UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	DOCKET NO. OPA 09-2018-0002
	)	
VSS International, Inc.	)	**COMPLAINANT'S REPLY TO**
	)	**RESPONDENT VSS INTERNATIONAL,**
Respondent.	)	**INC.'S OPPOSITION TO**
	)	**COMPLAINANT'S MOTION FOR**
	)	**ACCELERATED DECISION AS TO**
	)	**LIABILITY**
	)	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Code of Federal Regulations

Federal Register

I. INTRODUCTION

Respondent has expended considerable effort in Respondent's Opposition to Complainant's Motion for Accelerated Decision ("Response") to complicate a relatively simple matter. That is, Respondent is required to comply with the federal Oil Pollution Prevention regulations, including the requirements for Spill Prevention Control and Countermeasure ("SPCC") regulated facilities and Facility Response Plan ("FRP") regulated facilities, and failed to do so. In its Response, Respondent attacks Complainant's showing in Complainant's Memorandum in Support of its Motion for Accelerated Decision as to Liability ("Supporting Memorandum"), that Respondent's facility, located at 3785 Channel Drive, in West Sacramento, California ("Facility"), which is approximately 200 feet from the Sacramento River Deep Water Ship Chanel ("SRDWSC"), is subject to both SPCC and FRP requirements, because: (1) discharges from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful, a requirement for showing that a facility is subject to both SPCC and FRP requirements; and (2) a discharge from the Facility could cause substantial harm to the environment, a requirement for showing that a facility is also subject to FRP requirements. Respondent further attacks Complainant's showing that Respondent failed to meet the SPCC and FRP requirements that formed the basis of Counts I through V in Complainant's Administrative Complaint and Opportunity to Request a Hearing ("Complaint"). As demonstrated below, Respondent's arguments fall short of their intended marks and are full of erroneous legal analysis, misquotations, and red herrings. Respondent has not offered probative evidence to challenge Complainant's demonstration that the record establishes that there is no genuine issue as to any material fact as to Respondent's liability and Complainant is entitled to the relief

requested in its Motion for Accelerated Decision as to Liability ("Motion"), which is judgment as a matter of law as to liability.

II. DENIAL OF THE MOTION IS NOT WARRANTED

Complainant sincerely regrets that it failed to comply with the instruction in the Prehearing Order, dated April 20, 2018, to contact the other party to determine whether the other party has any objection to the granting of the relief sought in the motion, and to state the position of the other party in the motion. Complainant offers no excuses and apologizes to this Court for its oversight.

Respondent's request to this Court to dismiss the Motion pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), which provide for a finding of default "after motion," and which would thereby waive Complainant's "right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice," is not warranted. *See* 40 C.F.R. § 22. 17(a). The Consolidated Rules provide that "[w]hen the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." *Id.* § 22.17(c). Here, if such a motion requesting default were pending, which it is not, good cause exists to deny such motion because the available relief for such a motion, which is dismissal of the Complaint with prejudice, is not in proportion to Complainant's offense.

There was no prejudice to Respondent because Respondent had over two weeks to respond to the Motion and did indeed file a substantive response to the Motion within this allotted time. Respondent has shown no interest in settlement: the record demonstrates that

Complainant and Respondent engaged in discussions over the course of several years seeking to find common ground on the issues in this case, *see generally* RX 7 through RX 36, and these discussions were unsuccessful; and while Complainant was agreeable to mediation for this matter, Respondent expressly declined mediation. Finally, the filing of the Motion was well in advance of any relevant deadlines set forth by this Court.

Respondent's argument that there was harm because many issues could have been eliminated from the Motion is belied by Respondent's vigorous opposition to the Motion. The Motion and Supporting Memorandum were not, as Respondent suggests, unnecessarily lengthy. The Motion simply asks this Court for an accelerated decision as to liability. The Supporting Memorandum is structured so that the elements of a prima facie case under the Oil Pollution Prevention regulations are laid out in a straightforward manner, quickly summarizes the elements in which Respondent admitted to in its Response to Administrative Complaint and Request for a Hearing ("Answer"), and addresses in detail the elements that Respondent denied in its Answer. The structure of and analysis in the Motion and Supporting Memorandum would not have changed if Complainant had contacted Respondent. Now, both Complainant and Respondent have spent considerable effort preparing substantive memoranda regarding the Motion. Not only is denial of the Motion not warranted, a ruling on the Motion could substantially narrow the issues to be presented at hearing thereby saving resources for this Court.

