UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	
Bertschinger Oil Company **Seminole County, Oklahoma** **(Wooten Tank Battery)**	**MOTION FOR ASSESSMENT OF CIVIL PENALTY**
	Docket No. CWA 06-2009-4808
RESPONDENT.	

MOTION FOR ASSESSMENT OF CIVIL PENALTY

Pursuant to the Regional Judicial Officer's Order, the Complainant United States Environmental Protection Agency ("EPA") Region 6 files this Motion for Assessment of Civil Penalty along with supporting documentary evidence. Complainant EPA is seeking civil penalties in the amount of **$22,000**. In support of this, the Complainant EPA states and argues as follows:

I. PROCEDURAL BACKGROUND

1. Governing Procedures. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. ' 22.1 *et seq.*

2. Filing of the Complaint. On September 8, 2009, the original Complaint and one copy was filed with, and received by, the Regional Hearing Clerk, EPA Region 6.

3. Answer to the Complaint. Respondent failed to file an Answer to the Complaint.

4. Motion for Default. On June 2, 2010, Complainant EPA filed a Motion requesting Respondent be found in default and liable for violations alleged in the Complaint for Respondent's failure to file a timely answer to the complaint. The Regional Judicial Officer subsequently issued an Order Finding Respondent in Default and for Further Proceedings, requiring Complainant to file a Motion for Assessment of Civil Penalty by July 30, 2010.

II. STATUTORY REQUIREMENTS

5. Section 311(b)(6)(B)(i) of the Clean Water Act ("Act"), 33 U.S.C. § 1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990, authorizes the Administrator of EPA to issue an Administrative Complaint for failing to comply with Spill Prevention Control and Countermeasure regulations set forth at 40 C.F.R. Part 112 under the authority of Section 311(j) and other provisions of the Clean Water Act, 33 U.S.C. § 1321(j) and 33 U.S.C. 1251 *et seq.* ("SPCC regulations"). Section 311(b)(6)(A)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(A)(ii), authorizes the assessment of a Class 1 civil penalty by the Administrator for any owner, operator or person in charge of any onshore facility who fails or refuses to comply with any regulation issued under Section 311(j) of the Act, 33 U.S.C. § 1321(j), to which that owner, operator, or person in charge is subject. Pursuant to Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. § 19.4, Respondent is liable for civil penalties up to $11,000 per violation, up to a maximum of $32,500.

6. Section 311(j) of the Act, 33 U.S.C. § 1321(j) authorizes EPA to promulgate regulations establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from onshore facilities, and to contain such discharges.

III. PENALTY ASSESSMENT

7. Civil Penalty. Complainant EPA is seeking assessment of a civil penalty in the amount of **$22,000** for multiple violations of 40 C.F.R. 112.3, 112.5 and 112.7, as promulgated pursuant to Section 311(j), 33 U.S.C. 1321(j).

8. Prima Facie Case - Civil Penalty. Under 40 C.F.R. 22.17(c) and 22.27(c), a Default Order functions as an Initial Decision and becomes a Final Order 45 days after its service. As per 40 C.F.R. 22.24, the Complainant EPA bears the burden of proof for justifying its calculations of penalties.

9. Additional Proposed Evidentiary Exhibits Attached for Penalty Calculation. Attached to this Motion for Assessment of Civil Penalty are the following attachments identified as proposed evidentiary exhibits. Complainant includes these exhibits as corroborating evidence of the facts as alleged in the Complaint and as an aid to the Regional Judicial Officer in assessing a penalty as proposed by the Complainant. The Complainant submits for inclusion into evidence as part of the Administrative Record in the above-stated case the following proposed evidentiary exhibits:

a. Complainant's Proposed Evidentiary Exhibit 1: Copy of EPA SPCC Inspection Record, dated February 6, 2008. This proposed evidentiary exhibit is offered to assist the Regional Judicial Officer in assessing a penalty and to corroborate the allegations in Counts 1 and 2 of the Complaint, to wit:

> 1. Failure to develop, implement, or prepare a written Spill Prevention Control and Countermeasure Plan. (40 C.F.R. 112.3);
> 2. Failure to conduct periodic visual inspections of containers, foundation and supports for deterioration and maintenance needs. (40 C.F.R. 112.9(c)(3));
> 3. Failure to perform periodic examinations of valves and pipelines on a scheduled basis for general condition (including items such as: flange joints, valve glands 2nd bodies, drip pans, pipeline supports, bleeder and gauge valves, polish rods/stuffing box.) (40 C.F.R. 112.9(d)(1)).

b. Complainant's Proposed Evidentiary Exhibit 2: Copy of SPCC Inspection Summary, dated February 6, 2008. This proposed evidentiary exhibit is offered to assist the Regional Judicial Officer in assessing a penalty and to corroborate the allegations in Counts 1 and 2 of the Complaint.

c. Complainant's Proposed Evidentiary Exhibit 3: Copy of U.S. EPA "*Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act*," dated August, 1998, from the Office of Enforcement and Compliance Assurance ("Penalty Policy"). This proposed evidentiary exhibit is offered to assist the Regional Judicial Officer in assessing a penalty.

d. Complainant's Proposed Evidentiary Exhibit 4: Copy of U.S. EPA "*Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)*. This proposed evidentiary exhibit is offered to assist the Regional Judicial Officer in assessing a penalty.

e. Complainant's Proposed Evidentiary Exhibit 5: Economic Benefit Calculation Sheet. This proposed evidentiary exhibit is offered to assist the Regional Judicial Officer in assessing a penalty.

f. Complainant's Proposed Evidentiary Exhibit 6: Penalty Calculation. This proposed evidentiary exhibit is offered to assist the Regional Judicial Officer in assessing a penalty.

g. Complainant's Proposed Evidentiary Exhibit 7: Declaration of Tom McKay, EPA Region 6, Senior Environmental Employee and Inspector, dated July 27, 2010. This proposed evidentiary exhibit is offered to authenticate Complainant's Proposed Evidentiary Exhibits 1 and 2 to corroborate the allegations in Counts 1 and 2 of the Complaint, and assist the Regional Judicial Officer in assessing a penalty.

h. Complainant's Proposed Evidentiary Exhibit 8: Declaration of Bryant Smalley, EPA Region 6, Oil Pollution Act Enforcement Officer, on the Proposed Penalty Calculation, EPA Region 6, dated July 28, 2010. This proposed evidentiary exhibit is offered to authenticate Complainant's Proposed Evidentiary Exhibits 3 through 6, and corroborate the allegations in the Complaint and assist the Regional Judicial Officer in assessing a penalty.

10. Assessment of Civil Penalty. Under the facts outlined in the Complaint and the corroborating evidence in the proposed evidentiary exhibits, and pursuant to 40 C.F.R. 22.27(b), the Complainant EPA requests the Regional Judicial Officer approve assessment of a civil penalty in the amount of **$22,000** against the Respondent for multiple violations of the Clean Water Act, as amended by the Oil Pollution Act of 1990. In support of this request, the Complainant argues as follows:

a. Statutory Factors for Assessment of Penalty: Section 311(b)(8) of the Act, 33 U.S.C. 1321(b)(8), provides that in determining the amount of a civil penalty under the Act, the Administrator shall consider: **1)** the seriousness of the violation or violations; **2)** the degree of culpability involved; **3)** the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; **4)** any history of prior violations; **5)** any other penalty for the same incident; **6)** any other matters as justice may require; **7)** the economic impact of the penalty on the violator, and; **8)** the economic benefit to the violator, if any, resulting from the violation.

b. Agency Guidelines for Assessment of Penalty: Agency guidelines for determining penalties in Class 1 administrative cases for failure to comply with SPCC regulations set forth at 40 C.F.R. Part 112, as promulgated under Section 311(j) of the Act, 33 U.S.C. 1321(j), do not exist. However, EPA has established the "*Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act,*" dated August, 1998, from the Office of Enforcement and Compliance Assurance ("Penalty Policy") to aid EPA in negotiating ***settlement*** of Class 1 claims for violations concerning the failure to properly and adequately prepare and/or implement an SPCC Plan. (Complainant's Proposed Evidentiary Exhibit 3.) Since the Penalty Policy's main purpose is to assist the EPA in arriving at a *settled*-upon

penalty, Complainant concedes that the Regional Judicial Officer is not bound to follow it. However, Complainant offers its use to help guide the Regional Judicial Officer in assessing an appropriate penalty, taking into consideration the eight (8) statutory factors found in Section 311(b)(8), 33 U.S.C. ' 1321(b)(8). Complainant also offers the Declaration of Bryant Smalley who used the Penalty Policy as a means to arrive at a proposed penalty amount in an effort to assist the Regional Judicial Officer in assessing a penalty in this case.

c. Facts: The facts as alleged in the Complaint and as corroborated by the evidentiary exhibits describe a situation in which the Respondent failed to perform the following:

> 1. Count 1 - Failure to develop, implement, or prepare a written SPCC plan in accordance with 40 C.F.R. 112.7, to wit: failure to provide a Spill Prevention Control and Countermeasure Plan pursuant to 40 C.F.R. 112.3;
> 2. Count 2 - Failure to conduct periodic visual inspections of containers, foundation and supports for deterioration and maintenance needs pursuant to 40 C.F.R. 112.9(c)(3), and; Failure to perform periodic examinations of ground valves and pipelines on a scheduled basis for general condition (including items, such as: flange joints, valve glands 2nd bodies, drip pans, pipeline supports, bleeder and gauge valves, polish rods/stuffing box.) pursuant to 40 C.F.R. 112.9(d)(1).

It is unknown when Respondent acquired the Wooten Tank Battery as an operator. However, the facility began operations in 1950. (Complainant's Proposed Evidentiary Exhibit 1). Assuming Respondent has been operating the facility since 1950, Respondent had approximately ten (60) years to cure the violation in Count 1 with respect to its failure to prepare a written SPCC plan prior to EPA's February 6, 2008, SPCC inspection. (Complainant's Proposed Evidentiary Exhibit 1).

Complainant does not have any evidence as to the type of environment surrounding the facility or how sensitive it may be. The SPCC Inspection Report (Complainant's Proposed Evidentiary Exhibit 1) indicates on page 1 of the report that the facility is a mere 500 feet away from an unnamed tributary that flows into Negro Creek.

d. Statutory Factor 1 - **Seriousness of the Violation**: Complainant argues that Respondent's failure to properly develop and implement a SPCC plan in accordance with regulations for a facility that has a total bulk storage capacity of approximately 29,568 gallons within a mere 500 feet from an unnamed tributary of Negro Creek, thence East,

approximately half a mile, to Negro Creek, a navigable water; thence Southeast to the Canadian River (also a navigable water) is very serious. If the total bulk storage of the facility were to fail, the risk of escaped oil reaching Negro Creek and the Canadian River is quite high. This risk increases substantially without a properly prepared SPCC plan and without implementing the plan designed to prevent such an occurrence. Each violation listed in each Count of the Complaint is serious, but when the violations are added together their cumulative effect is exponentially more serious.

1) Penalty Policy Step 1.a: If the Penalty Policy were to be used to calculate an appropriate *settlement* amount for a Class 1 administrative case, Complainant argues that the facts of the instant case would warrant classifying the violation as "Major Noncompliance" in the matrix provided under "Step 1.a: Seriousness", on page 7 of the Penalty Policy. With a total storage capacity of 29,568 gallons, the violations would fall in the range between $8,000 and $20,000 on the matrix on page 7 of the Penalty Policy for no SPCC plan and no secondary containment; failure to implement SPCC plan, and; inadequate or incomplete plan implementation resulting in grossly inadequate containment or hazardous site conditions.

The Penalty Policy takes into account the storage capacity of the facility when determining the seriousness of the violation. Respondent's facility has a storage capacity of 29,568 gallons, a significant amount and almost 3/4ths of the 42,000 gallon threshold listed in the next significant matrix. (Complainant's Proposed Evidentiary Exhibit 1 throught 8).

