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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF **VSS INTERNATIONAL, INC.** 3785 Channel Drive West Sacramento, CA Respondent.	DOCKET NO. OPA 09-2018-0002 **RESPONDENT VSS INTERNATIONAL, INC.'S POST-HEARING REPLY BRIEF**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Respondent VSS International, Inc. ("Respondent" or "VSS") hereby submits its Post-Hearing Reply Brief, as directed in the Presiding Officer's Order of June 19, 2019.

II. COUNTS I THROUGH V

A. Count I (Depiction of AST's in SPCC Plan Figure)

Notably, in Complainant's Post-Hearing Reply Brief In Opposition To Respondent's Initial Post Hearing Brief ("Reply Brief"), EPA does not dispute that the April 2012 Condor report:

(i) identified all AST's on Table 3 of the report (particularly, tanks 817, 818 and 848);

(ii) showed these tanks by location (and outlined their circumference) on Figure 3 of the report;

(iii) listed the AST's and, for each, the tank's number and contents on Table 3 of the report.[1]

Having acknowledged that the SPCC plans contained the relevant information required by the regulation, the EPA raises in its Reply Brief only the argument that a violation of Count I "warrants a substantial penalty" because the required information was contained on two pages, and not solely on one page, in the SPCC plans.[2]

[1] Nor does EPA dispute that substantially the same information was included in the 2014 Plan (RX 92 pages 23 – 27 of 140, page 35 of 140, page 100 of 140, and page 115 of 140) and the 2016 Plan (CX 18 page 19 of 161 and pages 22 – 26 of 161).

[2] EPA in this regard does not ground in the record its claim that the required information was provided in "various figures, tables and pages," Reply Brief at 2, and that the information contained a "lack of accurate detail" and was "disorganized," Reply Brief at 3.

In support of the position that a substantial penalty is warranted, EPA cites to two documents, the 2002 SPCC Final Rule Notice (67 Fed. Reg. 47042 (July 17, 2002)) and the EPA SPPC Guidance Document (CX 34).

However, neither of these documents supports EPA's proposition that having the required information in two pages instead of one page is a violation of the rule and in fact supports the interpretation that, where appropriate, due to the level of detail involved (as was the case here) the 40 CFR Section 112.7(a)(3) information may be contained on more than two pages instead of one page.

In this regard, this Final Rule Notice states:

> "You may mark the contents of each container either on the diagram of the facility, or on a separate sheet or log …." *Id.*[3]

Likewise, the EPA SPCC Guidance Document states:

> "Additionally, the diagram may be attached to a facility inspection checklist to identify area, containers, or equipment subject to inspection…" (CX 34 page 250 of 921).

Moreover, the SPCC Guidance Document contained at CX 34 actually includes as a template which, as is the case with the VSS SPCC Plans, includes an illustrative facility diagram with storage areas and tank locations on one page (CX 34 page 262 of 921) and a list of tank volume and contents on another page (CX 34 page 263 of 921), as to which the SPCC Guidance Document states:

[3]This view is further supported by an earlier reference in the same document that notes that larger facilities "are assumed to already have a diagram that may be attached to the SPCC Plan."

"The scale and level of detail shown on a facility diagram may vary according to the needs and complexity of the facility … as long as the information is contained in more detailed diagrams of the systems or is contained in some other form and such information is maintained elsewhere at the facility and this location is referenced in the SPCC Plan."[4]

B. Count II (Professional Engineer's Certification)

40 CFR Section 112.3(d) provides that a licensed Professional Engineer must review and certify a Plan for it to be effective to satisfy the requirements of that section. As noted previously, the Professional Engineer is required to attest: (i) That he or she is familiar with the requirements of [Section 112.3(d)]; (ii) That he or she or his or her agent has visited and examined the facility; (iii) That the Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of Section 112; (iv) That procedures for required inspections and testing have been established; and (v) That the Plan is adequate for the facility."

As acknowledged previously by VSS, the regulation requires that the Professional Engineer make a certification, and it is only logical that that certification should be contained in the SPCC Plan (as was done here).

Although EPA continues to argue that the subparts of the certification must be repeated verbatim in the certification itself, it still has not cited to any authority that supports that interpretation. Neither its Initial or Reply Brief contains any authority that states that the attestation subparts must be repeated in the Plan, other than citing to (i) a "sample" used in the guidance document for the hypothetical "Unified Oil Facility in Stonefield, Massachusetts" (that

[4] Here, this information was not just referenced in the SPCC Plan, it was included in the SPCC Plan.

by its terms is only a hypothetical)[5] and an inspector checklist which, in this case was not extant at the time of the inspection (as Ms. Witul testified that she took notes on a different document during the inspection, which was not produced to VSS) (Tr. 157:3 – 159:6). Moreover, the finalized field inspection notes were not transmitted to VSS until less than a year prior to the filing of the complaint.

EPA's contention that the certification in the VSS Plan did not cross-reference the regulations also overlooks the fact that that section of the plan is entitled: "Professional Engineer's Certification (40 CFR 112.3(d))."