III. RESPONDENT HAS FAILED TO PRODUCE PROBATIVE EVIDENCE SHOWING THAT THERE IS A GENUINE DISPUTE OF MATERIAL FACTS

A. RESPONDENT'S FACILITY IS SUBJECT TO FRP AND SPCC REQUIREMENTS

1. The Facility is subject to SPCC requirements because discharges from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful (Response, III.A, p. 4)

Respondent wrongly contends that the SPCC applicability test at 40 C.F.R. § 112.1(b), where discharges from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful, tracks the FRP applicability test at 40 C.F.R. § 112.20(f)(1)(ii)(B), where a facility is subject to FRP requirements if, because of its location, it could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines. It is a well-established canon of construction that the use of different words or terms demonstrates an intent to convey a different meaning for those words. *Padash v. INS*, 358 F.3d 1161, 1169, n.7 (9th Cir. 2004) *citing SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("Even words with remarkably similar definitions can still convey a unique or distinct meaning or flavor from words that are similar or even synonymous in nature because of their differing tone or usage within a sentence").

The language in Section 112.1(b) is not the same as the language in Section 112.20(f)(1)(ii)(B). Section 112.1(b) is a requirement for SPCC applicability; whereas Section 112.20(f)(1)(ii)(B) is a requirement for FRP applicability. Sections 112.1(b) and 112.20(f)(1)(ii)(B) describe two separate standards: a "may be harmful" standard for SPCC applicability; and a "substantial harm" standard for FRP applicability. Only a subset of SPCC-regulated facilities is subject to the additional FRP requirements at 40 C.F.R. § 112.20. *See* 65

Fed. Reg. 34,690 (May 31, 2000) ("The owner or operator of a facility that is required to have a spill prevention control and countermeasure (SPCC) plan under the Oil Pollution Prevention regulation (40 CFR part 112) and that could cause 'substantial harm' to the environment must prepare and submit to EPA a facility response plan"). Conflating Section 112.1(b) with Section 112.20(f)(1)(ii)(B), as Respondent does, would create an absurd outcome in that only facilities that are subject to the additional FRP requirements would have to follow the SPCC requirements. Thus, if EPA had intended for the standard set forth in Section 112.1(b) to be the same as the standard set forth in Section 112.20(f)(1)(ii)(B), it should have used identical language or cross-referenced the two sections.

Respondent has failed to offer any evidence showing that there is a genuine dispute of material facts that a discharge from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful. Accordingly, Respondent's Facility is subject to the SPCC requirements, including the SPCC requirements described in Counts I through IV of the Complaint.

2. The Facility is also subject to FRP requirements because a discharge from the Facility could cause substantial harm to the environment

An SPCC-regulated facility is also subject to FRP requirements if a discharge could cause substantial harm to the environment. *See* 40 C.F.R. § 112.20(a). "Substantial harm," which Respondent states is the central issue in the case, is only an element of a prima facie case for FRP liability (i.e., Count V) and, as discussed in Section III.A.1, above, has no bearing on SPCC liability (i.e., Counts I through IV). *See* Respondent's Motion, III.B, p. 5. Nevertheless, a discharge from the Facility, could cause substantial harm to the environment because Respondent's Facility has a capacity of more than one million gallons and a discharge from the Facility could cause injury to fish and wildlife and sensitive environments.

i. A discharge from the Facility could cause injury to fish and wildlife and sensitive environments

As discussed in further detail below, Respondent's legal analysis of the application of the FRP regulations to its Facility is flawed. Respondent offers no probative evidence to dispute Complainant's showing that the SRDWSC is a sensitive environment and misconstrues the regulatory formula for determining "substantial harm." Because the Facility, which is 200 feet from the SRDWSC, is within the planning distance to a fish and wildlife and sensitive environment, as properly construed following the applicable formula, a discharge from the Facility could cause injury to a fish and wildlife and sensitive environments.

a. The SRDWSC is a sensitive environment (Response, III.B and III.D)

Respondent attempts two unpersuasive arguments and offers no evidence to dispute that the SRDWSC is within the Area Contingency Plan ("ACP"). First, Respondent argues that "the Complaint has not established whether the site is within the ACP." *See* Response, III.B, n.5. An administrative complaint must include "[s]pecific reference to each provision of the …implementing regulations…which respondent is alleged to have violated" and "[a] concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a). The Complaint more than meets these requirements. Paragraph 11 of the Complaint states that "[t]he Facility covers approximately 10.5 acres and lies approximately 200 feet north of the [SRDWSC]" and Paragraph 18 of the Complaint states that "[t]he Facility is located at a distance (as calculated pursuant to 40 CFR Part 112 Appendix C or comparable formula) such that a discharge from the Facility could cause injury to fish and wildlife and sensitive environments." Taken together, these two provisions provide sufficient notice to Respondent that Complainant is alleging that a

discharge from the Facility could cause injury to fish and wildlife and sensitive environments and, therefore, the Facility is subject to FRP requirements.

