached here. Did -- when you  
 23 prepared -- or you -- are you -- did you participate  
 24 in preparing the -- let me find it -- the economic  
 25 benefit adjustment of \$28,159?

1 A That's noted on page 18, CX-48, page 18 at  
 2 the bottom. I was the analyst.  
 3 Q Right.  
 4 A Yes.  
 5 Q Okay. So just to look at a couple of items  
 6 there, the subcomponents are shown in A, B, C, and D,  
 7 is that right?  
 8 A Yes.  
 9 Q Okay. So the first one, the 10,878 figure,  
 10 on-time capital and one-time costs. What does that  
 11 refer to in your understanding?  
 12 A So those are costs that may have been  
 13 expended on things like equipment or training or even  
 14 exercises.  
 15 Q Okay. And then for item B, the delay  
 16 capital and one-time costs? What are those?  
 17 A So those are things that I -- just a moment,  
 18 please. I believe those are the -- I believe that's  
 19 based on the amount of time that the capital costs  
 20 weren't in place.  
 21 Q Expended?  
 22 A Expended, yeah.  
 23 Q Mm-hmm, okay. So in other words, it's a --  
 24 if I may use the expression, and you can correct me if  
 25 I'm wrong, kind of the time value of money sort of a

1 concept?  
 2 A Right.  
 3 Q Okay. And for item C?  
 4 A So the voided and reoccurring costs have to  
 5 do with -- because this is specifically for FRP, those  
 6 would be the costs of having an -- the OSRO contract  
 7 in place for X number of years, not having exercises  
 8 and drills for X number of years, and not having  
 9 ongoing training for X number of years.  
 10 Q Okay. So on that, let me just ask you,  
 11 would you -- in performing this calculation for this  
 12 purpose, if you had information, let's say, for the  
 13 OSRO contract, that we -- you mentioned two things.  
 14 One was the -- having the on-scene response contract  
 15 in place, and the other was doing the drills and  
 16 exercises. If you were to find out that once the  
 17 contract was fully executed, there were -- there were  
 18 no costs that were -- that arose simply from the  
 19 contract being in place, that's one thing. And then  
 20 if you knew that the employees that were doing the  
 21 drills and exercises were being compensated through  
 22 their normal salary or hourly wage, would that have  
 23 any impact on your calculation of item C?  
 24 A I understand the question, but I guess I  
 25 don't understand the concept.

1 Q Can you -- please.  
 2 A Well, I don't understand how training would  
 3 be free. It would be free to the employee, but the  
 4 employer would pay for training from someone. And an  
 5 OSRO contract means paying an Oil Spill Response  
 6 Organization to be on call, so there is a cost  
 7 associated with that.  
 8 Q Okay. That's your understanding of how  
 9 those contracts work.  
 10 A Yes.  
 11 Q Okay. And the last category, initial  
 12 economic benefit, the \$19,001, what's your  
 13 understanding of what that --  
 14 A I'm sorry, which figure?  
 15 Q This -- well, we're still in items A through  
 16 E here on the worksheet, but this is paragraph D,  
 17 where it says initial -- excuse me, initial economic  
 18 benefit of A, B, and C, it's -- I think --  
 19 JUDGE BIRO: It's just a totaling.  
 20 MR. McNEIL: Yeah, and see, I was going to  
 21 say it seems to be additive, except I -- yeah, no, I  
 22 -- that's what I thought as well, but my question is  
 23 if I add up A, B, and C, I get a different number, so  
 24 I'm trying to understand.  
 25 BY MR. McNEIL:

1 Q Your -- the number here in D is \$19,001. Do  
 2 you see that?  
 3 A I do.  
 4 Q Okay. So is D, as seemingly from the  
 5 description -- is D supposed to reflect the sum of A  
 6 and B and C?  
 7 A By the description, it would seem that it  
 8 would.  
 9 Q Okay. So that number would be something  
 10 like 34,000 or --  
 11 MS. SUGERMAN: Objection, Your Honor. It's  
 12 essentially misreading the text. It's A minus B plus  
 13 C.  
 14 MR. McNEIL: Ah, okay. Thank you. Okay,  
 15 and -- thank you, counsel.  
 16 BY MR. McNEIL:  
 17 Q And then last question on this for you, Ms.  
 18 Witul, is would there -- would there be any place in  
 19 these calculations for the preparation of the various  
 20 plans that you -- I think you are aware that VSS did  
 21 over the course of this matter? That would include  
 22 substantial harm criteria analyses, but it would also  
 23 include Facility Response Plans and drafts of those  
 24 plans that were submitted to EPA. Does that -- does  
 25 that factor into these costs --