C. Count III (Amending SPCC Plan Within Six Months)

In its Reply Brief, EPA first provides a number of arguments that it claims supports its contention that the 2012 Condor plan should be read to comport with EPA's contention that Tank # 2001 was put into service on March 21, 2012.[6] As noted previously, EPA relies on the September 2013 inspection report prepared by Ms. Witul ten months after the site inspection, even though, on cross-examination, Ms. Witul acknowledged that she did not in fact have first-hand knowledge of whether Tank # 2001 was actually in operation during her inspection conducted in November 2012. Tr. 222:5 – 223:10.

[5] Indeed, the hypothetical upon which EPA relies in its Reply Brief prominently states in its "Disclaimer" (CX 34 page 485 of 921) as follows: The sample SPCC Plan in Appendix D "is not an actual facility, nor does it represent any actual facility or company. Rather, EPA is providing illustrative examples of the type and amount of information that is appropriate SPCC Plan language for these hypothetical situations … this sample SPCC Plan is not a template to be adopted by a facility; doing so does not mean that the facility will be in compliance with the SPCC rule requirements. Nor is the sample plan a template that must be followed in order for the facility to be considered in compliance with the SPCC rule." This is contrary to EPA's assertion that this hypothetical establishes that "EPA has consistently maintained that a written certification that spells out each of the elements is required." Reply Brief at 5.

[6] For this reason, in addition to the points previously raised by VSS, EPA has no basis for concluding, as it does at page 7 of the Reply Brief, that "all of the statements in the 2012 SPCC Plan that Tank # 2001 was under construction were outdated and should be discarded as not compelling."

As far as Tank # 2002 is concerned, EPA's arguments again are not on point.

First, EPA cites to the Hearing Transcript (pages 76-78) to establish that the addition of a 2.4 million gallon tank constitutes a material change, but EPA omits the context of this testimony, which was elicited in response to a question about whether adding the first 2.4 million gallon tank (not the second 2.4MM gallon tank) would be material. Even accepting that testimony, it is not applicable to Tank #2002 because that testimony (from EPA's witness Mr. Swackhammer) referred to the addition of Tank #2001 (Tr. 77:17-78:8) (referring to EPA's Opening Statement, which referenced its contention that "adding 2.4 million gallons of oil constitutes a material change…." (Tr. 13:12-16).

Second, EPA cites to a quotation from the 2002 SPCC Final Rule (67 Fed. Reg. 47042, 47097 (July 17, 2002)) that applies to "a replacement of one tank with more than one identical tank" for the proposition that a replacement of one tank with more than one identical tank is a material change. In this case, Tank # 2002 was not a replacement tank. However, and while bringing on line Tank # 2002 added to the storage capacity at VSS, the tank was already in place, had been identified in prior SPCC plans, and was within the same (sufficient) secondary containment as the existing tank (which had been initially designed for both Tank # 2001 and #2002). As noted in VSS's Initial Post-Hearing Brief, the addition of Tank # 2002 in the 2017 FRP and SPCC Plans was not by that time a material change that affected VSS's "potential for a discharge" (40 CFR Section 112.5(a)) such that the operational status of the tank could not be adequately addressed in the subsequent plan prepared in 2017.

D. Count IV (AST Inspection Program)

1. EPA's Arguments Concerning the Relevant Time Period Are Unpersuasive.

As VSS argued in its Initial Post-Hearing Brief, EPA limited the relevant time period for Count IV in unequivocally stating to this Tribunal that it was "'not seeking a finding of liability on this issue after January 2016.'" Respondent's Initial Post-Hearing Brief at 8-9 (emphasis added) (quoting Complainant's Reply to Respondent VSS International, Inc.'s Opposition to Complainant's Motion for Accelerated Decision as to Liability at 17). EPA offers little in rebuttal, raising two weak points: (1) the unremarkable fact that EPA has not amended its Complaint and (2) that EPA's Prehearing Brief stated that it believed it was still entitled to seek penalties for the initial alleged period. Reply Brief at 9. Neither of these points changes the fact that EPA previously represented to this Tribunal and VSS that it was not seeking liability after January 2016.

In its present Reply, EPA entirely ignores this Tribunal's Order on EPA's Motion for Accelerated Decision. Like VSS, the Tribunal took EPA's clear-cut statements to mean what they said: that EPA "is not seeking liability for Count IV after January 2016" and that EPA "appears to acknowledge in its Accelerated Decision Memorandum that Respondent ceased the violation of 40 CFR § 112.7(e) alleged in Count IV following January 2016." Order on Complainant's Motion for Accelerated Decision as to Liability at 25-26. EPA's recanting of its prior statement in its Prehearing Brief—a statement buried in a footnote—cannot overwrite the Tribunal's Order that framed this matter for the Administrative Hearing.

Likewise, EPA's back-pedaling footnote conveys its own uncertainty on the issue following the Court's Order. Citing the Tribunal's language, EPA wrote, "Complainant believes that pursuant to the unamended Complaint it may seek penalties for full duration that facts are

established at the hearing." Complainant's Prehearing Brief at 17 n.4 (emphasis added). EPA's belief is, of course, irrelevant. If EPA wanted clarity on the issue, it had the opportunity to raise the matter when the Tribunal called for preliminary matters at the start of the hearing. Tr. 7:3-4. But it did not do so. Any lingering uncertainty should not be construed against VSS, but against the party that created it, EPA.