Second, Respondent argues that it has "established that the site is not within any *other* protected fish and wildlife designated area." *See* Response, III.B, n.5 (emphasis added). While Respondent previously raised these arguments in its Prehearing Exchange, these are not settled issues in the case. Moreover, Respondent's suggestion that it is necessary to establish that the SRDWSC is a protected fish and wildlife designated area[1] to establish that the SRDWSC is a "fish and wildlife and sensitive environment" within the meaning of 40 C.F.R. § 112.2, is a red herring. The SRDWSC is a fish and wildlife and sensitive environment simply because it is listed as a sensitive site in the ACP. *See* 33 U.S.C. § 1321(j)(4)(C)(ii) (providing that the ACP shall, among other things, "describe the area covered by the plan, including the areas of special . . . environmental importance that might be damaged by a discharge . . . ."); *see also* 40 C.F.R. § 300.210(c)(4) (Area Committees "incorporate into each ACP a detailed annex containing a Fish and Wildlife and Sensitive Environments Plan . . . and shall include other areas considered sensitive environments in a separate section of the annex . . . ."). The analysis to determine whether the SRDWSC is a fish and wildlife and sensitive environment ends once it is determined that it is listed as a sensitive site in the ACP. There is no need to delve deeper to determine whether the SRDSWC is also a "protected fish and wildlife designated area," as that term is used by Respondent. Respondent does not in fact dispute that the SRDSWC is included in the ACP as a sensitive site.

[1] Presumably by using the term "protected," Respondent is referring to an area designated as critical habitat under the Endangered Species Act.

b. A discharge from the Facility could cause injury to the SRDWSC (Response, III.B)

Respondent's attempt to complicate a straightforward legal analysis to determine that a discharge could cause injury to the SRDWSC assumes more complicated circumstances than at issue. The correct analysis is straightforward because the Facility is less than 0.5 miles from the SRDWSC and because, as discussed above, the SRDWSC is itself a fish and wildlife and sensitive environment because it is listed as a sensitive site in the ACP. Applying the applicable planning distance calculation presented in Appendix C to 40 C.F.R. Part 112 to the facts at hand requires a finding that a discharge from the Facility could cause substantial harm.

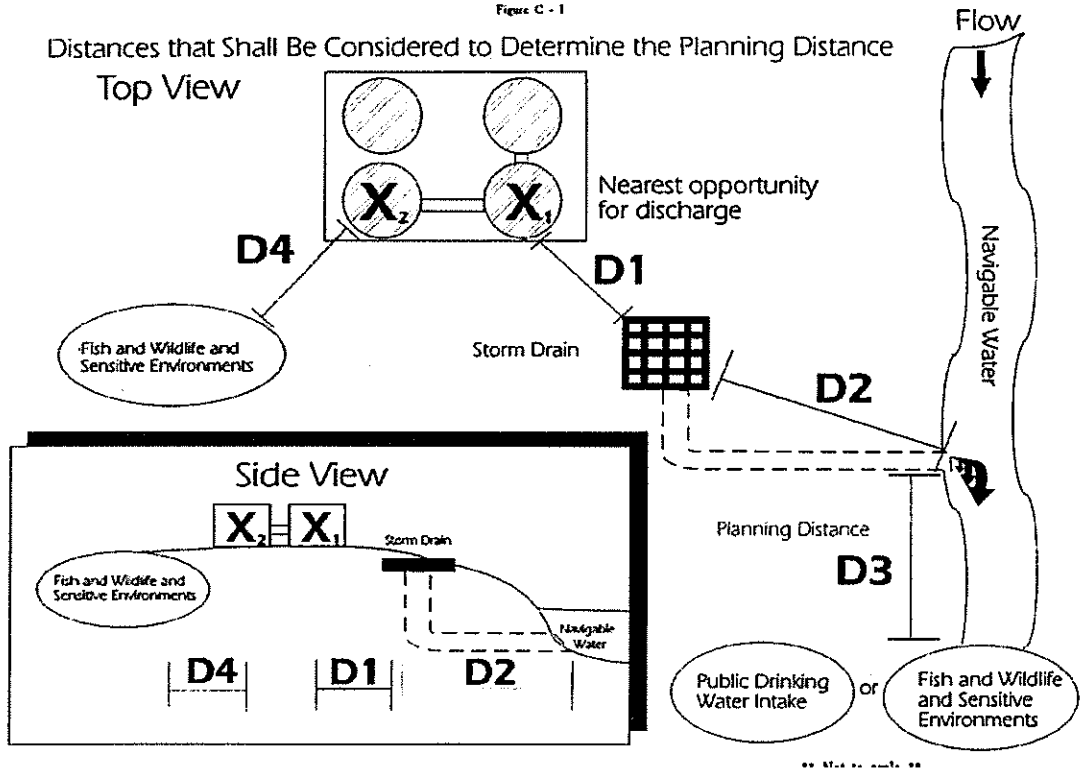
Respondent suggests that Complainant failed to calculate a planning distance and that this failure is fatal to the Motion. This is untrue on both accounts. First, Complainant did calculate the planning distance and determined that the planning distance is anything greater than zero or, put another way, determined that any discharge from the Facility necessarily satisfies the planning distance calculation. As discussed in Section V.A.7.ii.b.2 of the Supporting Memorandum, the applicable planning distance calculation for Respondent's Facility is "D3" because the Facility is within 0.5 miles of a navigable water (and here the navigable water, the SRDWSC, is also a sensitive environment). *See* 40 C.F.R. Pt. 112, App. C, Section 5.5. "D3=Distance downstream from the outfall within which fish and wildlife and sensitive environments could be injured…" *Id*. at Section 5.4.[2]