1 A Yes.  
 2 Q -- would you consider --  
 3 A That would be a capital cost, yes.  
 4 Q That would -- okay. So it would -- so it  
 5 though -- to the extent that you had had documentation  
 6 of those costs, would you have considered that as an  
 7 offset for the capital costs?  
 8 A It would be part of it, not an offset.  
 9 Q Part. I don't quite understand. Part of it  
 10 meaning --  
 11 A Part of -- part of the actual costs, rather  
 12 than the offset.  
 13 Q Oh, okay. So are we -- are we talking about  
 14 the A, the one-time costs? Is that what you're  
 15 referring to?  
 16 A Right, it is considered a one-time cost.  
 17 It's also considered an annually recurring cost,  
 18 because there might be updates required.  
 19 Q Right. Let me -- I'm going to try to make  
 20 my question simpler. So in other words, here we have  
 21 -- just in rough figures, we've got 10,000 for A,  
 22 almost 11,000, and we've got, for example, just shy of  
 23 16,000 for C. So let's say VSS had documentation that  
 24 it had provided to EPA that showed that it spent in  
 25 excess of 11,000 for on-time capital and one-time

1 costs, or had -- could demonstrate recurring annual --  
 2 annual costs that exceed the 16,000 figure in C.  
 3 Would that be taken into account by you in the  
 4 economic benefit calculation, or would it be  
 5 disregarded?  
 6 A It would be taken into consideration if they  
 7 provided figures.  
 8 Q Okay.  
 9 MR. McNEIL: Your Honor, may I have a  
 10 moment?  
 11 JUDGE BIRO: Of course.  
 12 BY MR. McNEIL:  
 13 Q With ongoing research into VSS's, you know,  
 14 financial condition or financial resources, can you  
 15 share with us and the Court what -- sort of what that  
 16 -- how that informed your decision about the being a  
 17 sophisticated company or a large-sized company?  
 18 A I will share that. I looked at the company  
 19 website. I also looked at information, publicly  
 20 available information, through Reference USA that  
 21 shows particulars for VSS and also Basic Resources.  
 22 All those seemed healthy, viable companies.  
 23 Q Okay. Did you have any -- did you -- were  
 24 you able to ascertain any number in terms of net  
 25 worth, or gross sales, or anything like that, or --

1 A I can't remember off the top of my head.  
 2 There may be information in an exhibit.  
 3 Q Okay.  
 4 MR. McNEIL: I have nothing further at this  
 5 time, Your Honor.  
 6 JUDGE BIRO: Okay, thank you.  
 7 MS. SUGERMAN: I need a moment to collect  
 8 binders and get a little organized here, I think. I  
 9 lost my -- Okay.  
 10 How are you doing, by the way? You're okay?  
 11 THE WITNESS: Yes.  
 12 MS. SUGERMAN: Almost over. I'll go  
 13 backwards in time here. And so CX-35 and CX-36 in the  
 14 record are the Reference USA and Dunn & Bradstreet  
 15 reports that were pulled, and if we want to go ahead  
 16 and enter those into the record as evidence, then  
 17 counsel will know what we relied on.  
 18 JUDGE BIRO: Is there any objection, Mr.  
 19 McNeil?  
 20 MR. McNEIL: No objection, Your Honor.  
 21 JUDGE BIRO: CX-35 and CX-36 are admitted  
 22 into the record.  
 23 //  
 24 //  
 25 //

1 (The documents referred to,  
2 previously identified as  
3 Complainant's Exhibits No. 35  
4 and 36, were received in  
5 evidence.)

## REDIRECT EXAMINATION

BY MS. SUGERMAN:

8 Q And then in terms of the economic benefit  
9 analysis, we discussed this a little bit, but we  
10 didn't -- since we didn't receive figures -- since you  
11 didn't receive figures from the facility, what did you  
12 use to determine costs for that analysis?

13 A I used the information collection requests  
14 that were prepared -- sent -- the collection requests  
15 sent out by the EPA and then the information that's  
16 gathered in those concerning FRP facilities, such as  
17 CX-46, I believe.