Finally, EPA's accusation that VSS has taken its statements out of context lacks merit. As VSS argued in its Initial Brief, EPA's statement concerning the liability period was in no way qualified or limited. Respondent's Initial Post-Hearing Brief at 8-9. In Reply, EPA never even tries to explain—or even acknowledges, for that matter—the very statement that forms the basis for VSS's current argument. Without such an explanation, VSS respectfully submits that EPA be bound by its statements, and that Count IV be limited to January 1, 2015 through January 30, 2016. And because EPA does not argue that it has proven a violation during the relevant period VSS should prevail on Count IV. *See* Respondent's Initial Post-Hearing Brief at 10-12.

2. EPA Has Also Failed To Prove a Violation of 40 CFR Section 112.7(e) During the Relevant Period It Initially Alleged.

Even when accounting for the portion of the relevant period that it previously abandoned, EPA has not met its burden. As VSS noted in its Initial Post-Hearing Brief, a tank integrity inspection program that is consistent with industry standards contains three components: (1) routine inspections that the facility conducts; (2) formal certified external inspections; and (3) formal certified internal inspections. What exactly EPA continues to challenge in its Reply Brief is not entirely clear, so VSS addresses each type of inspection below.

Routine Inspections. While EPA does not explicitly concede that it is not asserting VSS did not conduct routine inspections, it identifies no evidence suggesting otherwise. For that reason alone, it has not satisfied its burden.

Certified External Inspections. At the Hearing, and in its Initial Post-Hearing Brief, VSS provided evidence showing that all of the tanks at its facility had received certified external inspections, were replaced, or were taken out of service. *See* Respondent's Initial Post-Hearing Brief at 14-16. EPA appears to half-heartedly contest this in its Reply, writing, "The documents in the Prehearing Exchange, RX 55 through RX 68, which were entered into the record at hearing, only demonstrate steps towards compliance because the documents do not include records of formal inspections *on all tanks at the Facility*." Reply Brief at 10 (emphasis added). But the reports submitted were only exemplars of the certified inspections conducted; EPA completely ignores Craig Fletcher's testimony concerning the remaining certified external tank inspections. EPA offers virtually no evidence to contradict Mr. Fletcher's testimony that all tanks at the facility had either received a certified external inspection, been replaced, or placed out of service. *See* Respondent's Initial Post-Hearing Brief at 14-16 (collecting evidence of certified external inspections for each tank, including Mr. Fletcher's testimony). EPA was free to cross-examine Mr. Fletcher on the external inspections performed whose reports were not entered into the record, but it did not ask any questions concerning these reports. Consequently, the only record evidence demonstrates that VSS conducted a certified external inspection on—or replaced—every tank at its facility.

Certified Internal Inspections. Finally, as to the certified internal inspections, EPA does not appear to take issue with the evidence outlined in VSS's Initial Post-Hearing Brief showing that, at most, only six tanks have overdue internal inspections. *See id.* But even if these inspections are overdue, they do not fall within the relevant time period of January 1, 2015 to January 30, 2016 under any circumstances. As EPA acknowledges, VSS had until at least November 2016—five years from the date the revised regulations took effect—to comply. Reply

Brief at 11. This left VSS with at least ten additional months to comply before a violation could possibly occur. Likewise, the tank integrity program designed by Mr. Fletcher provided for certified internal inspections to occur as late as the 2018-2019 Winter Season. RX 9 at 6. This falls even later than the end of liability period EPA alleges in its Complaint—January 1, 2018. Compl. ¶ 65; *see also* Reply Brief at 9. In short, while a handful of certified internal inspections may be overdue, VSS was permitted by the Fletcher Report to finish its internal inspections *after* the end of the relevant period. EPA has therefore failed to establish a violation during the relevant period—either as modified by its subsequent statements or as initially alleged.

3. VSS Indisputably Took Good-Faith Efforts to Comply with the Revised Regulations.

EPA's assertion that "[t]he record does not demonstrate good faith efforts to meet the regulatory requirements" with respect to the AST integrity testing requirement is baseless and completely belied by the record. Reply Brief at 11. First, EPA argues that "Respondent did not take steps to establish written procedures and document them in its SPCC Plan until several years after the requirement to document the inspection and testing procedures took effect in 2011, and after EPA brought the violation to Respondent's attention on May 22, 2014." *Id.* at 12. But as EPA knows, VSS retained an outside firm, Condor Earth Technologies, to prepare its SPCC Plan, and that plan provided, "All of the ASTs that contain oil products are shop built and are supported on an impervious, corrosion-resistant surface (concrete). AST construction consists of either welded or riveted steel panels. Visual inspection of these ASTs is functionally equivalent to integrity testing. Consequently, no additional integrity testing will be performed on the shop built ASTs." CX 16 at 17. It is undisputed VSS completed such visual inspections on a regular basis and therefore complied with its SPCC plan as written. RX 2 at 64-169.

When VSS subsequently learned that more was required in May 2014, it promptly retained Fletcher Consultants Inc.—one of the premier consultants in California—to prepare a tank integrity testing program that would comply with industry standards. That protocol was sent to VSS in September 2014, just a few months after VSS became aware of the violation. Based on his interactions with VSS at that time, Mr. Fletcher testified that VSS was "very eager to conform with the requirements of the standard and definitely wanted to remain compliant with the requirements." Tr. 608:17-20. If VSS's efforts here are not a good-faith attempt at compliance, it is hard to see what is.