The Penalty Policy takes into account the existence and adequacy of secondary containment. Respondent's facility has secondary containment. However, there is vegetation within the containment, loose oil at the base of above-ground storage tanks ("ASTs"), and oil staining around the ASTs and valve connections. (Complainant's Proposed Evidentiary Exhibits 1, 2, and 7).

The Penalty Policy also takes into account the degree and nature of the violations. There are three violations in the instant case. Failure to prepare a written SPCC plan and no secondary containment are factors listed as an example of "Major Noncompliance." Failure to periodically inspect containers and valves and piping is not specifically listed per se; however, Complainant argues that these violations are akin to inadequate or incomplete plan implementation resulting in hazardous site conditions. Taken as a whole, the cumulative effect of all three

violations greatly undermines Respondent's ability to prevent or respond to a worst case spill, rendering the violations as a whole as "Major Noncompliance." Using the Penalty Policy as a guide, the higher range of the amount in the matrix (approximately $20,000) would be appropriate given the storage capacity, the failure to prepare an SPCC plan and the other violations creating a hazardous site condition.

An EPA memorandum dated September 21, 2004, titled "*Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004*," ("DCIA Penalty Policy"), implements 40 C.F.R. Part 19, "Adjustment of Civil Penalties for Inflation," and the Debt Collection and Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701 *et. seq.* The DCIA Penalty Policy increases the initial gravity component of a penalty calculation by 17.23% for violations occurring after March 15, 2004. By virtue of the DCIA Penalty Policy, the initial gravity component amount of $20,000 is increased by 17.23% for a total of $23,446.

2) Penalty Policy Step 1.b: Step 1.b of the Penalty Policy (page 9) discusses the upward adjustment of the original amount determined in Step 1a of the matrix. Step 1.b considers the potential environmental impact of a worst case discharge. An upwards adjustment is recommended if the discharge would likely have an effect on human health, actual or potential drinking water, a sensitive ecosystem, wildlife, navigable waters, adjoining shorelines, vegetation and proximity to water or adequacy of containment. Using the Penalty Policy as a guide, the facts in the instant case warrant classifying the violation as a moderate impact due to the facility's proximity to Negro Creek and the Canadian River, navigable water of the U.S. (Complainant's Proposed Evidentiary Exhibits 1, 2, and 7). The lack of an SPCC plan and the failure to periodically inspect containers, valves and piping at a facility in relatively close proximity to Negro Creek and the Canadian River, make it likely that a 29,568 gallon discharge of oil will have a significant impact on a navigable water, its adjoining shoreline and vegetation. A moderate impact would warrant an upwards adjustment of 25% from the amount in Step 1.a. under the Penalty Policy for a total of $29,307.50.

3) Penalty Policy Step 1.c: Step 1.c of the Penalty Policy (page 10) allows for the upward adjustment of the amount determined under Step 1.b to account for the duration of the violation. The exact date Respondent has owned or operated the facility is

unknown. The Complaint alleges Respondent has owned or operated it since at least prior to August 16, 2002. Complainant admittedly has no evidence to support this. The only evidence Complainant has is that the facility itself began operating in 1950. (Complainant's Proposed Evidentiary Exhibit 1). Respondent has not provided any evidence on the matter, either.

Respondent has provided no evidence it has come into compliance with the violations alleged in the Complaint. Under the Penalty Policy, the maximum upward adjustment of 30% is allowed (0.5% for each month the violation has continued for a maximum of 60 months) from the amount in Step 1.b. Without more, Complainant has no choice but to propose the maximum upward adjustment of 30% from the amount in Step 1.b.

e. Statutory Factor 2 - **Culpability**: Complainant argues that Respondent knew or should have known it should have: 1) developed and prepared an SPCC Plan in accordance with the regulations, and 2) provide periodic visual inspections of its containers, valves and piping in accordance with regulations. The sheer volume of the total capacity of Respondent's facility (29,568 gallons) coupled with the fact that the facility is only 500 feet from an unnamed tributary that connects to Negro Creek is enough for any owner/operator to know that certain preventive measures are needed to prevent a worst case discharge. Respondent has not provided any evidence to indicate it could not have reasonably known it was supposed to comply with the regulations, nor has it provided any evidence that it lacked the resources or information available to it.

In using the Penalty Policy as a guide, the policy suggests an upwards adjustment of the penalty amount determined from Step 1 of the policy depending on the degree of culpability. The Penalty Policy allows for an upward adjustment of up to 75% of the amount in Step 1 depending on the degree of culpability. Factors to consider under the penalty policy include the sophistication of Respondent and resources and information available to it, and any history of regulatory staff explaining to Respondent its legal obligations or notifying Respondent violations. Complainant lacks evidence of those factors. However, given the fact that Respondent should have at least known of its obligations by virtue of the facility's storage capacity and proximity to navigable waters, Complainant proposes an upward adjustment of slightly half of the maximum allowable upward adjustment amount of 75%, to wit: 35%.

f. Statutory Factor 3 - **Mitigation**: Section 311(b)(8) of the Act, 33 U.S.C. 1321(b)(8) requires consideration of the nature, extent, and

degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge. The instant case is not one involving a discharge of oil in violation of Section 311(b)(3) of the Act, 33 U.S.C. 1321(b)(3). Instead, it involves the failure to prepare an SPCC Plan as required by the regulations and the failure to provide period visual inspections of its facility in violation of Section 311(j) of the Act, 33 U.S.C. 1321(j), and 40 C.F.R. 112.3 and 112.9. However, Complainant contends that the Regional Judicial Officer should consider the fact that failure to prepare an SPCC Plan and provide periodic visual inspections of containers, valves and piping greatly increases the threat of a discharge. Respondent has not provided any evidence indicating mitigating circumstances for its failure to prepare an SPCC Plan or provide periodic visual inspections under Section 311(j) of the Act, 33 U.S.C. 1321(j) and 40 C.F.R. Part 112, nor has it provided any evidence that it has come into compliance by having prepared one or having put in place a schedule of periodic visual inspections following notification of its violations. As such, no reduction in the penalty amount as set thus far under the guidance of Steps 1 and 2 of the Penalty Policy should be given under this factor. If anything, an upwards adjustment from that amount should be set due to Respondent's failure to provide evidence that it has come into compliance after being notified of the violations.

g. Statutory Factor 4 - **History of Prior Violations**: Complainant is not aware of any history of prior violations by Respondent within the past five (5) years. Likewise, Respondent has not provided any evidence of prior violations on its part within the past five (5) years. Complainant argues that the amount thus far calculated under Steps 1, 2 and 3 of the Penalty Policy should not be adjusted downwards for lack of prior violations. Likewise, no upward adjustment should be made since there is no evidence of prior violations within the past five (5) years.

h. Statutory Factor 5 - **Any Other Penalty for the Same Incident**: Complainant is not aware of any other penalty Respondent has paid for failure to prepare an SPCC plan or provide periodic visual inspections of containers, valves and piping. Respondent has also not provided any information that it has paid another penalty to another agency for failure these violations. As such, Complainant contends there is no reason to offset the proposed penalty by an amount that could have been taken into consideration had such other penalty been paid.

i. Statutory Factor 6 - **Other Matters as Justice May Require**: Complainant argues that Respondent's unresponsiveness and unwillingness to settle since having been served the Complaint should be considered by the Regional Judicial Officer in assessing a penalty.

Complainant expended valuable resources at taxpayer expense in bringing this case before the Regional Judicial Officer and preparing its motions for default and assessment of civil penalty, yet Respondent chose to ignore both the Complaint and the Regional Judicial Officers orders. Various times prior to the filing of the Complaint and thereafter, Complainant contacted Respondent in an attempt to settle its liability for failure to prepare an SPCC plan and provide periodic visual inspections. However, Respondent has been unresponsive and has not shown in any way that it has addressed the violations by coming into compliance with the regulations since the filing of the Complainant. The Regional Judicial Officer should take these factors into account when considering assessment of a penalty in this matter. No downward adjustment should be made to the amount calculated under Steps 1 through 5 of the Penalty Policy thus far.

j. Statutory Factor 7 - **Economic Impact of Penalty on Violator**: Complainant has no evidence of any adverse economic impact a proposed penalty of $22,000 may have on the Respondent. Respondent has not provided any financial information to support the claim or to indicate how it may be impacted economically from payment of a penalty. Complainant argues that the Regional Judicial Officer should consider Respondent's history of unresponsiveness throughout this administrative process as an indicator that any economic impact is minimal and not sufficient to warrant a reduction in the proposed penalty amount of $22,000.

k. Statutory Factor 8 - **Economic Benefit**: Complainant argues that Respondent has accrued an economic benefit by avoiding necessary compliance costs and obtaining a competitive advantage. Respondent has avoided paying significant costs by not complying with federal requirements for oil production bulk storage facilities. It has gained an unfair competitive advantage over other facilities that have born the cost to comply with federal law and prevent damage to human health and the environment. Complainant argues that the Regional Judicial Officer should take this into consideration.

By all calculations under the Penalty Policy as described above and in the Declaration of Bryant Smalley, Respondent's proposed penalty amount adds up to a total of $47,095.24. However, since Section 311(b)(6)(B)(i) limits the amount of a Class 1 penalty to $11,000 for each violation, Complainant argues that $22,000 is an appropriate penalty amount.

THEREFORE, in accordance with 40 C.F.R. ' 22.1 *et seq.*, the Complainant moves that, based on the aforementioned facts and law, the Regional Judicial Officer issue a Default Order in this matter, enter a judgment

against the Respondent, and Order that the Respondent pay a proposed civil penalty in the amount of **$22,000**.

Respectfully submitted,

Edwin M. Quinones
Attorney for Complainant
Assistant Regional Counsel
Region 6, 6RC-S
1445 Ross Ave.
Dallas, TX 75202
(214) 665-8035

7-28-10
Date

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Motion for Assessment of Civil Penalty was hand delivered to, and filed with, the Regional Hearing Clerk, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy of such Motion was placed in the United States mail, to be sent by regular mail, on this 28th day of July, 2010, addressed to the following:

Mr. Richard O. Bertschinger
Bertschinger Oil Co.
6417 Grandmark Dr.
Nichols Hills, OK 73116-6534

Edwin Quinones

7-28-10
Date

EXHIBIT 1

ACKNOWLEDGEMENT AND RECORD OF SPCC INSPECTION AND PLAN REVIEW
ONSHORE OIL PRODUCTION FACILITIES

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY – REGION 6

1445 Ross Avenue, 6 SF-RO, Dallas, Texas 75202-2733

SPCC Case #: FY-INSP- 080085 | FRP ID: FRP-06-

SPCC Inspection Date: 2/6/2008 | FRP Inspection Date:

Name of Facility: Wooten Tank Battery

Latitude: 34.920856 (2) Longitude: -96.75756 (3) Source: Garmin GPS III Plus

Facility Address/Location: EW 1440 Rd & NS 3510 Rd

City: Konawa County/Parish: Seminole State: OK Zip: 74849

Facility Contact: Richard Bertschinger Title: owner/operator

Telephone Number: 405-842-4527 Email:

Name of Owner/Operator: Bertschinger Oil Company

Corporate Address: 6417 Grandmark Drive

City: Oklahoma City State: OK Zip: 73116

Corporate Contact: Richard Bertschinger Title: owner/operator

Telephone Number: 405-842-4527 Email:

405-848-49

Synopsis of Business: oil production

How many employees work at this facility? 4

If unmanned, how many employees maintain this facility?

NAICS #: 21111

Route of Entry to Waterway: South to Negro Creek → East to Canadian River

Distance to Navigable Waterway (in feet): South 500'

Relative direction to water body: 500' Elevation above water body (ft):

SPCC inspector name: Tom McKay	FRP inspector name:
Team members:	Team members:
SPCC Plan review by: Tom McKay	FRP review by:
Date of review: 2/6/2008	Date of review:

Acknowledgement of Inspection

Company Contact: [signature] Title: PRES.