18 Q Okay. And one of counsel's questions  
19 regarding your declarations, it seemed to me it was  
20 asking about what you have relied on in making your  
21 determination regarding whether the facility was  
22 subject to FRP. And in your initial testimony I think  
23 you testified that you also contacted headquarters, is  
24 that correct? You got some feedback from headquarters  
25 as to whether it was applicable at this facility in

1 terms of --

2 A Yes.

3 Q And then do you know if headquarters  
4 contacted anybody else involved, any experts in this  
5 field, to determine applicability?

6 A Yes. In order to substantiate information,  
7 headquarters contacted one of their contractors for  
8 that purpose, yes.

9 Q Okay. So it sounds like you used your own  
10 judgment and experience. You actually consulted  
11 headquarters, and headquarters may have also contacted  
12 an outside contractor.

13 A Yes.

14 Q I'd like to look quickly -- about the -- and  
15 just some of the Tank 865 issues. Is it -- I think  
16 it's CX-55.

17 MS. SUGERMAN: Can I just use these? Are  
18 these --

19 (Asides.)

20 MS. SUGERMAN: Okay, CX-52, please.

BY MS. SUGERMAN:

22 Q And you had mentioned earlier that you did  
23 modify that first page with a red circle, and that  
24 that's not original to the photo. Can you flip  
25 through those and just explain to me what's in each

1 photo and what the red circles are?

2 A The red circles indicate Tank 865.

3 Q Maybe describe its location.

4 A And so CX-52, page 1, there's a circle --  
5 freeform circle around the tank that's positioned in  
6 an area that is to the right of a vertical line that  
7 is a secondary containment wall. So it indicate --  
8 it's showing that the tank is outside of containment.

9 Q And this is the tank that you testified  
10 earlier to -- there was no indication that it was  
11 permanently closed, correct?

12 A Yes, it didn't meet the regulatory  
13 definition of permanently closed.

14 Q And then what's the concern with something  
15 not being officially permanently closed?

16 A I think -- if there's no evidence that it's  
17 -- or there's no quality evidence that it's empty,  
18 that it will be put back into use and either of those  
19 could cause discharge.

20 Q Okay. So yes, if you could go through the  
21 -- keep going through the files there.

22 A The first image was May 2012. Page 2, CX-  
23 52, page 2 of 4, is an image dated 10/6/12. Again,  
24 the freeform circle around the tank kind of in the  
25 middle of the picture, and the tank is again shown in

1 the area outside of any secondary containment. And  
2 then page 3 of 4, the tank now is more to the right in  
3 the picture. There's a freeform circle drawn around  
4 it, and the tank again is outside of secondary  
5 containment. And in the final -- that image was dated  
6 2016, October 2016. In the final image that shows an  
7 imagery date of February 1, 2018, the tank indicated  
8 by the red circle is now inside the secondary  
9 containment walls and -- that include the two large  
10 tanks.

11 Q Okay. And in your experience and your  
12 activities as an inspector, do you need to know the  
13 exact quantity of oil in any given tank at any time,  
14 or is the relevant number related to whether it's  
15 available to store oil?

16 A It's whether it's available to store oil.  
17 It's based on actual storage capacity of the tank.

18 Q So for example, Tank 2001, if you observed  
19 that it was insulated and it was piped, to make your  
20 determination of whether it was available to store  
21 oil, did you need to know the contents of the tank at  
22 that time?

23 A No.

24 Q I realize I may have failed to admit Exhibit  
25 CX-13. If you could return to CX-13 for a moment.

1 You've got it there. And so in CX-13, we discussed  
2 this was the email where EPA was requesting records.  
3 It's your -- we had this conversation earlier, but to  
4 clarify, it's your understanding that EPA received  
5 each and every one of these records?

6 A I don't -- none of the training records were  
7 received at the time. I don't believe an executed  
8 OSRO contract was received.

9 Q To the extent we may have receive -- you may  
10 have received some of these records after the fact,  
11 would that constitute complete compliance?

12 A No.

13 Q Okay.

14 MS. SUGERMAN: And I would like to move to  
15 admit CX-13 into evidence.

16 JUDGE BIRO: Is there any objection?

17 MR. McNEIL: No objection.

18 JUDGE BIRO: CX-13 is admitted into the  
19 record.

20 (The document referred to,  
21 previously identified as  
22 Complainant's Exhibit No. 13,  
23 was received in evidence.)

24 (Asides.)