EPA also argues that VSS's bad faith is evidenced by the fact that "it failed to follow the set schedule" in the FCI integrity testing program. Reply Brief at 12. Not so. Admittedly, VSS's adherence to the FCI program was not always perfectly timely, but this does not necessarily amount to a violation of 40 CFR Section 112.7(e) and certainly does not demonstrate bad faith. The FCI integrity testing program provided "flexibility for that process so the facility can adapt their operations so they wouldn't need to take every single tank out of service at the same time." Tr. 621:4-6. Again, the proposal provided for internal inspections to occur up until the 2018-2019 Winter Season. RX 9 at 6. Further, as Mr. Fletcher explained, "[y]ou can learn a lot from the tanks you internally inspect in the first year." *Id.* at 621:8-10. And that is exactly what happened, as EPA acknowledges: as VSS conducted inspections, it learned new information, and decided to replace certain tanks instead of needlessly conducting inspections. Reply Brief at 12 n.12. While this may have resulted in a few tanks having inspections that were overdue, replacing old tanks with new ones is a "big investment for the facility"—and is something that should be applauded, not penalized. Tr. 634:25-634:1.

Overall, VSS attempted in good faith to comply with its obligations under the revised version of 40 CFR Section 112.7(e). To the extent there were imperfections, these should be contextualized: after the changes to 40 CFR Section 112.7(e) went into effect in late 2011, the entire industry has been in "a state of catch-up." Tr. 646:16-17. That is because "there are literally hundreds of thousands of tanks in the United States that were installed before the advent of the requirement to perform inspections consistent with an industry standard." *Id.* at 646:9-13. As discussed in this Reply Brief and in VSS's Initial Post-Hearing Brief, VSS has not been indifferent to the regulations or defiant of them; to the contrary, it has always attempted to comply and taken substantial steps in furtherance of that.

E. Count V (Facility Response Plan)

In EPA's Reply Post-Hearing Brief, it makes the following contentions regarding the potential applicability of the FRP requirement to the VSS facility:

First, EPA contends that the secondary containment calculation to be performed for FRP applicability should have been based on a containment wall height;

Second, EPA concludes that Tank # 865 was not permanently closed and thus the volume of its contents should have been added to the calculation;

Third, EPA essentially seeks to rewrite the regulation by contending that where a facility is with 0.5 miles of a navigable water, no analysis of overland flow can or should be performed;

Fourth, the facility is within a designated Area Contingency Plan;

Fifth, any facility within a calculated planning distance categorically would have met the regulatory prerequisite of "injury";

Sixth, Mr. Michaud's analysis shows that there was a requirement for an FRP; and

Seventh, VSS did not submit a timely and complete FRP.

Each of these is discussed in turn.

First, regarding the calculation of secondary containment within the Bulk Asphalt Containment Storage Area, Mr. Michaud never visited the site, Mr. Michaud has not observed or tested the containment wall, Mr. Michaud is not a structural engineer, Mr. Michaud did not know whether there was a structural engineer for the wall but, even if there was, he did not know what the "Max. Fluid Ht" reference meant.

Although Mr. Michaud speculated that it could be a structural calculation of the strength of the wall,[7] there are no any structural plans for the wall in the record, the identity of the structural engineer, if any, is not identified, and there is no summary or report of the conclusions of any such review.

For Mr. Michaud's part, he testified that he was "unsure" about the meaning of the Max. Fluid Ht. reference in the Haley & Aldrich report, that he had to "think twice" about it, but, after he "thought twice," he "used a four-foot zero … calculation [and] I adopted that as, the basis for my calculations …." (a calculation that showed that there was sufficient containment). Tr. 286:10 – 291: 6. This is not "sound" (or "unsound") engineering practice – it is not engineering practice at all; rather, it is an interpretation that the Haley & Aldrich report was ambiguous and, as such, Mr. Michaud performed his calculation using two different scenarios, not knowing which reflected actual site conditions. Mr. Michaud noted this ambiguity in his initial report in 2016 and repeated his view in his testimony at the hearing, as set forth in VSS's Initial Post-Hearing Brief. He testified that he ultimately used the 4'-0" height, which showed the wall permitted for adequate secondary containment.

[7] As noted previously, Mr. Swackhammer testified that while secondary containment can be engineered, it need not be so, Respondent's Initial Post-Hearing Brief at 8 n.8.

Furthermore, although EPA contends that "[a]bsent a compelling reason to disregard [the 3'-2"] number, it should be used as the most conservative, and therefore the most reliable, input …." But EPA cites no authority for its evidentiary proposition that the 3'-2" should be used "[a]bsent a compelling reason" (a novel evidentiary burden) or how EPA developed that standard as the level of proof applicable in a case such as this one. Similarly, while EPA contends that "the burden shifted to Respondent to disprove that the 'plainly-stated' 3'2" maximum fluid height is not the appropriate input in the calculation," EPA cites no authority for this "burden-shifting" evidentiary proposition.