Inspector: Tom McKay Title: Inspector EPA/SEE

Phone: (214) 665-2180

Memorandum Of Understanding

(check all applicable descriptions)

Non-Transportation Related	Transportation Related		
☑ EPA	☐ USCG	☐ MMS	☐ OPS

Facility Type

Onshore Oil:		Offshore Oil:
☑ Production	☐ Drilling/workover	☐ Drilling, Production and Workover

☐ **Bulk Storage** (check all applicable descriptions)

☐ Refinery/Petrochemical	☐ Commercial/Private	☐ Public	☐ Military
☐ Petroleum Distributor	☐ Gas Station/Convenience	☐ School/University	☐ Federal
☐ Trucking/Transport	☐ Auto Dealership	☐ Hospital	☐ State
☐ Contractor	☐ Consumer	☐ Government	☐ Other:
☐ Railroad	☐ Utilities	☐ Federal	_____
☐ Farm	☐ Aviation	☐ State	
☐ Trustee/Native American		☐ Local	

Applicable Storage Containers

(check all applicable descriptions)

☑ Aboveground Storage Tanks	☐ Underground Storage Tanks	☐ Drums	☑ In-plant Piping	☐ Other Containers
☐ Mobile/portable Storage Units	☐ Surface Impoundments	☐ Lagoons	☐ Equipment	_____ _____

Storage Function

(check all applicable descriptions)

☑ Transferring	☐ Distributing	☑ Processing	☑ Gathering	☐ Consuming/Using	☐ Operations

Facility Startup Date: 1950 ±	AST Storage Capacity (gal): 29,568
☑ Existing facility ☐ New facility (After Aug. 16, 2002) *112.3(a)*	UST Storage Capacity (gal):
Is an SPCC Plan prepared? *112.3* ☐ YES ☑ NO	Is an SPCC Plan maintained on-site? ☐ YES ☑ NO
Is an SPCC Plan available for review? ☐ YES ☑ NO (During normal working hours) *112.3(e)(2)*	(For at least 4 hours/day, excluding oil production facilities) *112.3(e)(1)*

If this is a new facility, was the Plan prepared prior to startup? *112.3(b)* ☐ YES ☐ NO ☑ N/A

Is the Facility: ☐ Unattended ☐ Attended (☐ Daily (8 hr) ☐ Daily (24 hr) ☑ Periodically) weekly visits.

* Is the SPCC Plan PE certified? *112.3(d)* ☐ YES ☑ NO Date of Certification:

Name of Professional Engineer: No Plan

License Number: State:

Is the SPCC Plan reviewed every 5 years and, is there an SPCC Plan review signoff sheet? *112.5(b)* ☐ YES ☑ NO

Does the SPCC Plan indicate that management has approved the Plan? *112.7* ☐ YES ☑ NO

Mgmt Personnel Name:

Mgmt Personnel Title:

Have there been reportable spills at this facility of more than 1,000 gallons? *112.4(a)* ☑ YES ☐ NO

Or, has the facility had two spills of more than 42 gallons in the past 12 months? *112.4(a)* ☐ YES ☑ NO

If YES to either, provide: Date of spill: Was Plan submitted per 40 CFR 112.4? ☐ YES ☐ NO

Date of spill: Was Plan submitted per 40 CFR 112.4? ☐ YES ☐ NO

Has there been any change of facility design, construction, operation, or maintenance, that could affect the facility's potential for discharge? *112.5(a)* ☐ YES ☑ NO

If YES, was the amendment a Plan change ☐ or, a design change ☐. Describe the change(s):

Spill may have used creek for operations

Date of latest change: Name of PE certifying amendments *112.5(c)*:

Certification #:

* The PE certification must attest that the following requirements have been satisfied (check items not satisfied): *112.3(d)(1)*:

☐ (i) He/she is familiar with the requirements of the SPCC rule;

☐ (ii) He/she or his agent has visited and examined the facility;

☐ (iii) The Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of the SPCC rule;

☐ (iv) Procedures for required inspections and testing have been established;

☐ (v) The Plan is adequate for the facility;

GENERAL REQUIREMENTS FOR SPCC PLANS 112.7(a-d)	Adequately Addressed in Plan	
Does the Plan format follow the sequence in the rule? *112.7*	☐ YES ☐ NO ☐ N/A	no plan
If no, is a cross-reference provided?	☐ YES ☐ NO ☐ N/A	
Does the Plan call for additional facilities or procedures, methods, or equipment not yet fully operational?	☐ YES ☐ NO ☐ N/A	
If yes, are these items discussed in the Plan? *112.7*	☐ YES ☐ NO ☐ N/A	
Does the Plan include a discussion of conformance with SPCC requirements? *112.7(a)(1)*	☐ YES ☐ NO ☐ N/A	
Does the Plan deviate from SPCC requirements? *112.7(a)(2)*	☐ YES ☐ NO ☐ N/A	
If yes, does the plan describe detailed alternative methods to achieve equivalent environmental protection?	☐ YES ☐ NO ☐ N/A	
Does the Plan contain a facility diagram? *112.7(a)(3)*	☐ YES ☐ NO ☐ N/A	
Does the diagram include:	☐ YES ☐ NO ☐ N/A	
- The location and contents of each container?	☐ YES ☐ NO ☐ N/A	
- Completely buried storage tanks?	☐ YES ☐ NO ☐ N/A	
- Transfer stations?	☐ YES ☐ NO ☐ N/A	
- Connecting pipes?	☐ YES ☐ NO ☐ N/A	
Is there a description in the Plan of the physical layout of the facility and include: *112.7(a)(3)*	☐ YES ☐ NO ☐ N/A	
- The type of oil in each container and its storage capacity? *112.7(a)(3)(i)*	☐ YES ☐ NO ☐ N/A	
- Discharge prevention measures including procedures for routine handling of products? *112.7(a)(3)(ii)*	☐ YES ☐ NO ☐ N/A	
- Discharge or drainage controls? *112.7(a)(3)(iii)*	☐ YES ☐ NO ☐ N/A	
- Countermeasures for discharge discovery, response, and cleanup? *112.7(a)(3)(iv)*	☐ YES ☐ NO ☐ N/A	
- Methods for disposal of recovered materials in accordance with applicable legal requirements? *112.7(a)(3)(v)*	☐ YES ☐ NO ☐ N/A	
- Contact list and phone numbers for the facility response coordinator, NRC, cleanup contractors, and federal, state, and local agencies? *112.7(a)(3)(vi)*	☐ YES ☐ NO ☐ N/A	
Does the Plan include information and procedures for reporting a discharge? *112.7(a)(4)*	☐ YES ☐ NO ☐ N/A	
Does the Plan include procedures to use when a discharge may occur? *112.7(a)(5)*	☐ YES ☐ NO ☐ N/A	
Does the Plan include a prediction of equipment failure(s) that could result in a discharge from the facility per *40 CFR 112.7(b)*?	☐ YES ☐ NO ☐ N/A	
Does the Plan discuss appropriate containment and/or diversionary structures/ equipment (including transfer areas) per *40 CFR 112.7(c)*?	☐ YES ☐ NO ☐ N/A	

no containment for load line taken care of by berm.

GENERAL REQUIREMENTS FOR SPCC PLANS 112.7(a-d) (Continued)	Adequately Addressed in Plan	
Has it been determined in the Plan, that the installation of structures or equipment is not practicable? *112.7(d)* If YES,	☐ YES ☐ NO ☑ N/A	
- Is the impracticability clearly demonstrated? (integrity testing and leak testing of containers, pipes, and valves)	☐ YES ☐ NO ☐ N/A	
- Is a strong contingency plan per 40 CFR 109 provided? *112.7(d)(1)*	☐ YES ☐ NO ☐ N/A	
- Is a written commitment of manpower, equipment, and materials provided in the SPCC plan? *112.7(d)(2)*	☐ YES ☐ NO ☐ N/A	

Comment:

INSPECTIONS, TESTS, AND RECORDS 112.7(e)	Adequately Addressed in Plan	Adequately Addressed in Field
Are inspections and tests required by 40 CFR 112 conducted in accordance with written procedures developed for the facility? *112.7(e)*	☐ YES ☐ NO ☐ N/A No Plan	☐ YES ☐ NO ☐ N/A
If Yes, are written procedures, records of inspections, and/or customary business records:		
- Signed by the appropriate supervisor or inspector?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Kept with the SPCC Plan?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Maintained for a period of three (3) years?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A

Comment:

PERSONNEL TRAINING AND DISCHARGE PREVENTION PROCEDURES 112.7 (f)	Adequately Addressed in Plan	Adequately Addressed in Field
Are oil handling personnel trained on: *112.7(f)(1)*		
- The operation and maintenance of equipment to prevent the discharge of oil?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Discharge procedure protocols (discovery and notification)?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Applicable pollution control laws, rules, and regulations?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- General facility operations?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- The contents of the Plan?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A

PERSONNEL TRAINING AND DISCHARGE PREVENTION PROCEDURES 112.7 (f) (Continued)	Adequately Addressed in Plan	Adequately Addressed in Field
Is there a designated person accountable for spill prevention? *112.7(f)(2)* Name of individual: _____	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Are spill prevention briefings scheduled periodically? *112.7(f)(3)* What is the schedule (minimum at least once a year)? ☐ Daily ☐ Weekly ☐ Monthly ☐ Annual	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Comment:		

FACILITY TANK CAR AND TANK TRUCK LOADING/UNLOADING RACK (excluding offshore facilities) 112.7(h-j)	Adequately Addressed in Plan	Adequately Addressed in Field
Does loading/unloading area drainage flow to catchment basin(s), or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- To treatment system? *112.7(h)(1)*	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- If NO to either, is quick drainage system used?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Is containment system designed to hold at least the maximum capacity of any single compartment of a tank car or tank truck?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Is a system used to prevent departure (tank trucks/tank cars) before completing the disconnection from transfer lines? *112.7(h)(2)* If YES, are there:	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Interlocked warning lights? or,	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Physical barrier systems (i.e., wheel locks)? or,	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Warning signs? or,	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Vehicle brake interlock system?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Are tank cars/tank trucks lower most drains and all outlets inspected for discharges prior to filling and departure? *112.7(h)(3)*	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Does the Plan include a risk analysis and/or evaluation of field-constructed aboveground tanks for brittle fracture? *112.7(i)*	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Does the Plan include a discussion of conformance with applicable requirements of the SPCC rule or any applicable state rules, regulations, and guidelines? *112.7(j)*	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A

FACILITY TANK CAR AND TANK TRUCK LOADING/UNLOADING RACK (Continued) (excluding offshore facilities) 112.7(h-j)		
Comment:		
OIL PRODUCTION FACILITY DRAINAGE 112.9 (b) Note: See Tank and Secondary Containment Forms	**Adequately Addressed in Plan** N o t e n	**Adequately Addressed in Field**
Are drains of dikes or drains described in *112.7(1)* at tank batteries and separation and treating areas closed and sealed at all times except when uncontaminated rainwater is being drained? *112.9(b)(1)* If YES. No valves, evaporation; but siphons out in emergency	☐ YES ☑ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Prior to drainage of the diked area(s), is the rainwater inspected, valves opened and resealed under responsible supervision, and records kept of such events? *112.8(c)(3)(ii)(iii)&(iv)*	☐ YES ☑ NO ☐ N/A	☑ YES ☐ NO ☐ N/A
- Is accumulated oil on the rainwater removed and returned to storage or dispose of in accordance with legally approved methods? *112.9(b)(1)*	☐ YES ☑ NO ☐ N/A	☑ YES ☐ NO ☐ N/A
Are field drainage systems (ditches, oil traps, sumps, or skimmers) inspected for accumulation of oil? *112.9(b)(2)* If Yes,	☐ YES ☑ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Is accumulated oil promptly removed?	☐ YES ☑ NO ☐ N/A	☑ YES ☐ NO ☐ N/A
Comment:		
OIL PRODUCTION FACILITY BULK STORAGE CONTAINERS 112.9 (c)	**Adequately Addressed in Plan** N o n e	**Adequately Addressed in Field**
Are the materials and construction of the containers compatible with the oil stored and the conditions of storage? *112.9(c)(1)*	☐ YES ☑ NO ☐ N/A	☑ YES ☐ NO ☐ N/A
Do all tank battery, separation, and treating facility installations have adequate secondary means of containment for the capacity of the largest single container plus sufficient freeboard for precipitation? *112.9(c)(2)*	☐ YES ☑ NO ☐ N/A	☑ YES ☐ NO ☐ N/A
Is drainage from undiked areas confined in a catchment basin or holding pond? *112.9(c)(2)*	☐ Adeq ☑ Inad ☐ N/A	☐ YES ☐ NO ☑ N/A