[2] On page 8 of the Response, Respondent incorrectly cites to 40 C.F.R. Part 112, Appendix C, Section 5.3 for the description of the D3 planning distance. This section provides as follows:

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

Section 5.3 is a formula for calculating oil traveling over land that is used when a facility is located at a distance greater than 0.5 miles from navigable waters and planning distance D1 or D2 is used. *See* 40 C.F.R. Part 112, App.

Figure C-1, reproduced below, makes clear that a more extensive planning distance calculation is only needed when the fish and wildlife and sensitive environment is further downstream from the discharge point to the navigable water, and not one and the same, i.e. when the discharge is directly to the fish and wildlife sensitive environment. *See* 40 C.F.R. Pt. 112, App. C, Fig. C-1.



Here, since the discharge point to the navigable water is the SRDWSC, and the SRDWSC is a fish and wildlife and sensitive environment, using the D3 planning distance calculation, the discharge to the sensitive environment is immediate upon discharge to the SRDWSC and treated as instantaneous by regulation.

C, Section 5.0. The correct description for the D3 planning distance is provided in 40 C.F.R. Part 112, Appendix C, Section 5.4.

Second, because the fish and wildlife and sensitive environment is so close to the Facility, calculating a planning distance is not necessary, and certainly if not done, though it was done here, is not fatal. The regulations do not require a planning distance calculation where it is clear, such as here, that a fish and wildlife and sensitive environment would be impacted. *See* 40 C.F.R. Pt. 112, App. C, Section 1.3 ("calculation of a planning distance for proximity to fish and wildlife and sensitive environments and public drinking water intakes is required, unless it is clear without performing the calculation (e.g., the facility is located in a wetland) that these areas would be impacted").

Respondent also offers a flawed legal interpretation to argue that locational factors should be considered as part of the planning distance calculation. In making this argument, Respondent misquotes 40 C.F.R. Part 112, Appendix C, Section 5.6, stating that locational factors must be considered when a facility is located "*less* than 0.5 miles from a navigable water." Response, III.B, p. 8 (emphasis added). But in fact, Section 5.6 is only applicable to "[a] facility that is located at a distance *greater* than 0.5 miles from a navigable water." 40 C.F.R. Pt. 112, App. C, Section 5.6 (emphasis added). Here, Section 5.6 is not relevant because, as already established, the Facility is not located at a distance greater than 0.5 miles from a navigable water. Rather, Section 5.5 is the applicable section, which does not permit consideration of locational factors. *Compare* 40 C.F.R. Part 112, Appendix C, Section. 5.5 (which excludes any reference to the consideration of locational factors as appropriate for facilities less than 0.5 miles from navigable waters) *with* Section 5.6 (which discusses the types of locational factors that may be considered for facilities greater than 0.5. miles from navigable waters).[3] Respondent ignores the clear

[3] It may be appropriate to consider locational factors during a hearing regarding penalty. At such time, Respondent would have the opportunity to present its arguments why it believes that locational factors would minimize the harm from a worst-case discharge, and Complainant would in turn have an opportunity to rebut these arguments.

direction of the regulations and proceeds to offer a lengthy discussion of locational factors in a blatant attempt to confuse this Court. *See* Response, III.B, pp. 10-15.

ii. Even if the Facility has adequate secondary containment, it is subject to FRP requirements because a discharge from the Facility could cause injury to fish and wildlife and sensitive environment and therefore could cause substantial harm to the environment (Response, III.C)

Based on the issues raised in Section III.C of the Response, Complainant concedes that there appears to be a genuine issue of material fact as to whether Tank 865 in the product manufacturing and storage area is an active tank. However, this factual issue has no ultimate impact on the ability for this Court to find that a discharge from the Facility could cause substantial harm to the environment because having inadequate secondary containment is only one of several ways in which a facility becomes subject to the FRP requirements. As described above, there is no genuine issue of material fact that the Facility is located such that a discharge from the Facility could cause injury to a fish and wildlife and sensitive environment and therefore cause substantial harm to the environment. This incontrovertible fact alone is sufficient to determine that the Facility is subject to the FRP requirements.