Second, regarding Tank # 865, while EPA contends that "the photographs in the [Powers] report [d]o not show signage that Tank # 865 had been permanently closed, Reply Brief at 15, EPA does not address the photographs referenced in VSS's Initial Post-Hearing Brief, which, as noted therein, stated:

> (i) the tank is clearly marked "**EMPTY**," (DSCF2553.JPG, DSCF 2515.JPG, DCSF 2555.JPG, DCSF 2556.JPG, DCSF 2580.JPG) as well as being clearly marked "**NOTICE: OUT OF SERVICE**" (DSCF2537.JPG, DSCF2534.JPG, DSCF2538.JPG);
>
> (ii) the lines have been blinded (DSCF2560.JPG)
>
> (iii) the valves are capped and are disconnected (DSCF2553.JPG, DSCF2555.JPG and DSCF2559.JPG)
>
> (iv) the tank mixer is disconnected (DSCF2526.JPG); and
>
> (v) the tank heater is disconnected (DSCF2542.JPG and DSCF2543.JPG).[8]

[8] It is exactly because the tank could not be used (and its fittings, pumps, heaters and valves disconnected) that the tank was not in an "aboveground storage area," which also is a prerequisite to the determination made under 40 CFR Section 112.20(f)(1)(ii)(A) (*i.e.*, it was in an inactive production area precisely because it could not and was not going to be used). *See* (Continued...)

Based on the foregoing, EPA's position that this tank therefore "could easily be put back into use," Reply Brief at 16, strains the limits of credulity. The only item that is not readily apparent in the photographs is the date that the tank was marked closed; while the date may well be present on the tank, beyond a doubt, all other indicia of closure (which are overwhelming) are present and the photographs clearly show the tank could not mistakenly have been placed back in service.

The regulations do not require that closed tanks be removed from a facility and so VSS deciding to place this tank in an inactive area of the plant was entirely within the scope of the regulation. As noted previously, during the relevant timeframe, Tank # 865 was not within an "aboveground storage area," as is required by 40 CFR Section 112.20(f)(1)(ii)(A)—as Tank # 865 had been empty and out of service since 2004 (a fact which is not disputed in the record) and was thus located outside of any active production areas at the VSS facility. *See* Declaration of Kari Casey In Support Of Respondent VSS International, Inc.'s Opposition To Motion For Accelerated Decision, dated August 20, 2018, Par. 7. EPA has failed to address this regulatory prerequisite.

Third, although EPA denies that it is arguing that "preparation of an FRP is automatic if a facility is within one-half mile of a navigable water," EPA's Reply Brief further underscores that this is the case, a position EPA also advanced at the hearing. As a consequence, the overland transport of oil must be evaluated (as stated in Section 5.1) and, in fact, in this case, both experts performed an overland flow analysis and EPA's expert testified that overland transport also was part of the applicability analysis for facilities not bordering a body of water.

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also Tr. 457:24-458:2: "Well, that tank, 865, should have been identified, I believe, as 880, and it got – it was incorrectly identified as in spill containment and it was not. It never has been."

However, EPA's position is not consistent with the regulations and is not even consistent with the testimony of its own expert at the hearing.

As was corroborated by EPA's own witnesses Mr. Swackhammer at the hearing of this matter, the planning distance calculations are used both for FRP applicability and to prepare for FRP response actions. In its Reply Brief, EPA essentially proposed that Section 5.0 "Overland Transport" be written out of the regulations. Mr. Swackhammer equated FRP applicability with the calculation of FRP planning distance. Mr. Swackhammer also testified (contrary to EPA's position in its Reply Brief) that "overland transport of oil" is required to be evaluated along with the D1 through D4 planning scenarios. Tr. 66:9 – 18. *See also* Tr. 70:13 – 18 ("Yes, you typically use the planning distance for applicability evaluations, and then you re-use that planning distance for planning development. It's an important component of what's called the vulnerability analysis that's part of the plan development"); Tr. 97:19 – 98:13 ("Q: Right. In other words, if you're within a half a mile, you're required to do the planning distance, and doing the planning distance is part of answering the ultimate question of whether an FRP is required. A: That's correct. Q: Okay. One last question. Have you ever seen a situation where a facility might be doing both a 5.0 overland transport analysis and a D3 navigable water analysis as part of answering the ultimate question of an FRP. A: Certainly, that's part of the reason for including section 5.0 in consideration of oil transport over land. So that's definitely envisioned. Even though it's not depicted here in Figure C-1, certainly the nearest opportunity, if there is no storm drain within that particular flowpath, then it would be a oil transport over land flow path to

the navigable water, be it a sheet flow or via open channel congruent flow, something along those lines.") [9]

Fourth, as noted in VSS's Initial Post-Hearing Brief, in VSS's opinion, EPA did not establish that the site is determined to be within a fish and wildlife and sensitive environment.

Fifth, as noted previously, it was incumbent upon EPA to establish as part of its prima facie case that the hypothesized discharge from the VSS facility would be likely to cause injury to fish and wildlife and sensitive environments.

Here, EPA acknowledges that it did not present evidence of this element of its prima face case. [10] *This should be dispositive.*

In any event, in the absence of any evidence, or even argument, EPA now contends that this Tribunal should overlook its omission in the presentation of its case for the reason that "EPA purposefully did not limit the definition of 'injury' to a discharge that would have the potential to cause substantial harm,'" citing to 59 Fed. Reg. 34070, 34079-34080 (July 1, 1994 (OPP Final Rule)). This is a non-sequitur but in any event it is unavailing.