25 //

1 BY MS. SUGERMAN:

2 Q While they're digging, I have one other  
3 question. So regarding the economic benefit  
4 calculations, do you feel like you looked at each and  
5 every one of the violations at issue here and the  
6 possible costs associated with each of those  
7 violations, and you input them into your calculation?  
8 Or was this just a subset of what you thought might  
9 have had associated costs?

10 A This was more a subset.

11 Q A subset. Did it include any of the tank  
12 integrity testing costs that may have been done?

13 A No, those were more SPCC violations, and  
14 this is just -- this was just based on the FRP.

15 Q So even though the penalty was for both the  
16 SPCC and the FRP violations, this particular economic  
17 benefit calculation really only captures the delay  
18 costs associated with Facility Response Plan data --

19 A Yes.

20 Q Okay.

21 (Asides.)

22 MS. SUGERMAN: Okay. So this is just an  
23 admission into evidence request. CX-21 was one of the  
24 FRP plans that we talked about, but I failed to --

25 JUDGE BIRO: Isn't that -- didn't you say

1 that was the exact same as 20?

2 UNIDENTIFIED SPEAKER: CX-20 was already --

3 MS. SUGERMAN: Oh, all right. Sorry.

4 (Asides.)

5 MS. SUGERMAN: Then it's covered. All  
6 right. Let me just do a quick consult. Okay. We are  
7 done. We would like to keep -- we don't want to  
8 release Janice, though. We want her available in case  
9 we need her.

10 JUDGE BIRO: They get -- okay, but they  
11 still get to do recross.

12 MS. SUGERMAN: Oh, yes. That's fine.

13 MR. McNEIL: Your Honor, no recross.

14 JUDGE BIRO: Oh, okay.

15 MR. McNEIL: Thank you, Judge.

16 JUDGE BIRO: All right. Thank you, Mr. --

17 MR. HELMLINGER: Your Honor, if we could ask  
18 the counsel, you had intended to call her as a  
19 witness. Have you gotten the facts from her in this  
20 that you otherwise might get in your direct?

21 MR. McNEIL: We probably need a little bit  
22 of time to answer your question --

23 MR. HELMLINGER: You bet, sure.

24 MR. McNEIL: -- but we will.

25 MR. HELMLINGER: Sure, okay.

1 JUDGE BIRO: Okay. It's 4:00. Are you  
2 prepared to call your next witness?

3 MR. HELMLINGER: We could, but it might take  
4 a full hour. I'm not sure what they would have for  
5 cross. I might suggest if we could take a couple  
6 minutes, we could talk about stipulations and maybe  
7 have some progress on that and speed things up for  
8 tomorrow.

9 JUDGE BIRO: That would be great. Let me go  
10 over with you while we're on the record all the  
11 exhibits that I believe we have admitted into the  
12 record today. And when I'm done, correct me if I'm  
13 wrong. I've tried to keep an accurate record.  
14 Complainant's Exhibits 1; 2; 4; 5; 6; 7; 8; 9; 10; 12;  
15 13; 16; 17; 18; 19; 20; 22; 24; 25; 26; 33; 34; 35;  
16 36; 45; 46; 47; and 48, only pages 10 through 23. Oh,  
17 52 and 53. Did I not say that?

18 MR. HELMLINGER: And then we had RX Exhibit  
19 83.

20 JUDGE BIRO: Right, so now we have the -- of  
21 the respondent's exhibits, I have a record that we've  
22 admitted Respondent's Exhibit 2; 6; 23; 50; and 83,  
23 pages 1 and 2; and 87. Is everybody in agreement? Do  
24 we -- do you want me to read it again? How are we?

25 MS. REYNOLDS: I wouldn't mind if you read

1 it once more. The -- I lost some of the very end.  
 2 UNIDENTIFIED SPEAKER: Of the CXs.  
 3 MS. REYNOLDS: Of the CXs. I lost you kind  
 4 of after 26.  
 5 JUDGE BIRO: After 26? Okay. So there was  
 6 25 and 26; 33; 34; 35; 36; 45; 46; 47; 48, but pages  
 7 only 10 through 23; 50; 52; 53. That's it.  
 8 How am I doing, Andrea?  
 9 UNIDENTIFIED SPEAKER: You're right.  
 10 JUDGE BIRO: Right, okay.  
 11 We're good?  
 12 MS. SUGERMAN: I'm sorry, did you say CX-47?  
 13 Was that on your list?  
 14 MR. HELMLINGER: Yes.  
 15 MS. SUGERMAN: Okay.  
 16 MR. HELMLINGER: Yeah.  
 17 MS. SUGERMAN: Then we're --  
 18 MR. HELMLINGER: We're good.  
 19 JUDGE BIRO: We're good?  
 20 MR. HELMLINGER: Yes.  
 21 JUDGE BIRO: How about Mr. McNeil? Are we  
 22 good?  
 23 MR. LUDWIG: I think so. I'm just going  
 24 through my list, which was sort of chronological, as  
 25 opposed to --