OIL PRODUCTION FACILITY BULK STORAGE CONTAINERS 112.9 (c) (Continued)	Adequately Addressed in Plan	Adequately Addressed in Field
Are containers, including tank foundation and supports, visually inspected for deterioration and maintenance needs? *112.9(c)(3)*	☐ YES ☐ NO ☐ N/A	☐ YES ☒ NO ☐ N/A
- At what frequency?:		
- Daily, or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☒ N/A
- Weekly, or (usual)	☐ YES ☐ NO ☐ N/A	☐ YES ☒ NO ☐ N/A
- Monthly, or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☒ N/A
- Annual, or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☒ N/A
- Other?	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☒ N/A
Are tank battery installations in accordance with good engineering practice? *112.9(c)(4)* (One or more of the following must be satisfied)	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☒ N/A
Do containers have:		
- Adequate capacity to prevent overfill? *112.9(c)(4)(i)* or	☐ YES ☐ NO ☐ N/A	☒ YES ☐ NO ☐ N/A
- Overflow equalizing lines between containers? *112.9(c)(4)(ii)* or	☐ YES ☐ NO ☐ N/A	☒ YES ☐ NO ☐ N/A
- Vacuum protection to prevent container collapse? *112.9(c)(4)(iii)* or	☐ YES ☐ NO ☐ N/A	☒ YES ☐ NO ☐ N/A
- High level alarms where facilities are part of a computer production control system? *112.9(c)(4)(iv)*	☐ YES ☒ NO ☐ N/A	☐ YES ☐ NO ☒ N/A

Comment: house oil at base of oil stg

FACILITY TRANSFER OPERATIONS, OIL PRODUCTION FACILITY 112.9 (d)	Adequately Addressed in Plan (No plan)	Adequately Addressed in Field
Are aboveground valves/piping examined periodically (including flange joints, valve glands, drip pans, pipe supports, stuffing boxes, bleeder/gauge valves, etc.)? *112.9(d)(1)*	☐ YES ☑ NO ☐ N/A	☐ YES ☑ NO ☐ N/A
- At what frequency:		
– Daily, or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☑ N/A
– Weekly, or (visual)	☐ YES ☐ NO ☐ N/A	☐ YES ☑ NO ☐ N/A
– Monthly, or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☑ N/A
– Annual, or	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☑ N/A
– Other? ______________________.	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☑ N/A
Are brine or saltwater disposal facilities examined often? *112.9(d)(2)*	☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Is there a flowline maintenance program established? *112.9(d)(3)*	☐ YES ☑ NO ☐ N/A	☐ YES ☑ NO ☐ N/A

Comment:
Leaking oil at valve connection at base of [illegible]. Also, Operator advised he will replace nipple on equalizing line

SUBSTANTIAL HARM CERTIFICATION 112.20(e)		
Does the Plan include a copy of the Certification of the Applicability of the Substantial Harm Criteria per 40 CFR Part 112.20(e)? *Attachment C-II*	☐ YES ☑ NO ☐ N/A	

Container Inspection Form

Container ID: StockTank

Maximum capacity (gal): 210000 Container height (ft): 12'

Nominal capacity (gal): 210000 Container diameter (ft): 16' Year Built: 1958

Current Status: ☑ Active ☐ Standby ☐ Out of service ☐ Closed

Material(s) Stored in Container:

☑ Crude oil ☐ Gasoline ☐ Diesel ☐ Fuel oil ☐ Jet fuel ☐ Vegetable oil/animal fats, grease

Other: _____

Container Type:

☑ Vertical Cylindrical
☐ Fixed Roof (Vented)
☐ Coned Roof – (Vented)
☐ Coned Roof – (Not Vented)
☐ External Floating Roof
☐ Internal Floating Roof
☐ Hemispheroid (Noded)
☐ Hemispheriod (Not Noded)
☐ Geodesic Dome
☐ Spheroid
☐ Horizontal Cylindrical
Other: _____

Container Material:

☑ Single Wall Steel
☐ Double Wall Steel
☐ Painted
☑ Not Painted
☐ Fiberglass Reinforced Plastic
☐ Composite (steel with fiberglass)
☐ Wooden
Other: _____

Container Construction: ☑ Welded ☐ Riveted ☐ Bolted ☐ Shop Fabricated ☑ Field Erected

Container Cathodic Protection: ☑ None ☐ Sacrificial Anode(s) ☐ Impressed Current

Inspect container including the base for leaks, specifically looking for:

Drips, weeps, & stains:
☑ Check if present and check if:
Acceptable ☐
Or, if Unacceptable ☑.
☐ Adequate

Discoloration of tank:
☐ Check if present and check if:
Acceptable ☐
Or, if Unacceptable ☐.
☐ Adequate

Corrosion:
☐ Check if present and check if:
Acceptable ☐
Or, if Unacceptable ☐.
☐ Adequate

Comment on container inspection: Loose oil on base of tank

Container Foundation Material:

☑ Earthen Material ☐ Ring Wall ☐ Concrete (w/impermeable mat.) ☐ Concrete (w/o impermeable mat.)

☐ Steel ☐ Unknown Other: _____

Inspect container foundation, specifically looking for:

Cracks:
☐ Check if present and check if:
Acceptable ☐
Or, if Unacceptable ☐.
☑ Adequate

Settling:
☐ Check if present and check if:
Acceptable ☐
Or, if Unacceptable ☐.
☑ Adequate

Gaps (between tank and foundation):
☐ Check if present and check if:
Acceptable ☐
Or, if Unacceptable ☐.
☑ Adequate

Container Inspection Form

Comment on foundation inspection: ---

Container Piping Construction:

☑ Aboveground ☐ Underground ☑ Steel (bare) ☐ Steel (painted) ☐ Steel (galvanized)

☐ Double walled ☐ Copper ☐ Fiberglass reinforced plastic ☐ Unknown

Other: ---

Inspect pipes/valves, specifically looking for:

Leaks at joints, seams, valves:
☑ Check if present and if:
Acceptable ☐
Or, if Unacceptable ☑,
☐ Adequate

Discoloration:
☑ Check if present and if:
Acceptable ☐
Or, if Unacceptable ☑
☐ Adequate

Corrosion:
☑ Check if present and if:
Acceptable ☐
Or, if Unacceptable ☐,
☑ Adequate

Bowing of pipe:
☐ Check if present and if:
Acceptable ☐
Or, if Unacceptable ☐,
☑ Adequate

Pooling of stored material:
☐ Check if present and if:
Acceptable ☐
Or, if Unacceptable ☐,
☑ Adequate

Comment on piping/valve inspection: Some leaking oil & stain at load line valve connections

---

Secondary Containment Types:

☑ Dikes/berms/retaining walls ☐ Curbing ☐ Culverts and/or gutters ☐ Spill diversion ponds

☐ Sorbent Materials ☐ Retention Ponds ☐ Weirs and/or booms

Other – Loc.: ---

Secondary Containment Checklist:

☐ Capacity does not appear to be adequate?
☐ Not sufficiently impervious to stored material?
☐ Standing water within dike or berm?
☐ Erosion or corrosion of dike or berm?
Location: ---
☐ Drainage mechanism manually operated?
☑ Presence of stored material within dike or berm?
☑ Debris/vegetation within or on the dike or berm area?

Comment on containment inspection: Some vegetation in containment oil staining around ASTs and valve connections

---

EXHIBIT 2

Spill Prevention Control and Countermeasure Inspection Findings, Alleged Violations, and Proposed Penalty Form

(Note: Do not use this form if there is no secondary containment)

These Findings, Alleged Violations and Penalties are issued by EPA Region 6 under the authority vested in the Administrator of EPA by Section 311(b)(6)(B)(I) of the Clean Water Act, as amended by the Oil Pollution Act of 1990.

Company Name: Wooten Tank Battery

Facility Name: Bertschinger Oil Company

Address: 6417 Grandmark Drive

City: Oklahoma city

State: OK Zip Code: 73116

Contact: Richard Bertschinger

Docket Number: CWA6- - -

Date: 2/6/2008

Inspection Number: FY-INSP-08CC85

Inspectors Name: Tom mckay

EPA Approving Official:

Enforcement Contacts:

Nelson Smith	(214)665-8489	Bryant Smalley	(214)665-7368
Roberto Bernier	(214)665-8376	Ted Pahl	(214)665-8061

Summary of Findings

(Onshore Oil Production Facilities)

GENERAL TOPICS: 112.3(a),(d),(e); 112.5(a), (b), (c); 112.7 (a), (b), (c), (d) (i) & (j)
(When the SPCC Plan review penalty exceeds $1,000.00 enter only the minimum allowable of $1,000.00.)

- [x] No Spill Prevention Control and Countermeasure Plan- *112.3*
- [ ] Plan not certified by a professional engineer- *112.3(d)*
- [ ] No management approval of plan- *112.7*
- [ ] Plan not maintained on site (applies if facility is manned at least four (4) hours per day)- *112.3(e)(1)*
- [ ] Plan not available for review- *112.3(e)(1)*
- [ ] No evidence of five-year review of plan by owner/operator- *112.5(b)*
- [ ] No plan amendment(s) if the facility has had a change in: design, construction, operation, or maintenance which affects the facility's discharge potential- *112.5(a)*
- [ ] Amendment(s) not certified by a professional engineer- *112.5(c)*

☐ Plan does not follow sequence of the rule and/or cross-reference not provided- *112.7*

☐ Plan does not discuss additional procedures/methods/equipment not yet fully operational- *112.7*

☐ Plan does not discuss conformance with SPCC requirement- *112.7(a)(1)*

☐ Plan does not discuss alternative environmental protection to SPCC requirements- *112.7(a)(2)*

☐ Plan has inadequate or no discussion of conformance with SPCC rules or applicable State rules, regulations and guidelines- *112.7(j)*

☐ Plan has inadequate or no facility diagram- *112.7(a)(3)*

☐ Plan has inadequate or no description of the physical layout of the facility- *112.7(a)(3)(i-vi)*

☐ Plan has inadequate or no information and procedures for reporting a discharge- *112.7(a)(4)*

☐ Plan has inadequate or no description and procedures to use when a discharge may occur- *112.7(a)(5)*

☐ Inadequate or no prediction of equipment failure which could result in discharges- *112.7(b)*

☐ Plan does not discuss and/or facility does not implement appropriate containment/diversionary structures/equipment-(including transfer areas) *112.7(c)*

- Claiming installation of appropriate containment/diversionary structures is impractical but:

☐ Impracticability has not been clearly denoted & demonstrated- *112.7(d)*

☐ No contingency plan- *112.7(d)(1)*

☐ No written commitment of manpower, equipment, and materials- *112.7(d)(2)*

WRITTEN PROCEDURES AND INSPECTION RECORDS 112.7(e)

☒ Inspections and tests required by 40 CFR Part 112 are not in accordance with written procedures developed for the facility- *112.7(e)*

Written procedures and/or a record of inspections and/or customary business records:

☒ Are not signed by appropriate supervisor or inspector- *112.7(e)*

☒ Are not kept with the plan- *112.7(e)*

☒ Are not maintained for three years- *112.7(e)*

PERSONNEL TRAINING AND DISCHARGE PREVENTION PROCEDURES 112.7(f)

☒ No training on the operation and maintenance of equipment to prevent discharges- *112.7(f)(1)*

☒ No training on discharge procedure protocols- *112.7(f)(1)*

☒ No training on the applicable pollution control laws, rules, and regulations- *112.7(f)(1)*

☒ No training on general facility operations- *112.7(f)(1)*

☒ No training on the contents of the SPCC Plan- *112.7(f)(1)*

☒ No designated person accountable for spill prevention- *112.7(f)(2)*

☒ Spill prevention briefings are not scheduled and conducted periodically- *112.7(f)(3)*

☐ Plan has inadequate or no discussion of personnel and spill prevention procedures

FACILITY TANK CAR AND TANK TRUCK LOADING/UNLOADING RACK 112.7(h)

☐ Inadequate secondary containment, and/or rack drainage does not flow to catchment basin, treatment system, or quick drainage system- *112.7(h)(1).*

☐ Containment system does not hold at least the maximum capacity of the largest single compartment of any tank car or tank truck- *112.7(h)(1).*

☐ There are no interlocked warning lights, or physical barrier system, or warning signs, or vehicle brake interlock system to prevent vehicular departure before complete disconnect from transfer lines- *112.7(h)(2).*

☐ There is no inspection of lowermost drains and all outlets prior to filling and departure of any tank car or tank truck- *112.7(h)(3).*

☐ Plan has inadequate or no discussion of facility tank car and tank truck loading/unloading rack.