As before, the cited reference actually supports VSS's position because the reference explains that the definition of "injury" was modeled on the definition in the Natural Resource Damage Assessments (NRDA) rule at 43 CFR Section 11.14, and noted that, "in the preamble to

[9] S*ee* Section 5.1: "Facility owners and operators *must* evaluate the potential for oil to be transported over land to navigable waters of the United States. The owner or operator must evaluate the likelihood that portions of a worst case would reach navigable waters via open channel flow or from sheet flow across the land, or be prevented from reaching navigable waters when trapped in natural or man-made depressions excluding secondary containment structures." (Emphasis supplied.)

[10] "Injury" is defined in Section 112.2 as follows: "Injury means a measurable adverse change, either long-term or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions."

the NRDA final rule (51 FR 27706) DOI indicates that the injury definition *does not measure insignificant changes* and that the definition relies on changes that have been demonstrated to adversely impact the resources in question …." *Id*. (emphasis supplied).

Here, as noted in VSS's Initial Post-Hearing Brief, at p. 20 n. 19, there is no basis for concluding that EPA's expert Mr. Michaud's hypothetical "one inch" formula ("if it move[s] into that, that body of water … by one inch, it will – it will have impact to that body of water, according to the regulations ….")—even it were have to have been established in this case—would constitute an impact that was not "insignificant" or one that has been "demonstrated to adversely impact the resources in question." Certainly, EPA presented no evidence that this was the case, or why that should be so.

Sixth, EPA contends that Mr. Michaud's analysis shows that an FRP was required, stating:

> "Complainant established that the WHF Analysis is not the only analysis for analyzing how oil from a worst-case discharge from the Facility might flow overland, that the WHF Analysis was overly simplistic, and that the analysis offered by Mr. Michaud provides Complainant, and the Presiding Officer, with a reasonable basis to conclude that it is likely that a portion of oil from a worst-case discharge at the Facility could reach the SRDWSC."

First, it was not alleged in EPA's prior filings or at the hearing that WHF's analysis was "overly simplistic," nor does EPA offer any backup for that claim in its Post-Hearing Reply Brief, where it now first has been made.

Second, and more importantly, while VSS does not take issue with Mr. Michaud's use of the model created (and used by both experts) by James C. Y. Guo, *Overland Flow Model for Hot*

Asphalt Oil Spill" (2005), VSS strenuously objects to the portion of Mr. Michaud's analysis based upon his self-created, EPA-funded, VSS-specific model which he used to determine initial splash and other components of his analysis.

It was disclosed only at the hearing that Mr. Michaud's first effort in developing this model (as to which he later would be contracted to EPA for at least four sites[11]) was developed *for this specific site in contemplation of litigation*.

In this regard, Mr. Michaud testified as follows:

> "Q: Okay, And what's the – what's the name of your model?
>
> A: I don't – I haven't named it, it's not a published model. I, I refer to it in my head, I guess, when people ask me about it as the column collapse model.
>
> Q: Does it have any sort of intellectual property protection that you've applied for?
>
> A: I have not, no.
>
> Q: Does anybody else have it, besides you?
>
> A: I don't – so I may have – I may have shared the basic model with EPA. I'm not – I'm not sure. Certainly, it's available to EPA, if they would like to see it. It's their property.
>
> Q: They paid for it.
>
> A: Correct.
>
> Q: When was the model developed, what year?
>
> A: I, I think my initial version of the model was probably in 2016….

[11] Tr. 280:10 – 281:19.

A: And if it was developed in 2016, that's also the year that you prepared the report, was this report part of the research and development of the model?

A: Yes, yeah."

Tr: 351:13 – 352: 19.

While this factual record certainly raises legitimate questions of bias, VSS is not required to establish whether or not bias was present respecting Mr. Michaud and this particular EPA contract for the VSS facility because, based on the testimony, clearly there is a fundamental question of reliability, at the very least as to that portion of Mr. Michaud's testimony that rests on his self-developed, EPA-funded, non-peer reviewed, model. *City of Pomona v. SQM North America*, 750 F. 3d 1036 (9th Cir. 2014) (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)). In this case, this component of Mr. Michaud's testimony was an integral part of his substantial harm calculations and thus the unreliability of that component negates his ultimate conclusions set forth in CX 14 (pages 9 to 12 of 20).

Seventh, as previously noted, VSS engaged a consultant to prepare an FRP and assist the facility in implementing the FRP.

Although EPA takes a seemingly unfair and unwarranted swipe at VSS's consultant, Kari Casey (Reply Brief, pages 22 – 23), the record is clear that EPA itself may have had less than an superior command of the FRP regulatory scheme (as evidenced, in part, by EPA's May 22, 2014 letter and the testimony of some of its employees at the hearing).

Be that as it may, VSS demonstrated through its submittals and testimony at the hearing its dedication to making good-faith efforts to comply with the FRP requirements. At the same time, although EPA argues that this Tribunal should disregard EPA's own statements and conduct, EPA did not honor obligations it made to VSS and did not disclose to VSS information

that would have been in furtherance of VSS's compliance efforts (*e.g.*, not forwarding to VSS a copy of EPA's FRP Plan Review Checklist, which set forth the alleged deficiencies in the FRP Plan as of 2017). Certainly, by the time of the hearing (the last inspection having occurred in 2016), EPA was unable to articulate any matters of alleged FRP non-compliance that remained.