B. RESPONDENT FAILED TO MEET CERTAIN SPCC AND FRP REQUIREMENTS

1. Count I: Respondent's SPCC Plan(s) did not include management approval; a facility diagram with all fixed containers, storage containers, storage areas and connecting pipes; and containment or diversionary structures for tanks not permanently closed (Response, III.E)

Respondent contends that compliance should be evaluated on only the April 2012 and May 2017 SPCC Plans and that the October 2014 and January 2016 SPCC Plans were simply drafts. At no time, however, did Respondent state to Complainant that the October 2014 and the January 2016 SPCC Plans were drafts. Nor do these SPCC Plans have any markings (e.g., a

watermark) to indicate that they are drafts. *See generally* CX 17 and CX 18. Respondent cites to its discussion in Section III.I of the Response for support that Complainant agreed to provide feedback to Respondent as it was refining its submission of its SPCC Plans. However, Section III.I of the Response is limited to a discussion on the adequacy of the FRP and shows no commitment by EPA to provide feedback on Respondent's alleged draft SPCC Plans. Furthermore, there is no basis to assume compliance assistance by the regulator allows a regulated entity to avoid compliance with applicable regulations.

Exhibit A of the Witul Declaration provides a summary of the deficiencies that Ms. Witul identified from her review of the April 2012, October 2014, January 2016, and May 2017 SPCC Plans, and provides a summary of the deficiencies observed during her November 2012 and September 2016 inspections of the Facility. Even if this Court accepts Respondent's contention that only the April 2012 and May 2017 SPCC Plans should be considered for determining the scope of Respondent's SPCC violations, Complainant has demonstrated, and Respondent has not rebutted, that the April 2012 SPCC Plan falls short of SPCC requirements; specifically, it fails to include each fixed oil storage container and the storage area where mobile or portable containers are located, the type of oil in each fixed container and its storage capacity, and associated piping, as required by 40 C.F.R. § 112.7(a)(3). Rather, Respondent incorrectly states that "Complainant has acknowledged that the VSSI 2012 SPCC plan was compliant with applicable requirements. (Motion, p. 25, fn.9)." Response, III.E, p. 17. Again, Respondent attempts to mislead this Court because Footnote 9 of the Supporting Memorandum relates only to the April 2012 Professional Engineer certification (Count II) and not the remainder of violations identified in the Complaint. Supporting Memorandum, V.B.2., n.9 ("EPA finds no fault with Respondent's Professional Engineer certification *in the April 2012 SPCC Plan*" (emphasis added)).

2. Count II: Respondent's SPCC Plans did not have an adequate certification from a Professional Engineer (Response, III.F)

Respondent does not dispute that its October 2014 and January 2016 SPCC Plans did not contain adequate Professional Engineer certifications. Instead, Respondent again claims that these were "drafts" and therefore not subject to regulations. As discussed in Section III.B.1, above, Respondent has not demonstrated that its October 2014 or January 2016 SPCC Plans were drafts.

3. Count III: Respondent failed to update its SPCC Plan within six months after putting Tank # 2001 and Tank # 2002 into service (Response, III.G)

i. Tank # 2001

Respondent suggests that the evidence that Complainant relied on to determine that Tank # 2001 went into service in late March 21, 2012 is unreliable. However, this evidence was not only reliable but was admitted by Respondent in Respondent's own documents submitted to Complainant. The evidence that Complainant relied on included: (1) Respondent's August 23, 2013 response to EPA's information request pursuant to Sections 308 and 311(m) of the CWA, 33 U.S.C. §§ 1318 and 1321(m) (CX 11); (2) the October 2014 FRP/SPCC Plan (CX 17, p. 106); (3) the January 2016 SPCC Plan (CX 18, p. 98); (4) the January 2017 FRP (CX 19, p. 14); and (5) the May 2017 FRP (CX 21, p. 20). Since Respondent submitted these documents to Complainant, they were presumably carefully reviewed and edited by multiple personnel at the Facility and/or contractors of Respondent. Indeed, Respondent stated in its response to EPA's information request, signed by Jeffrey R. Reed, President of VSS International, Inc., that

> this response was prepared with the principle input of several employees of VSS Emultech and Basic Resources, Inc. (the parent corporation of VSS Emultech) as well as input of outside vendors, environmental consultants and legal counsel to VSS Emultech. These people include the following…Pat McNairy…Jeff Nowlin…Diane Minor…Randy Tilford…Wesley P. Greenwood…and Robert Job.