OIL PRODUCTION FACILITY DRAINAGE 112.9(b)

☐ Drains for the secondary containment systems at tank batteries **and** separation **and** central treating areas are not closed and sealed at all times except when uncontaminated rainwater is being drained- *112.9(b)(1)*

☐ Prior to drainage of diked areas, rainwater is not inspected, valves opened and resealed under responsible supervision and records kept of such events- *112.9(b)(1)*

☐ Accumulated oil on the rainwater is not removed and returned to storage or disposed of in accordance with legally approved methods- *112.9(b)(1)*

☐ Field drainage system (drainage ditches and road ditches), oil traps, sumps and/or skimmers are not regularly inspected and/or oil is not promptly removed- *112.9(b)(2)*

OIL PRODUCTION FACILITY BULK STORAGE CONTAINERS 112.9(c)

☐ Plan has inadequate or no risk analysis and/or evaluation of field-constructed aboveground tanks for brittle fracture- *112.7(i)*

☐ Container material and construction are not compatible with the oil stored and the conditions of storage- *112.9(c)(1)*

☐ Size of secondary containment appears to be inadequate for containers and treating facilities- *112.9(c)(2)*

☒ Excessive vegetation which affects the integrity an/or walls of containment system are slightly eroded or have low areas- *112.9(c)(2)*

☐ Drainage from undiked areas is not confined in a catchment basin or holding pond- *112.9(c)(2)*

☒ Visual inspections of containers, foundation and supports are not conducted periodically for deterioration and maintenance needs- *112.9(c)(3)* Loose oil & staining

☐ Tank battery installations are not in accordance with good engineering practice because none of the following are present- *112.9(c)(4)*

(1) Adequate tank capacity to prevent tank overfill- *112.9(c)(4)(i)*, **or**
(2) Overflow equalizing lines between the tanks- *112.9(c)(4)(ii)*, **or**
(3) Vacuum protection to prevent tank collapse- *112.9(c)(4)(iii)*, **or**
(4) High level alarms to generate and transmit an alarm signal where facilities are part of a computer control system- *112.9(c)(4)(iv)*.

FACILITY TRANSFER OPERATIONS, OIL PRODUCTION FACILITY 112.9(D)

☒ Above ground valves and pipelines are not examined periodically on a scheduled basis for general condition (includes items, such as: flange joints, valve glands and bodies, drip pans, pipeline supports, bleeder and gauge valves, polish rods/stuffing box.)- *112.9(d)(1)*
leaking connector - loose oil & staining

☐ Brine and saltwater disposal facilities are not examined often- *112.9(d)(2)*

☐ Inadequate or no flowline maintenance program (includes: examination, corrosion protection, flowline replacement)- *112.9(d)(3)*

☐ Plan has inadequate or no discussion of oil production facilities

EXHIBIT 3

CIVIL PENALTY POLICY
FOR SECTION 311(b)(3) AND SECTION 311(j)
OF THE CLEAN WATER ACT

Office of Enforcement and Compliance Assurance
August 1998

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I. INTRODUCTION AND BACKGROUND

The Oil Pollution Act of 1990 ("OPA"), part of which amended Section 311 of the Clean Water Act ("Act" or "CWA"), became law shortly after the Exxon Valdez spilled over 11 million gallons of oil into Alaska's Prince William Sound. The Oil Pollution Act provided EPA with new authorities to enforce Section 311(b)(3) and Section 311(j) of the CWA, 33 U.S.C. §§1321(b)(3) and (j). Section 311(b)(3) prohibits the discharge of threshold amounts of oil or hazardous substances to navigable waters of the United States. To reduce the likelihood of a mishap, regulations issued under Section 311(j) (published at 40 C.F.R. Part 112) require facilities that store oil in significant amounts to prepare spill prevention plans and to adopt certain measures to keep accidental releases from reaching navigable waters. Certain types of facilities that pose a greater risk of release must also develop plans to respond promptly to clean up any spills that do occur.

Sections 311(b)(6) and (7) of the CWA, 33 U.S.C. §§1321(b)(6) and (7), authorize civil penalties for violation of any of these requirements. The penalty monies are deposited in the Oil Spill Liability Trust Fund, administered by the U.S. Coast Guard, and are used to help cover any spill cleanup costs incurred by the government. Civil penalties reduce the likelihood of a spill by providing an incentive to the violator and to other members of the regulated community to comply with the Act's requirements, help replenish funds that are used to clean up the environment, and provide a level playing field for businesses that meet their obligations under the law.

A. Purpose and Scope

This civil penalty policy is provided for the use of EPA litigation teams in establishing appropriate penalties in settlement of civil administrative and judicial actions for violations of Sections 311(b)(3) and 311(j) of the Clean Water Act. It does not apply to criminal cases that may be brought for violations of Section 311 of the Act, nor to the civil enforcement of response orders issued under Section 311(c) or (e) of the Act, 33 U.S.C. §1321(c) or (e). This policy sets forth how the Agency expects to exercise its enforcement discretion in determining the minimum civil penalty settlement for violations of Section 311(b)(3) and (j) of the Clean Water Act, and states the Agency's views as to the proper allocation of enforcement resources by clarifying the minimum penalty amount that EPA may accept in settlement of a case. This policy also provides general guidelines on administrative civil penalty pleading practices under Sections 311(b) and (j) of the Clean Water Act.

This policy is intended as guidance, and is not final agency action. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It does not affect the right of any respondent or defendant to decline to settle a case in favor of litigating liability or the proposed penalty amount, and it does not bind judges or presiding officers in their assessments of penalties. Upon concurrence by the Water Enforcement Division in ORE, this policy may be waived on a case-by-case basis.

This policy shall be implemented no later than thirty days after its issuance. It applies to all Section 311(b)(3) and (j) actions filed after its implementation. It also applies to all cases that are pending when it is implemented, but in which the government and the respondent or defendant have not yet reached agreement in principle on the amount of the civil penalty.

B. Statutory Authorities

OPA increased penalties for violations of Section 311 of the Clean Water Act. In administrative cases, Section 311(b)(6) of the Act, as amended, 33 U.S.C. §1321(b)(6), authorizes EPA to assess Class I or Class II administrative penalties for the violation of Section 311(b)(3) or Section 311(j). A Class I penalty may be assessed in an amount of up to $10,000 per violation, not to exceed $25,000. For the reasons provided in earlier Agency guidance interpreting a predecessor provision of the Clean Water Act, for liability purposes each violation should also be tabulated on a daily basis.[1] A Class II penalty may be assessed in an amount of up to $10,000 per day of violation, not to exceed $125,000. These and all other statutory provisions cited in this policy have been increased by ten percent, for events occurring after January 30, 1997, by the Debt Collection Improvement Act of 1996 (DCIA)[2] and its implementing regulations published at 40 C.F.R. Part 19. Future across-the-board inflation adjustments under the DCIA are to be published not less often than every four years.

OPA also established new judicial sanctions. A person who violates Section 311(b)(3) of the Act is subject to a civil penalty of up to $25,000 per day of violation, or up to $1,000 per barrel of oil or per unit of reportable quantity of CWA-listed hazardous substance discharged. In instances of gross negligence or willful misconduct, these penalties increase to a $100,000 minimum and a maximum of $3,000 per barrel or unit of reportable quantity discharged. EPA interprets this to mean that in the judicial forum the government may elect whether per day or volumetric penalties may apply according to how it pleads its case, or plead both approaches in the alternative.[3] The law also provides that a person subject to regulations implementing the spill

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[1] The Class I "per violation" language was borrowed from the Class I approach in Section 309(g) of the Act. *See* H.R. Rep. No. 653, 101st Cong., 2d Sess. 153 (August 1, 1990)(Conference Committee Report on H.R. 1465). We adopt here the rule and reasoning provided in 1987 guidance interpreting Section 309(g). *See* "Guidance on the Effect of Clean Water Act Amendment Civil Penalty Assessment Language," OW/OECM, August 28, 1987 (published in the CWA Compliance/Enforcement Compendium, 1997 ed., at III.B.8).

[2] 31 U.S.C. 3701 note; Publ. L. 104-134, 110 Stat. 1321 (1996). *See* 61 Fed. Reg. 69,359 (December 31, 1996)(includes *erratum* that Section 311(b)(7)(B) spill penalty has been adjusted from $25,000 per day to $11,000 per day, instead of $27,500 per day) and 62 Fed. Reg. 13514-17 (March 20, 1997) (Correcting *errata* in December 31, 1996, publication as a technical correction; maintaining the January 30, 1997, effective date in all cases).

[3] This is based on the plain meaning of the disjunctive statutory language, which does not limit a penalty request, and Senator Lieberman's statement in debate during consideration of OPA that, "It was my intent in writing the penalty provisions of my legislation, which have been substantially adopted in this bill that, in the event of a spill, the Government apply the penalty provisions in a manner which will punish the violator and deter and

prevention and response program of Section 311(j) of the Act may be assessed civil penalties of up to $25,000 per day of violation. These statutory penalties have also been increased by ten percent for events occurring after January 30, 1997.

Pursuant to Section 311(b)(8) of the Act, 33 U.S.C. §1321(b)(8), a Section 311 civil penalty assessment is based on the following factors:

- The seriousness of the violation or violations;
- The degree of culpability involved;
- The nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge;
- Any history of prior violations;
- Any other penalty for the same incident;
- Any other matters as justice may require;
- The economic impact of the penalty on the violator; and
- The economic benefit to the violator, if any, resulting from the violation.

If negotiations break down and a case is litigated, the judge or presiding officer must consider these elements to determine the amount of any civil penalty. Agency negotiators themselves are not explicitly required to use the Section 311(b)(8) assessment factors. But since settlement negotiations are always conducted in the shadow of the courtroom, this policy uses each statutory factor (as well as other necessary, but extrinsic, considerations) to guide the Agency bottom-line settlement position and to allow it to be coordinated with any subsequent litigating position. Because failed penalty negotiations often lead directly to litigation, the enforcement team should establish and keep an accurate record of each of these factors.

Four of the statutory factors (seriousness, culpability, mitigation efforts, history of violations) relate to the severity of the violator's actions, and form the gravity component of the calculation. The next three factors (other penalties incurred, other matters as justice may require, and economic impact on the violator) are broad considerations that may lead to case-by-case adjustments of the gravity component based on specific circumstances. Calculating the gravity component is described in Sections III. B and C, below. The violator's economic benefit is added to the gravity component to form the base penalty amount.