III. COMPLAINANT'S REPLY FAILS TO RESCUE ITS OVERREACHING PENALTY REQUEST.

As with Complainant's Initial Post-Hearing Brief, Complainant's Post-Hearing Reply Brief rests on circular reasoning without grounding in fact. Indeed, Complainant seems to miss the entire point of Respondent's arguments about Complainant's chosen penalty.

To be clear, Respondents do not challenge the existence of EPA's Penalty Policy, what the text of the Penalty Policy says, or whether, should the Presiding Officer find Respondent liable for statutory or regulatory violations, penalties may ensue. *See* Reply Brief at 25-26.

What Respondent *does* argue is that Complainant has failed to support its penalty request through *application* of the policy to the facts. Respondent addresses Complainant's arguments *seriatim*:

A. Respondent does not dispute the content of the Clean Water Act, EPA's regulations, or EPA's penalty policy.

1. "The Clean Water Act expressly authorizes penalties for failure to comply with the Oil Pollution Prevention regulations." (Reply Brief at 25-26).

Respondent agrees. Respondent does not deny that penalties are a consequence for failure to comply with the Clean Water Act. But whether a party is *liable* for failure to comply with the law is distinct from what *penalty* should ensue, which Complainant overlooks when it cites *In re: Industrial Chemicals Corp.*, 10 E.A.D. 241 (2002), 2002 WL 102373, at *2, for the proposition that "supposedly good environmental performance has no bearing" on *liability*. *See*

Reply Brief at 26. What Complainant has not shown—even if it succeeds in proving *liability*—is that its chosen *penalty* is appropriate.

2. "The potential for harm of storing large quantities of oil in aboveground storage tanks is well established." (Reply Brief at 26-27)

Again, Respondent does not dispute that EPA's regulations and preambles thereto say what they say.

But Complainant has failed to connect those regulatory and preambular statements to its arguments regarding the appropriate penalty for any finding of liability against Respondent. For example, EPA may have "recognized the risk inherent in storing large amounts of oil in aboveground storage tanks," Reply Brief at 26, but if such risk were attributable to a specific penalty amount there would be no discretion in the penalty policy. In a statutory scheme where liability is strict but penalties are discretionary it simply cannot follow that any violation necessarily equates with the maximum penalty, which Complainant seeks here.

3. "EPA's General Enforcement Policy provides an appropriate framework to analyze the statutory Penalty Criteria of 'seriousness.'" (Reply Brief at 27-28)

Respondent has not argued that the General Enforcement Policy is inappropriate. Instead, Respondent maintains that Complainant has failed to correlate policy with fact, and in so doing has failed to satisfy its burden to demonstrate that the penalty it seeks is warranted. Complainant has provided no persuasive response.

B. Complainant's recitation of the Penalty Criteria fails to persuade that its requested penalty is appropriate.

Respondent agrees that "one cannot apply the penalty policy unquestionably as if the policy were a rule with binding effect." Reply Brief at 28 (citation omitted). But that is exactly what Complainant has done here, contrary to its claim that it has "adapt[ed]" the policy in

forming its request, Opening Brief at 28, as the following discussion—and VSS's Initial Post-Hearing Brief—demonstrates.

1. "Moderate Noncompliance"

EPA's Penalty Policy explains that the "examples" Complainant argues lead inexorably to a "moderate noncompliance" finding are "for purposes of illustration only," and that the category selected should "tak[e] into consideration the specific facts of the case." CX 40 at 21. In such consideration, facts that are "certainly relevant . . . are facility design and other features that serve to reduce environmental risk." *Industrial Chem. Corp.*, 2002 WL 102373, at *17.

Not only has Complainant not explained how the facility's design or other features should mitigate Complainant's assessment of seriousness, it has also failed to explain the foundational inquiry of environmental risk. *See* VSS Initial Post-Hearing Brief at 38-39. Citation to generalizations in a preamble do not suffice, *e.g.*, Reply Brief at 27, where EPA's own policy instructs Complainant to consider the specific facts of this case.

Case in point, the issue of this particular facility's size: Respondent is aware of the Penalty Policy's category of "[m]ore than 1 million" gallons, and that Respondent's facility would fall under the "fourth column." Indeed, Respondent cited the specific page of the policy in its initial brief. VSS Initial Post-Hearing Brief at 39. Respondent's quarrel with Complainant's assessment is, again, not looking to the specific facts of the VSS facility. "More than 1 million" is a vast category, without outer limit. Complainant has failed to demonstrate why its request for $45,000 is appropriate here where the suggested range is $20,000 to $50,000. CX 40 at 9.