CX 11, pp. 2-3; RX 2, pp. 2-3. The information response further states that Tank # 2001 "was placed in service in late March, 2012 (based on knowledge of the facility personnel identified above, particularly Messrs. McNairy and Nowlin)." CX 11, p. 4; RX 2, p. 4. Finally, this information request response includes the following statement from Mr. Reed:

> In preparing this response, I caused a diligent records search and a diligent effort to interview current and former employees with pertinent information to be undertaken and completed. All pertinent information responsive to U.S. EPA's request is contained herein is true, correct and complete.

CX 11, p. 5; RX 2, p. 5.

In contrast to the formal submittals EPA relied on to determine Respondent was out of compliance with the SPCC regulations, Respondent cites to two pieces of information with no probative value to call into question the date in which Tank # 2001 was put into service. First, Respondent cites to RX 37, an email chain between Facility personnel and Respondent's consultants strategizing on how to respond to EPA's information request. In this email chain, there is a PDF attached in which there is a typed instruction stating "[p]rovide the date when each of the 2.5 million gallon [sic] Aboveground Storage Tanks were first put into use. In other words what is the date these ASTs first started being filled with asphalt." RX 37, p. 5. Under this typed instruction is a handwritten note that states "only 1 of the 2.5 M is in use 3/21/2013." *Id.* The information in this handwritten note appears to have been provided by Pat McNairy. *Id.* As discussed above, when Respondent provided its formal response to EPA, a response reviewed by not only Pat McNairy but also Nowlin and Reed, Respondent stated that the date that Tank # 2001 was put into service was late March 2012. In addition, if the late March date was truly an error, why didn't Respondent correct the date when it submitted its many SPCC and FRP Plans to EPA? *See* CX 17, p. 106; CX 18, p. 98; CX 19, p. 14; and CX 21, p. 20. Until the filing of the

Response, however, Respondent never provided EPA with any indication that the March 21, 2012 date was incorrect. The March 21, 2013 date that Respondent offers now appears, at best, to be most properly characterized as a typographical error.

Second, Respondent relies on Randall Tilford's declaration that merely makes a bald statement that Tank # 2001 was not in service in April 2012. Response, III.G, p. 18; *see also* Tilford Decl. ¶ 2. That Mr. Tilford's declaration does not state when Tank # 2001 went into service, nor does it state why the March 21, 2012, date that, as discussed above, was provided to EPA by Respondent in response to EPA's information request and was included in multiple versions of its FRP and SPCC, is telling. Respondent's own information request response, which includes substantial foundation, is overwhelmingly more probative than Mr. Tilford's unsupported declaration. Moreover, during Ms. Witul's November 2012 inspection of the Facility, Ms. Witul observed that Tank # 2001 was in service. Witul Decl. ¶ 13. Respondent can offer no probative evidence to dispute the March 21, 2012 date because there is none.

Even if this Court were to find that the date Tank # 2001 was put into service is in dispute, Respondent would still be in violation of the requirement of 40 C.F.R. § 112.5(a), which requires a facility to update its SPCC Plan within six months following a change in design, construction, operation or maintenance which materially affects its potential for a discharge. There is no dispute that Respondent did not amend its SPCC Plan to reflect that Tank # 2001 was put into service until at least October 2014, which would be over 1.5 years past even Respondent's alleged March 21, 2013 date of service.[4]

[4] In Sections III.E and III.F of the Response, Respondent argues that both its October 2014 and January 2016 SPCC Plans were drafts, not revisions, and that only its April 2012 and May 2017 SPCC Plans can be considered the official SPCC Plan for the Facility upon which compliance with the SPCC requirements should be evaluated. If this were the case, which Complainant believes is not supported, then even using Respondent's suggested dates of service, which Complaint also believes is not supported, Respondent should have amended its April 2012 SPCC Plan to reflect that Tank # 2001 had been put into service by October 21, 2013, and should have amended its April

ii. Tank # 2002

Respondent also offers the declaration of Mr. Tindall to suggest that Tank # 2002 went into service in January 2016. Here again, Mr. Tindall's declaration fails to explain why he is putting forward a date different than the July 15, 2015, date provided in Respondent's January 2017 FRP (CX 19, p. 14) and May 2017 FRP (CX 21, p. 20). Respondent's attempt to offer the Aerial Photo and Site Map, included in its January 2016 SPCC Plan, as additional evidence that Tank # 2002 was not in service in January 2016 also falls short. *See* CX 18, p. 16-17. The bottom right corner of the Aerial Photo identifies the image as a google image, dated April 18, 2014. *See id.,* p. 16. In addition, the Site Map is not dated. *See id.,* p. 17. Respondent has not submitted any evidence that the Aerial Photo and Site Map reflected conditions at the Facility on January 15, 2016.