In limited circumstances, for settlement purposes only, the bottom line settlement amounts may be further adjusted based on litigation considerations, and based on Supplemental Environmental Projects (SEP's). These are not mentioned in the statute, and therefore are not relevant to a judge or presiding officer deciding any contested proceeding.

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prevent future violations. Large civil penalties . . . are also especially important because, in certain cases, the liability of the spiller for cleanup costs under Federal law is limited by the provisions of this bill; aggressive penalties may need to compensate for this limited liability." 135 Cong. Rec. S11,545 (daily ed. August 2, 1990)(statement of Sen. Lieberman).

In all cases, however, EPA is limited in settlement and litigation to seeking no more than the violator's statutory maximum civil penalty liability. If a particular application of this policy results in a settlement figure greater than the available statutory maximum, subject to choice of forum concerns (see I.C below) the settlement bottom line must be reduced to conform to statutory limitations. All civil penalties paid pursuant to Section 311 of the Act, whether imposed administratively or judicially, are to be deposited in the Oil Spill Liability Trust Fund.[4] This fund is administered by the National Pollution Funds Center of the Coast Guard pursuant to Department of Transportation delegations and Section 7 of Presidential Executive Order 12777 (October 18, 1991).

C. Choice of Forum

The Agency enforcement team should apply this policy to determine whether to seek a penalty administratively or judicially. If the bottom line requires higher penalties than can be achieved in an administrative proceeding, EPA should refer the case to the Department of Justice for judicial enforcement. EPA staff may also choose to refer a Section 311 enforcement case for judicial action for other reasons, such as the need for injunctive relief.

In a case where a spill resulted from gross negligence or willful misconduct, Section 311(b)(7)(D) of the Act, 33 U.S.C. §1321(b)(7)(D), requires use of the judicial forum. As amended by the DCIA, it provides for a minimum penalty of $100,000 for events occurring before January 31, 1997, or a minimum of $110,000 for events occurring on or after that date.

II. ADMINISTRATIVE PENALTY PLEADING GUIDANCE

In judicial cases, the United States does not request a specific proposed penalty, but instead paraphrases the Clean Water Act in reciting a request for a penalty "up to" the statutory maximum. This is sometimes referred to as "notice pleading" for penalties. By contrast, Agency administrative complaints under proposed 40 C.F.R. §22.14(a)(4) (63 Fed. Reg. 9464, 9469, 9485 [February 25, 1998]) either may include a form of notice pleading or use a specific penalty request. (During their pendency, the proposed changes to 40 CFR Part 22 are to be used as procedural guidance for the administrative assessment of penalties under Section 311(g)(6) of the Clean Water Act.[5]) Although this section of the policy provides general guidelines on how EPA may select an appropriate penalty amount in an administrative complaint, it does not direct when an Agency litigation team should use penalty notice pleading and when it should plead for a sum certain.

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[4] *See* Section 4304 of OPA (Pub.L. 101-380, tit. IV, §4304, 104 Stat. 484) and 26 U.S.C. §9509(b)(8).

[5] *See also* 63 Fed. Reg. 9478 (February 25, 1998)(addressing Class I, non-APA cases).

The Agency litigation team may elect to adapt the settlement methodology in Part III of this policy ("Minimum Settlement Penalty Calculation") to establish a definitive penalty request in an administrative complaint. After reasonable examination of the relevant facts and circumstances (including any known defenses), the litigation team, when proposing a specified penalty in an administrative complaint, should in good faith make the most favorable factual assumptions, legal arguments, and judgments possible on behalf of the Agency. As a practical matter, any specific penalty amount proposed in an administrative complaint, unless the complaint is subsequently amended, will be the maximum that the enforcement team may seek at hearing, and generally will provide a starting point for settlement negotiations. Such an administrative penalty request therefore should be higher than the bottom line settlement amount determined under Part III of this policy.[6] Although appropriate in settlement calculations, Part III.F, "Additional Reductions for Settlements," should not be applied in drafting a complaint penalty figure.

A proposed penalty should not be inconsistent with the statutory factors in Section 311(b)(8), because those factors would ultimately be the basis of the presiding officer's penalty assessment. In any Class II complaint seeking a specific penalty, the Agency litigation team should also take into account the requirements of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121 (1996), if the respondent qualifies as a small business under that statute.[7] SBREFA by its terms does not apply to non-Administrative Procedure Act ("non-APA"), Class I cases.[8] For a more extended discussion of SBREFA, *see* "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," ORE/OECA, May 28, 1996 ("SBREFA Guidance").

When SBREFA does not apply, the "Adjustments" in Part III should not normally be used in drafting a definitive complaint penalty figure. These "Adjustments" are mitigating factors that are more appropriately asserted by the respondent, since at the outset of the case exculpatory or mitigating circumstances generally will be more accessible to the alleged violator than to the Agency.

III. MINIMUM SETTLEMENT PENALTY CALCULATION

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[6] *See* "Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases," OECM/OW, January 19, 1989 (published in the CWA Compliance/Enforcement Compendium, 1997 ed., at IV.C.17), for a detailed discussion of this issue.

[7] *See* 13 C.F.R. §121.

[8] Sections 331 and 332 of SBREFA amend the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412; 5 U.S.C. §504 and EAJA apply by their terms to APA proceedings only. Consequently, SBREFA does not apply to Class I (non-APA) Section 311 complaints.

A. Introduction

Before the filing of the complaint, the Agency litigation team must use the following guidelines to determine the minimum amount the Agency will accept in settlement for counts based on violations of Section 311(b)(3) or 311(j) of the Act, or receive a case-specific exemption from the Director of the Water Enforcement Division in ORE. This amount, along with the appropriate Appendix worksheet and a supporting rationale, should be included in the enforcement-confidential portion of the case file. After a complaint is filed, as the Agency receives more relevant information regarding liability and penalty issues, the litigation team should adjust its settlement figure accordingly, documenting the rationale for the changes.

The bottom-line figure resulting from application of this Section 311 civil penalty settlement policy and the specific calculation that led to it are not public. Each is privileged, enforcement-confidential information. It is work product developed for negotiation purposes, and should not be shared with administrative judges, respondents or defendants, or the public.[9] This policy itself, however, is public and not confidential.

In calculating the bottom-line settlement figure, the case development team should assume that all the allegations in the complaint will be successfully proven, except to the extent this policy specifically allows for the incorporation of litigation considerations into the penalty calculation. The subjective aspects of the various penalty factors should be applied conservatively in determining the settlement bottom line because that figure represents the minimum the Agency will accept in settlement, which may be less than the penalty amount that the litigation team considers otherwise ideally suited to the violation.

In creating the gravity penalty methodologies provided below, EPA has taken into account the 1997 effects of the DCIA on its statutory civil penalty claims. When further DCIA adjustments to Section 311 penalty authorities are published in the Federal Register, the dollar amounts provided below are deemed to be increased by the same inflation factor without need to republish this policy.[10] EPA may, of course, republish this policy to clarify the newly adjusted settlement amounts.

B. Preliminary Gravity Calculation

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[9] In administrative cases, which are governed by 40 C.F.R. Part 22, the settlement figure is *not* subject to any disclosure requirements of 40 C.F.R. § 22.14(a).

[10] The revised figures apply to all actions filed after the DCIA regulatory effective date as well as all filed cases in which the government and the respondent or defendant have not yet reached an agreement in principle on the amount of the civil penalty.

Although the arithmetic methodology of the gravity components for violations of each Section 311 enforcement program is similar, the nature of violations of the 311(j) and 311(b)(3) programs are substantially different. Consequently, this settlement policy provides separate discussion of gravity for each program. Both of the methodologies begin with a "seriousness" figure and then provide additional, statutorily-based adjustment factors. For both the Section 311(j) and 311(b)(3) programs, each adjustment factor calculation acts upon and replaces the immediately preceding calculation. The settlement methodologies, then, use an initial "seriousness" figure subject to a chain of sequentially applied adjustments.

1. *Section 311(j) -- Spill Prevention Control and Countermeasure (SPCC) and Facility Response Plan (FRP) Violations*

The gravity portion of the settlement penalty for violations of CWA Section 311(j) is to be determined by applying the following sequential steps.

STEP 1: SERIOUSNESS

The seriousness of a 311(j) violation depends, in part, on the risk posed to the environment as a result of the violation. Risk can encompass the extent of the violation, the likelihood of a spill, the sensitivity of the environment around the facility, and the duration of the violation. The extent of the violation, which also contributes to the seriousness of the violation, depends on the storage capacity of the violator's facility, the existence and adequacy of secondary containment, the degree and nature of the violations of the relevant requirements, and the duration of the violation. The sensitivity of the environment can be characterized by considering the potential environmental impact from a worst case discharge at the facility.

Step 1.a: Apply matrix. Determine an initial figure from the following table. Within each range, the Agency litigation team should exercise discretion, considering storage capacity and extent of noncompliance only, since other considerations are incorporated in later steps.

Extent of Noncompliance	**Storage Capacity of the Facility in gallons**			
	Less than 42,000	42,001 to 200,000	200,001 to 1 million	More than 1 million*
Minor Noncompliance:	$500 to $3,000	$2,000 to $6,000	$5,000 to $12,000	$8,000 to $20,000
Moderate Noncompliance:	$3,000 to $8,000	$6,000 to $15,000	$12,000 to $25,000	$20,000 to $50,000
Major Noncompliance:	$8,000 to $20,000	$15,000 to $30,000	$25,000 to $60,000	Not less than $50,000

* *This column also applies to all Facility Response Plan violators.*

Extent of Noncompliance: Use the following criteria to determine extent of noncompliance:

- *Minor Noncompliance*. Cumulatively, the violations have only a minor impact on the ability of the respondent to prevent or respond to worst case spills through the development and implementation of a plan.

- *Moderate Noncompliance*. Cumulatively, the violations have a significant impact on the ability of the respondent to prevent or respond to worst case spills through the development and implementation of a plan.

- *Major Noncompliance*. Cumulatively, the violations essentially undermine the ability of the respondent to prevent or respond to worst case spills through the development and implementation of a plan.

Examples in each category are provided below. These examples are for purposes of illustration only. The category actually used should be based on the criteria provided above, taking into consideration the specific facts of the case and the number of violations involved, even if that category is different than the one suggested by the list of examples below.

SPCC VIOLATIONS

Minor noncompliance: Failure to review plan after three years; failure to amend plan after minor facility change; failure to have amendment certified.

Moderate noncompliance: Plan not available during the normal 8-hour work day; inadequate or incomplete plan; inadequate or incomplete implementation of plan (but neither a complete lack of secondary containment, nor grossly inadequate secondary containment); no plan, but adequate secondary containment; implementation of applicable state plan that does not reference SPCC or meet all SPCC requirements; failure to amend or implement amended plan after spill or any major facility change; failure to submit required information after a spill; failure to certify plan.

Major noncompliance: No SPCC plan and no secondary containment; failure to implement SPCC plan; inadequate or incomplete plan implementation resulting in (1) grossly inadequate or no secondary containment or (2) hazardous site conditions.

FRP VIOLATIONS

Minor noncompliance: Failure to maintain certificate of nonapplicability; improper plan format; failure to provide copy of plan to local or State authority; no annual review of FRP to ensure consistency with the NCP/ ACP; failure to update or submit plan reflecting minor facility changes.

Moderate noncompliance: Submission of inadequate plan; submission of plan inconsistent with NCP/ACP; late submission of plan; failure to update or amend plan reflecting major facility changes; failure to amend or resubmit plan in response to RA notification; inadequate, incomplete, or late implementation of plan (without presenting a major risk); failure to develop or conduct a drill/exercise program.

Major noncompliance: Failure to submit FRP; substantial failure to implement FRP; inadequate or incomplete plan implementation resulting in major risk of significant and substantial harm to the environment; failure to maintain current proof of equipment and personnel available to respond to a worst case discharge; intentional or knowing violations.

Because spill response plan requirements established under Section 311(j)(5) and 40 C.F.R. §112.20 assume the existence of a facility posing a significant risk of harm, penalties for any facility that is subject to the facility response plan requirements should be read under the "more than 1 million gallons" column on the right, regardless of the facility's actual storage capacity.