2. "Major Impact"

Complainant asserts that its "determination is directly from the CWA § 311 Penalty Policy." Reply Brief at 30. That is precisely the problem. Complainant has demonstrated no

understanding of its duty to evaluate these particular circumstances. Complainant reasons as follows: (1) The SRDWSC is a sensitive area. (2) The "facility stores over four million gallons of oil and is located only 200 feet from the SRDWSC." (3) Therefore, "a discharge would likely have a significant effect on a sensitive ecosystem," and as such, constitute a "major impact." Reply Brief at 30. Complainant has skipped a step—an analysis of *why* statements (1) and (2) necessarily lead to conclusion (3). This omission is fatal to its conclusions.[12]

3. Duration of Violation

As before, in describing its adjustment to its penalty request for the duration of the alleged violations, Complainant follows the Penalty Policy as binding, with no exercise of the discretion and analysis the Penalty Policy requires. Reply Brief at 31. This is enough to reject Complainant's calculation.

4. Culpability

The arguments Complainant makes as to why Respondent is a "sophisticated" company meriting a 30% upward adjustment in penalty also miss the mark. Complainant cites to no definition of "sophisticated," making its assessment entirely subjective. Bare citation to two record documents, both containing only raw data regarding the company such as annual sales (CX 35 and CX 36), says nothing about a company's sophistication.

For example, if EPA wanted to set a sales-dollar threshold for sophistication, it could have, but it has not (nor has Complainant proffered sales totals as indicative of sophistication). Moreover, Complainant's citation to its penalty explanation does not support Complainant's

[12] The most Complainant has to say on this point is that "a portion of oil from a worst-case discharge at the Facility could reach the SRDWSC." Reply Brief at 22. Notably, Complainant does not make this assertion in making its case on penalty. Even if Complainant had done so, it would not be able to establish that "a portion of oil" that may "reach" the SRDWSC "would likely have a significant effect" on that area, as discussed above.

unqualified assertion regarding sophistication. Rather, EPA previously asserted that "it is reasonable to assume *some level* of Respondent's . . . sophistication." CX 48 at 15 (emphasis added). This is hardly a resounding conclusion.

The record demonstrates that Respondent relied heavily upon its consultant, Condor Earth Technologies, to guide its compliance with EPA requirements, precisely because Respondent lacked sophistication in this regard. *See, e.g.*, RX 2 at 3 (explaining that Respondent was "advised by Condor Earth" and that Condor, in turn, relied upon written and verbal representations from EPA, when preparing the SPCC plan).

The correspondence Complainant cites to support Respondent's alleged knowledge of EPA's requirements (RX 6 and RX 23) post-date several of the alleged violations by more than two, and as many as five, years, undermining claims that "respondent should have been able to *prevent* the violation," as the culpability factor requires. CX 40 at 12 (emphasis added). And it bears mention that the Presiding Officer called into question whether RX 6 could constitute the notice Complainant asserts. Order On Complainant's Motion For Accelerated Decision (December 26, 2018), p. 31 n. 28. Complainant's claims regarding sophistication, and by extension its upward adjustment for culpability, ring hollow.

5. FRP Penalty

Complainant's accusation that Respondent's legal arguments are indicative of substantive noncompliance is improper and not befitting a regulatory agency. Reply Brief at 32. Respondent has every right to press its argument regarding legal liability, and the effect of that liability on Complainant's penalty assessment. That is the nature of the adversarial system.

Regardless, Respondent *has* made good-faith efforts to comply with EPA's demands, whether or not they are in fact legally required. *See, e.g.*, Respondent's Initial Post-Hearing

Brief at 28. In the event the Presiding Officer determines Respondent was required to prepare an FRP, these circumstances should mitigate, or negate, any penalty assessment.

In sum, Complainant's attempt to salvage its penalty request on reply cannot compensate for the fundamental errors identified in Respondent's Initial Post Hearing Brief (at 36-41).[13] Should the Presiding Officer determine a penalty is warranted, a downward adjustment should be considered.

IV. CONCLUSION

Respondent VSS respectfully requests, for the foregoing reasons, that no penalty be assessed as to the SPCC counts (Counts I-IV) or, if a penalty is assessed, that it be *de minimis*, and further respectfully requests that there be no finding that VSS was required to prepare a FRP for its facility but, in the event the Presiding Officer decides an FRP was required, that no penalty be assessed.

Dated: October 11, 2019

CROWELL & MORING LLP

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VSS INTERNATIONAL, INC.

[13] Complainant's throwaway argument about its request being a "fraction" of the equivalent per-day penalty is a nonstarter. Reply Brief at 32. Congress enacted a statutory maximum for a reason, and did not assign a minimum average penalty. Complainant has requested the maximum, and its attempt to minimize that fact through resort to averaging is meritless.

CERTIFICATE OF SERVICE

I, Debra A. Jackson, hereby certify that on October 11, 2019, I caused to be filed electronically, the foregoing **RESPONDENT VSS INTERNATIONAL, INC.'S POST-HEARING REPLY BRIEF** in the Matter of VSS International, Inc., Docket No. OPA 09-2018-0002, with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Debra A. Jackson, herby certify that on October 11, 2019, I served a true and correct copy of the foregoing **RESPONDENT VSS INTERNATIONAL, INC.'S POST-HEARING REPLY BRIEF** in the Matter of VSS International, Inc via electronic mail to the following attorneys for the EPA:

Rebecca Sugerman at Sugerman.rebecca@epa.gov
Rebekah Reynolds at Reynolds.rebekah@epa.gov
Andrew Hemlinger at Helmlinger.andrew@epa.gov

Dated: October 11, 2019

Respectfully Submitted,

Debra A. Jackson

Debra A. Jackson