Nonetheless, even, if the Court accepts the evidence proffered by Respondent as probative, it is undisputed that Respondent did not amend its January 2016 SPCC Plan until January 2017, more than six months (in fact, one year) after the January 2016 date that Respondent now offers for putting Tank # 2002 in service. As such, there is no material factual dispute that Respondent failed to amend its SPCC Plan within six months of putting Tank # 2002 in service, in violation of 40 C.F.R. § 112.5(a), and a finding of liability is warranted.

2012 SPCC Plan to reflect that Tank # 2002 had been put into service in by July 2016. Respondent cannot escape partial liability for Count I (Management Approval) and liability for Count II (Professional Engineer Certification) by arguing that the October 2014 SPCC/FRP Plan was merely a draft, and then rely on the October 2014 SPCC/FRP Plan as the final SPCC Plan in this count (Count 3) to show compliance with the requirement to update its SPCC plan within six months after putting Tank # 2001 and then Tank # 2002 into service. In short, Respondent is attempting to have its October 2014 and January 2016 SPCC Plans be considered drafts only when it would relieve Respondent of a violation; Respondent cannot characterize the October 2014 and January 2016 SPCC Plans both ways.

4. Count IV: Respondent failed to keep records of inspections and tests (Response, III.H)

Respondent's assertion that Complainant has not provided evidence of noncompliance with the inspection and test requirements at 40 C.F.R. § 112.7(e) is unfounded. Response, III.H, p. 19. The Supporting Memorandum thoroughly outlines the industry standards for tank inspections and tests that are applicable to the Facility. Supporting Memorandum, V.B.4, pp. 26-30. The Supporting Memorandum explains how the industry standards that are applicable to the Facility, specifically the ultrasonic testing and internal inspection standards, were not adequately incorporated into the April 2012 SPCC Plan, and that the Facility failed to provide EPA with documentation of any formal external inspection by certified inspectors, including ultrasonic testing, or internal inspections performed prior to January 2016. *Id.*

Respondent suggests that the records provided to EPA on August 23, 2013, show that it met the requirement to document the inspections in accordance with industry standards. *See* RX 2, pp. 64-169. Upon examination, however, these records merely document the weekly informal external inspections performed by Facility personnel and do not demonstrate that Respondent had performed the required formal external inspections, including ultrasonic, testing and internal inspections. *See id.* The shortcomings of these records are clear when comparing the records of weekly *informal* external inspections, which were provided on August 23, 2013, with the records of *formal* inspections performed between June 1, 2016, and January 15, 2017, which were provided during the Prehearing Exchange. *Compare* RX 2, pp. 64-169 *with* RX 54-RX 68. Contrary to Respondent's suggestion, Complainant is not seeking a finding of liability on this issue after January 2016. Respondent has not produced any evidence showing that there is a genuine dispute that Respondent failed to keep records of required ultrasonic testing and internal inspections through January 2016.

5. Count V: Respondent failed to submit a timely and adequate FRP (Response, III.I)

i. Respondent's FRP was not timely

Respondent does not dispute that it did not submit an FRP until at least October 24, 2014. Respondent's argument that Complainant and Respondent were analyzing whether the FRP requirements applied between 2014 and 2017 is another red herring. *See* Response, III.I, p. 19. Liability pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), is strict; either the FRP requirements apply or do not apply to the Facility. *See United States v. B.P. Exploration & Prod. Inc. (In re Deepwater Horizon)*, 753 F.3d 570, 575 (5th Cir. 2014) (stating that "civil-penalty liability under 33 U.S.C. § 1321 arises irrespective of knowledge, intent, or fault"); *see also Ward v. Coleman*, 598 F.2d 1187, 1191 (10th Cir. 1979) (assessing penalty pursuant to 33 U.S.C. § 1321(b)(6) is "without regard to fault and subject to no defenses"), *rev'd on other grounds*, 448 U.S. 242 (1980). The time for Respondent to analyze whether the FRP requirements applied to the Facility was prior to adding the additional tank capacity that made the Facility subject to the FRP requirements in the first place. Moreover, it is not EPA's role to determine whether an individual facility is subject to FRP requirements. EPA relies on facility owners and operators to conduct this analysis.