Step 1.b: Adjust the amount determined from the matrix to reflect the potential environmental impact of a worst case discharge. Choose the most serious applicable category:

- *Major impact.* A discharge would likely have a significant effect on human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife (especially endangered species), due to factors such as proximity to water or adequacy of containment. Upward adjustment of 25% to 50%.

- *Moderate impact.* A discharge would likely have a significant affect on navigable waters (other than a drinking water supply), adjoining shorelines, or vegetation (other than a sensitive ecosystem) due to factors such as proximity to water or adequacy of containment. Upward adjustment of up to 25%.

- *Minor impact.* No adjustment.

Step 1.c: Adjust the amount from **STEP 1.b** to account for the duration of the violation. Determine the number of months that the violation continued. For each month, add one half of one percent to the amount from Step 1.b (e.g., if the violation continued for 32 months, increase the amount from the previous step by 16%), up to 30% maximum.

STEP 2: CULPABILITY

Consider the degree to which the respondent should have been able to prevent the violation, considering the sophistication of the respondent and the resources and information available to it, and any history of regulatory staff explaining to the respondent its legal obligations or notifying the respondent of violations. Depending upon the degree of culpability, the litigation team may increase the amount from **STEP 1** by as much as 75%.

STEP 3: MITIGATION

Section 311(b)(8) requires that in assessing a penalty the judge or presiding officer must consider the "nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge." Though a violation of SPCC regulations increases the threat of a discharge rather than actually causing a discharge, this factor can be taken into account in 311(j) cases by considering how quickly the violator comes into compliance, thereby mitigating the threat of a discharge. The litigation team should use the following guidelines:

- If the violator qualifies for application of EPA's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy" (60 Fed. Reg. 66706, December 22, 1995) ("Audit Policy"), the terms of that policy apply.

- When the violator comes into compliance before being notified of its violation by regulatory staff orally or in writing, reduce the amount from **STEP 2** by up to 25%.

- When the violator, after notification of its violation, comes into compliance within a reasonable time period not to exceed six months: No adjustment.

This is a downward adjustment only because any failure to come into compliance promptly after being informed of the violation is accounted for in **STEP 2** (Culpability).

STEP 4: HISTORY OF PRIOR VIOLATIONS

Adjust the amount from **STEP 3** if the respondent has a relevant history of violations within the past five years. Consider violations of SPCC and facility response plan regulations, discharges in violation of Section 311(b)(3), and any violation of an environmental statute that relates to the respondent's ability to prevent or mitigate a discharge in violation of Section 311(b)(3). Related violations, for example, could include certain operation and maintenance

violations that indicate a respondent's inattention to pollution control requirements. Relevant violations at any other facility under common ownership or control should be considered under this Step.

Violations include admitted violations (such as discharge monitoring reports or other required self-reporting), adjudicated violations, findings of violations by EPA or other agencies that have not been withdrawn or overturned by a reviewing authority, and cases that were settled by consent and involved the payment of a penalty (whether or not liability was admitted). If there is a history of such violations, the litigation team may increase the **STEP 3** amount by up to 100%, depending on the frequency and severity of such past violations.

2. Section 311(b)(3) -- Discharge Violations

STEP 1: SERIOUSNESS

The *potential* environmental impact of a discharge, the amount of the hazardous substance or oil involved, and (in certain circumstances) the duration of the discharge are critical factors in determining the seriousness of a violation of Section 311(b)(3) of the Act. Potential harm is distinct from actual harm because mitigation efforts can reduce the actual harm. Mitigation efforts are considered in **STEP 3** below; this initial Step considers only risk factors.

Alternative A: To determine the seriousness component of the penalty when potential environmental impact and quantity discharged are the most significant elements of the Section 311(b)(3) violation, select an amount within the appropriate cell in the following table.

Potential Impact	**Quantity Discharged (Barrels/RQ)**[11]				
	Less than 5	5 to 19	20 to 79	80 to 125	More than 125
Minor Impact:	$400 to $2,000	$1,000 to $6,000	$5,000 to $12,000	$9,000 to $20,000	$100 to $250 per bbl/RQ
Moderate Impact:	$2,000 to $7,000	$6,000 to $12,000	$10,000 to $25,000	$16,000 to $45,000	$250 to $500 per bbl/RQ
Major Impact:	$7,000 to $12,000	$12,000 to $30,000	$18,000 to $55,000	$45,000 to $90,000	$500 to $1000 per bbl/RQ

[11] *See* Section 311(b)(7)(A) of the Act, 33 U.S.C. §1321(b)(7)(A).

Quantity: Use the entire quantity discharged in violation of Section 311(b)(3), determined in accordance with any applicable Agency guidance or interpretation. The quantity of oil is measured by the number of barrels (one barrel equals 42 gallons). The quantity of hazardous substances is measured in reportable quantities (RQ), which are listed for each substance in 40 C.F.R. Part 117.

Potential Environmental Impact: The environmental impact of a spill can be greatly reduced by intervening factors that are not attributable to the discharger, such as intervention by independent third parties or luck (wind, tides, weather, time of day, etc.). These external factors should not affect the penalty amount. This factor also should not be affected by any mitigation efforts, since they are considered separately in **STEP 3** below. This factor should therefore be based on the *risk* to the environment caused by the spill, and not simply the actual harm it caused. Appropriate considerations include the proximity of the facility to sensitive areas (such as inhabited areas, drinking water, wildlife habitat), and the nature of the water body or shoreline potentially affected or endangered, such as pristine habitat for endangered species, a drinking water source, or a highly polluted industrial waterway. Use the following criteria to determine potential environmental impact:

- *Major Impact.* The discharge posed a significant threat to human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife (especially endangered species).

- *Moderate Impact.* The discharge posed a significant threat to navigable waters (other than an actual or potential drinking water supply), adjoining shorelines, or vegetation (other than a sensitive ecosystem).

- *Minor Impact.* All other discharges resulting in the entry of oil or a CWA hazardous substance into navigable waters or upon an adjoining shoreline in a reportable quantity.

Alternative B: If there is a reportable quantity of oil or a hazardous substance discharged to an adjoining shoreline or a navigable water of the United States, the duration of the event may be a more significant measure of seriousness than the quantity discharged. In such a case, the Agency litigation team should use the following criteria for this step, *but only if this leads to a higher amount than established by Alternative A:*

- *Major duration.* There has been a continuous or intermittent discharge representing more than fourteen days of violation. Not less than $100,000.

- *Moderate duration.* There has been a continuous or intermittent discharge representing at least four, but not more than fourteen, days of violation. From $25,000 to $100,000.

• *Minor duration.* There has been a continuous or intermittent discharge representing two or three days of violation. From $3,000 to $25,000.

STEP 2: CULPABILITY

Adjust the dollar amount from **STEP 1** based on the degree of culpability, using the highest applicable criterion:

• If gross negligence or willful misconduct were involved, triple the dollar amount derived in **STEP 1.**

• If gross negligence or willful misconduct were not involved, apply a sliding scale to increase the **STEP 1** amount by up to 50%, depending on the degree of culpability. Culpability in this circumstance can include either an act of commission, such as setting a valve in the wrong position, or by an act of omission, such as failing to check a pipeline for corrosion.

STEP 3: MITIGATION

Adjust the dollar amount from **STEP 2** based on the "nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge," using the following guidelines:

• If the violator otherwise qualifies for the complete elimination of the gravity component under EPA's Audit Policy through a qualifying audit, and the discovered discharges: (a) are reported immediately pursuant to the requirements of Section 311(b)(5), 33 U.S.C. §1321(b)(5), and its implementing regulation, 40 C.F.R. 300.300; (b) are made subject to governmental corrective or preventive measures that are independently enforceable under applicable environmental law; (c) collectively result in minor impact as described in Alternative A of Step 1; and, (d) are not the result of gross negligence or willful misconduct, the gravity component shall be reduced to zero.[12]

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[12] A Section 311(b) spill violator never can qualify for a 75% gravity component reduction under the Audit Policy since any discharge that is self-evident enough to be discovered in the ordinary course of business -- without a qualifying audit -- is already subject to the implicit monitoring and explicit reporting provisions of Section 311(b)(5) of the Act. To treat such disclosures as voluntary would undermine the purposes of Section 311 of the Act. There are several reasons why only certain minor, and no moderate or major, spill violations under Section 311 are eligible for mitigation under the Policy. The Audit Policy encourages the identification of violations that might not otherwise be discovered, whereas significant spills are likely to be found in the ordinary course of business or by third parties, even in the absence of auditing. Second, the Policy provides an incentive to prevent violations before they occur, while spills by definition reflect a failure to prevent. Third, penalties for spill violations are returned to the Oil Spill Liability Trust Fund to help cover response costs; failure to recover such penalties in some circumstances may unfairly shift the burden of Fund support to other parties. Finally, Condition D.8 of the Policy itself excludes violations that result in "serious environmental harm."

- If the violator has conducted the best and most prompt response possible (range depending on effort required), reduce at least 5% but not more than 40%.

- If the violator has conducted an adequate response, make no adjustment.

- If the violator has conducted an inadequate response, increase up to 25%.

- If the violator has failed to respond, increase at least 25% but no more than 50%.

Failure by the violator to properly notify the National Response Center also should be considered in this Step if the violator's inadequate notification or lack of notification adversely affected EPA's ability to respond effectively to the discharge or to direct the cleanup. In that case, the respondent's mitigation efforts should be classified as inadequate or worse. A failure to notify may be, independently, a criminal violation of Section 311(b)(5) of the Act, which is beyond the scope of this policy.

STEP 4: HISTORY OF PRIOR VIOLATIONS

Adjust the amount from **STEP 3** if the respondent has a relevant history of violations within the past five years. Consider violations of spill prevention and response regulations, discharges in violation of Section 311(b)(3), and any violation of an environmental statute that relates to the respondent's ability to prevent or mitigate a discharge in violation of Section 311(b)(3). Related violations, for example, could include certain operation and maintenance violations that indicate a respondent's inattention to pollution control requirements. Relevant violations at any other facility under common ownership or control should be considered under this Step.

Violations include admitted violations (such as discharge monitoring reports or other required self-reporting), adjudicated violations, findings of violations by EPA or other agencies that have not been withdrawn or overturned by a reviewing authority, and cases that were settled by consent and involved the payment of a penalty (whether or not liability was admitted). If there is a history of such violations, the litigation team may increase the **STEP 3** amount by up to 100%, depending on the frequency and severity of such past violations.

Further, since a purpose of the Audit Policy is prevention of harm to the environment, an audit-based discovery and reporting of a concluded Section 311 discharge must lead to prevention or correction of the uncovered problem to qualify for any civil penalty reduction. To this end, EPA may invoke other statutory provisions that may apply, such as Sections 309(a), 309(b), (b), 311(c) or 311(e) of the Act, or Section 7003(a) of RCRA, 42 U.S.C. §6973(a), since Section 311(b)(3) of the Act is not directly enforceable through injunctive relief.

C. Adjustments to Gravity

1. *Other Penalty for Same Incident*

If the violator has already paid a penalty to a State or local government for a violation arising out of the same incident, the Agency litigation team may use the prior penalty to offset the statutorily available federal penalty by as much as may be appropriate, taking into account the similarities and dissimilarities of the different laws that are being enforced.

2. *Other Matters as Justice May Require*

The litigation team may use this factor to adjust the proposed penalty amount if there are other relevant factors not set forth above, other than litigation considerations, which are discussed below. Litigation considerations should not be double counted here. The Agency litigation team should document for the case file an explanation of the considerations that were used in applying this factor.