1 JUDGE BIRO: I have it chronological, too,  
 2 if you'd like. Would you like me to read that?  
 3 UNIDENTIFIED SPEAKER: Yes.  
 4 JUDGE BIRO: Okay. Thirty-three --  
 5 Complainant's Exhibit 33; Respondent's Exhibit 83, the  
 6 first two pages; Complainant's Exhibit 2;  
 7 Complainant's Exhibit 1; Complainant's Exhibit 53;  
 8 Complainant's Exhibit 34, Respondent's Exhibit 87;  
 9 Complainant's Exhibit 25; Complainant's Exhibit 26;  
 10 Complainant's Exhibit 22; Complainant's Exhibit 46;  
 11 Complainant's Exhibit 47; Complainant's Exhibit 50;  
 12 Respondent's Exhibit 50; Complainant's Exhibit 16;  
 13 Complainant's Exhibit 5; Complainant's Exhibit 10;  
 14 Respondent's Exhibit 2; Complainant's Exhibit 4;  
 15 Complainant's Exhibit 52; Respondent's Exhibit 6;  
 16 Complainant's Exhibit 17; Complainant's Exhibit 18;  
 17 Complainant's Exhibit 9; Complainant's Exhibit 6;  
 18 Complainant's Exhibit 7; Complainant's Exhibit 8;  
 19 Complainant's Exhibit 19; Complainant's Exhibit 12;  
 20 Respondent's Exhibit 23; Complainant's Exhibit 45;  
 21 Complainant's Exhibit 20; Complainant's Exhibit 24;  
 22 Complainant's Exhibit 48, pages 10 through 23;  
 23 Complainant's Exhibit 35; Complainant's Exhibit 36;  
 24 Complainant's Exhibit 13, and now I'm lightheaded.  
 25 MR. HELMLINGER: Let's not do that again.

1 JUDGE BIRO: Yeah. Okay. Are we good?  
 2 Yeah? Okay. Okay. So now, you know, you can -- any  
 3 witnesses, you know, that are released, it's fine. If  
 4 you can agree on the exhibits for tomorrow and  
 5 stipulate, hopefully, to admissibility of as many as  
 6 you can --  
 7 MR. HELMLINGER: Yeah.  
 8 JUDGE BIRO: -- that would be really great.  
 9 MR. HELMLINGER: Sure. I have a proposal to  
 10 discuss with counsel. We might be able to get back to  
 11 you in 10 minutes and do that.  
 12 JUDGE BIRO: Oh, if you want to settle, that  
 13 would be good, too, but --  
 14 MR. HELMLINGER: No, not that proposal, on  
 15 -- just on -- just on exhibits. Just on exhibits.  
 16 JUDGE BIRO: Okay. All right. Well, so why  
 17 don't we stand in recess for today? If you want, we  
 18 can start up with your next witness first thing  
 19 tomorrow morning.  
 20 MR. HELMLINGER: Sure, sounds great.  
 21 JUDGE BIRO: Okay. All right. Thank you  
 22 very much.  
 23 Ms. Witul, there's a possibility you'll be  
 24 recalled to your testimony, so you really shouldn't  
 25 discuss your testimony any more with anybody,

1 including your own attorney, okay?  
 2 UNIDENTIFIED SPEAKER: Off the record.  
 3 JUDGE BIRO: Yeah.  
 4 (Whereupon, at 4:00 p.m., the hearing in the  
 5 above-entitled matter adjourned, to reconvene at 9:00  
 6 a.m., on May 17, 2019, the following day.)  
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REPORTER'S CERTIFICATE

DOCKET NO.: OPA-09-2018-00002  
CASE TITLE: Environmental Protection Agency v. VSS  
International, Inc.  
HEARING DATE: May 16, 2019  
LOCATION: San Francisco, CA

I hereby certify that the proceedings and  
evidence are contained fully and accurately on the  
tapes and notes reported by me at the hearing in the  
above case before the U.S. Environmental Protection  
Agency.

Date: May 16, 2019

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