EPA's enforcement program does provide a check to ensure a subset of facilities at any given time is following the FRP requirements. Indeed, after EPA's November 2012 inspection of the Facility, EPA formally communicated to Respondent that it believed that the Facility is subject to FRP requirements and was in violation of such requirements. *See* RX 6 (a letter from David Wampler, Acting Assistant Director of the Enforcement Division at EPA, to Jeffrey Reed, President of VSS International, Inc.). From sending that letter through the present, while EPA considered information provided to it by Respondent, EPA never withdrew its formal

determination that the Facility was subject to FRP requirements. Accordingly, if this Court finds that the Facility is subject to FRP requirements, it must find that Respondent failed to submit an FRP until at least October 24, 2014, the date of its first FRP.[5]

iii. Respondent's FRPs were not compliant with the Oil Pollution Prevention regulations

Respondent also does not dispute that when it finally did prepare an FRP, its FRP did not follow the format of the model facility-specific response plan, as required by 40 C.F.R. § 112.20(h). Respondent asserts that its FRP was compliant with the Oil Pollution regulations because staff at EPA "advised Respondent that it would evaluate, and permit VSSI to submit, an alternative FRP that would be suitable for the VSSI facility. *See* Declaration of Kari Casey, ¶ 4) [sic]; Declaration of Randall Tilford, ¶ 3." Response, III.I, p. 19. While this is certainly a fact subject to dispute and could be an issue raised during a hearing on penalty, this factual dispute has no bearing on liability. The regulations are explicit; the only way an FRP that does not follow the format of the model FRP would be adequate is if an owner or operator can show that it has prepared an equivalent response plan acceptable to the Regional Administrator to meet State or other Federal requirements. 40 C.F.R. § 112.20(h). Respondent provides no evidence, because there is none, that it provided or the Regional Administrator accepted an equivalent response plan for the Facility that did not follow the model FRP. Moreover, the regulations require that "[a] response plan that does not follow the specified format in appendix F to this part shall have an emergency response action plan as specified in paragraphs (h)(1) of this section and be supplemented with a cross-reference section to identify the location of the elements listed in paragraphs (h)(2) through (h)(10) of this section." *Id.* Thus, even if Respondent received

[5] For the same reasons presented in Sections III.B,1 and III.B.2, and Footnote 4, above, if this Court accepts as compelling Respondent's argument that Respondent's October 2014 FRP/SPCC Plan is a draft and not a revision, then the period in which Respondent failed to submit an FRP extended into 2017.

permission from the Regional Administrator to deviate from the model format, which it did not, its October 2014 FRP failed to include an emergency response action plan and have a cross-reference section, and its January 2017 FRP failed to include an adequate emergency response action plan. Moreover, Respondent has failed to demonstrate that it is implementing all FRP requirements, including training, exercises and drills.

IV. RESPONDENT'S EVIDENTIARY OBJECTIONS TO COMPLAINANT'S DECLARATIONS ARE WITHOUT MERIT AND ARE NOT RELEVANT TO LIABILITY

With its response, Respondent submits evidentiary objections to Complainant's declarations. Although these objections would be more properly framed as a motion in limine to allow Complainant an opportunity to fully rebut the objections, Complainant is submitting as an attachment to this Reply its responses to Respondent's objections. Regardless, none of the objections are relevant to the undisputed facts that establish the prima facie elements of liability for each count in the Compliant.

V. CONCLUSION

Respondent's arguments are unpersuasive. Complainant has unquestionably shown that there is no genuine issue of material fact that Respondent is subject to both SPCC and FRP requirements, and failed to comply with these requirements. Complainant respectfully requests that this Court find that Complainant is entitled to judgment as a matter of law as to liability. Specifically, Complainant requests that this Court find that: (1) discharges from the Facility could reasonably be expected to reach the SRDWSC in quantities that may be harmful; (2) a discharge from the Facility could cause substantial harm to the environment because a discharge from the Facility could cause injury to fish and wildlife and sensitive environments, because (a) the SRDWSC is a sensitive environment and (b) the Facility is within any planning distance; (3)

Respondent's SPCC Plan(s) did not include management approval; a facility diagram with all regulated fixed containers, storage containers, storage areas and connecting pipes; and containment or diversionary structures for tanks not permanently closed; (4) Respondent's October 2014 and January 2016 SPCC Plans did not have an adequate certification from a Professional Engineer; (5) Respondent failed to update its SPCC Plans within six months after putting Tank # 2001 and Tank # 2002 into service; (6) Respondent failed to keep records of required inspections and tests; and (7) Respondent failed to submit a timely and adequate FRP. A finding of liability on these issues would substantially narrow the case so that the scope of the hearing would be limited to determining an appropriate penalty based on the incontrovertible facts.

Dated: August 30, 2018

Respectfully Submitted,

/s/ *Rebekah Reynolds*

_____

Rebekah Reynolds
Assistant Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105
Telephone (415) 972-3916
reynolds.rebekah@epa.gov