3. *Economic Impact of Penalty on Violator*

Although reliable information regarding the economic impact of the penalty on the violator is unlikely to be available to the Agency prior to issuance or filing of the complaint, the litigation team should take this factor into account to the degree known in establishing a preliminary bottom line penalty amount. Absent reliable information to the contrary, the litigation team should assume that the violator is viable, and that economic impact is minimal and not sufficient to cause a reduction to the proposed settlement. In appropriate cases where known economic impact would otherwise be minimal, the litigation team may increase the penalty amount in order to ensure that there is a sufficient impact to specifically deter the violator from future violations.[13]

This factor should only be applied after analysis of copies of actual federal tax returns, audited financial statements, or financial information of comparable reliability. If an adjustment is made for an inability to pay, the case development team shall fully document its decision in the case file. The litigation team should also consult the SBREFA Guidance to determine if it may apply to this factor.

D. Economic Benefit

Violators frequently obtain an economic benefit by avoiding or delaying necessary compliance costs, by obtaining an illegal profit, by obtaining a competitive advantage, or by a

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[13] The Conference Committee's report on the Oil Pollution Act of 1990, H. Rep. 101-653, noted that "Civil penalties should serve primarily as an additional incentive to eliminate human error and thereby reduce the number and seriousness of oil spills." At 154.

combination of these or other factors. Calculate the economic benefit or savings accruing to the violator by the noncompliance, and add that amount to the gravity figure determined above. The recapture of economic benefit prevents a violator of environmental laws from having any financial incentive to disregard its legal obligations. The Agency litigation team should document in the case file how economic benefit is calculated.[14]

Because Section 311(b)(3) establishes a "no discharge" standard for oil or CWA listed hazardous substances in quantities that may be harmful, each person subject to this provision of law has an obligation to make whatever investment is necessary to avoid prohibited discharges. To estimate economic benefit in a Section 311(b)(3) case, the litigation team should, to the extent possible, determine the violator's avoided prevention costs, which may include capital costs, operation and maintenance costs, and training costs. Economic benefit is to be measured in the moment before the Section 311(b)(3) violation occurred, and based solely on avoided costs that would have been incurred prior to the discharge. There should be no offset recognized under this factor for any economic losses the violator incurs as a result of the illegal discharge, such as the cost of lost product, or cleanup or response costs. Cleanup and response costs -- which are independent reasons for a violator to comply with the law -- are already recognized as potentially mitigating factors in **STEP 3**.

In Section 311(j) cases, Agency staff should fully recognize all delayed or avoided costs, such as failure to prepare or implement an SPCC plan under 40 C.F.R. §112.3(b), hire a certified engineer as required by 40 C.F.R. §112.3(d), or prepare and submit a facility response plan pursuant to 40 C.F.R. §112.20.

E. Adjustment for Gross Negligence or Willful Misconduct

If the complaint alleges gross negligence or willful misconduct and use of the policy to this point has led to an amount that is less than the statutory minimum, the penalty figure for the Section 311(b)(3) count must be revised here to the statutory minimum amount. At the time of this writing, that is no less than $100,000 for events occurring before January 31, 1997, and no less than $110,000 for events occurring upon or after that date, pursuant to Section 311(b)(7)(D) of the Act, as amended by the DCIA. This figure may be reduced by applying litigation

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[14] The standard method for calculating the economic benefit resulting from a violator's delayed or avoided compliance is through the use of EPA's BEN model. Please refer to the "BEN User's Manual" (Office of Enforcement, December 1993, or any subsequent revision) for specific information on the operation of BEN. In some OPA cases, BEN may be inapplicable. For example, a pipeline operator may have been able to avoid noncompliance by operating its lines at fifty percent capacity, but instead established a risk of noncompliance by operating its lines at a higher capacity in order to enjoy greater product throughput. In this circumstance, a delayed or avoided cost analysis would be inappropriate. In such a case, it is necessary to look at the profit obtained from the extra throughput. Where the litigation team suspects that the violator is obtaining an economic benefit from an illegal profit or other, "non-BEN" means, the team should consult any developed guidance on these subjects or, in the absence of such guidance, consult with Headquarters for further advice.

considerations, if appropriate. Cases involving gross negligence or willful misconduct should be pursued judicially.

F. Additional Reductions for Settlements

1. *Litigation Considerations*

Some enforcement cases may have legal or evidentiary weaknesses, or equitable considerations, that make it likely that a judge or presiding officer would assess a penalty that is less than the bottom line calculated according to the above method. In such circumstances the bottom line penalty amount may be reduced to reflect the government legal staff's best professional judgment as to what penalty a judge or presiding officer might assess.

a. Appropriate and Inappropriate "Litigation Considerations"

While there is no universal list of appropriate litigation considerations, the following factors may be appropriate in evaluating whether the penalty settlement figure exceeds the penalty the Agency would likely obtain at trial:

1. Known problems with the reliability or admissibility of the government's evidence proving liability or supporting a civil penalty.

2. The credibility, reliability, and availability of witnesses.[15]

3. The informed, expressed opinion of the judge assigned to the case (or person appointed by the judge to mediate the dispute), after evaluating the merits of the case.[16]

4. The record of the judge assigned to the case in comparable or related cases. In contrast, the reputation of the judge or the judge's general demeanor, without a specific penalty or legal statement on a similar case, is rarely sufficient as a litigation consideration.

5. Statements by Federal, State or local regulators which the respondent credibly may argue led it to believe it was complying with the federal law under which EPA is seeking penalties.

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[15] The availability of a witness can affect the settlement bottom line if the witness cannot be produced at trial; it does not relate to the inconvenience or expense of producing the witness at trial.

[16] This factor, except as provided below with respect to the record of the judge or other trier of fact, may not be applied in anticipation, or at the stage of initial filing, and should not be applied by taking at face value what a judge might say simply to encourage settlement.

6. A mix of troublesome facts and weak legal argument such that the Agency faces a significant risk of obtaining a negative decision of national significance.

Litigation considerations *do not* include:

1. The Agency's desire to minimize the resource investment in the case to ordinary or minor expense.

2. A generalized goal to avoid litigation or to avoid potentially precedential areas of the law.

3. A duplicative statement of elements included or assumed elsewhere in this policy, such as inability to pay, or other factors as justice may require, or no history of prior violations, or good faith efforts by the violator to minimize or mitigate the threatened or actual discharge.

4. Off-the-record statements by the judge that large penalties are not appropriate before the court has had a chance to evaluate the specific merits of the case.

5. The fact that the protected adjoining shoreline or water of the United States is already polluted or can assimilate additional pollution.

6. The simple failure of a regulatory agency to initiate a timely enforcement action.

b. Factoring Litigation Considerations Into Penalty Calculation

The steps in the penalty calculation method set forth above correspond to the statutory penalty factors set forth in 311(b)(8), which a judge or presiding officer must use in determining the penalty amount. Whenever possible, litigation considerations should be incorporated into the bottom line penalty calculation by identifying the statutory penalty factor or factors that they affect, and adjusting the corresponding steps in the above calculation appropriately.

For example, if the litigation consideration is an evidentiary weakness pertaining to the degree of culpability, that step in the calculation should be adjusted to reflect the possible conclusions as to culpability a judge or presiding officer might reach at a hearing or trial. Similarly, if the litigation consideration is an evidentiary weakness as to the quantity spilled, or as to the potential environmental impact, the corresponding step in the calculation should reflect the possible conclusions a judge or presiding officer might reach after hearing the evidence.

Some litigation considerations may relate to issues that the penalty calculation method outlined above does not address at all, such as evidentiary or legal issues pertaining to establishing liability, or other factors that the litigation team has reason to believe will affect the judge's or presiding officer's decision. In such a case it may be appropriate to adjust the overall penalty without reference to a specific penalty factor or step in the methodology provided above.

Although this policy allows an initial estimate of litigation considerations in order to develop a bottom-line settlement figure, reductions for litigation considerations are likely to be most useful after the Agency obtains an informed view, through discovery and settlement activities, of the weaknesses in its case and the presiding judge's view of the case.

The Agency litigation team should document in the case file the rationale for any adjustments made on account of litigation considerations.

c. Approval of Litigation Considerations

The Agency recognizes that the quantitative evaluation of litigation considerations often reflects subjective legal opinions. Therefore, EPA Regions may reduce the preliminary penalty amount for litigation considerations for up to one-third of the net gravity amount (i.e., gravity as modified by the gravity adjustment factors) without Headquarters approval. Of course, such a reduction must be fully explained and maintained in the case file.

2. Supplemental Environmental Projects

The Interim Revised EPA Supplemental Environmental Projects Policy ("the 1995 SEP policy") applies to administrative and judicial settlements reached under Section 311(b)(3) and Section 311(j) of the Clean Water Act, and it, or any successor policy, is incorporated by reference into this policy. The 1995 SEP policy qualifies a SEP as an action "which the defendant/respondent is **not otherwise legally required to perform.**" [Emphasis in original].

In a Section 311(b)(3) context, this means that spill cleanup activities are not eligible for SEP recognition, since the statutory scheme already recognizes the violator as having cleanup responsibility. The development of an SPCC plan or installation of appropriate containment is not eligible for SEP recognition, since each is already required by regulation. Measures taken to prevent additional discharges in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), (when the government has made a concurrent unpermitted discharge claim under that provision) may qualify as a SEP if the injunctive relief is beyond the scope of equitable relief that the government may, after litigation, receive from a court pursuant to Section 301(a) of the Act.

EXHIBIT 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 21 2004

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)

FROM: Thomas V. Skinner TVS
Acting Assistant Administrator

TO: Regional Administrators

This memorandum modifies all existing civil penalty policies to conform to a final rule that increased statutory penalties. This amendment to our civil penalty policies will take effect on October 1, 2004. This memorandum also provides guidance on how to plead penalties and determine the new maximum penalty amounts that may be sought in administrative enforcement actions. On February 13, 2004, the United States Environmental Protection Agency (EPA) promulgated a final rule in the *Federal Register*, codified at 40 C.F.R. Part 19, Adjustment of Civil Penalties for Inflation and implementing the Debt Collection Improvement Act of 1996 (DCIA). At the same time, EPA also published minor conforming amendments to 40 C.F.R. Part 27, Program Fraud Civil Remedies. The rule took effect on March 15, 2004. Consequently, all violations occurring after March 15, 2004, are subject to statutory penalties that have been adjusted for inflation. We have attached a copy of the published rule for your convenience.

OVERVIEW

The primary purpose of the DCIA is to preserve the deterrent effect of civil statutory penalty provisions by adjusting them for inflation. In particular, the DCIA directed each federal agency to review its respective civil monetary penalty (CMP) provisions and to issue a regulation adjusting them for inflation. The DCIA also requires periodic review and adjustment of the CMPs at least once every four years.

The DCIA limited the first penalty inflation adjustment, effective on January 30, 1997, to 10% above the existing statutory provision's maximum amount. For EPA, this meant all the penalty provision maximums, with the exception of a few new penalty provisions added by the 1996 Safe Drinking Water Act (SDWA) amendments, which did not require any adjustment, were adjusted upward by 10%. By memorandum dated May 9, 1997 (1997 Memorandum), EPA modified all penalty policies to conform to the DCIA and the 1997 penalty inflation adjustment.

The second penalty inflation adjustment, pursuant to 40 C.F.R. Part 19, Adjustment of Civil Penalties for Inflation, became effective March 15, 2004. The statutory penalty provisions and the new maximum penalty amounts are found in the attached Table 1 of 40 C.F.R. 19.4. These increases in the penalty provisions apply only to violations that occur after the date the increases take effect; that is, violations after March 15, 2004. For example, Clean Water Act (CWA) Section 309 previously authorized judicial penalties of up to $27,500 per day per violation; since the new rule became effective, the new maximum penalty amount is $32,500. Therefore, if a violation subject to CWA section 309(d) started on March 1, 2004, and lasted through March 16, 2004, the maximum statutory penalty liability would consist of 15 days of violations at $27,500 per day, plus 1 day of violation at $32,500.

PENALTY POLICY CALCULATION CHANGES

By this memorandum, the Office of Enforcement and Compliance Assurance (OECA) modifies all existing penalty policies to increase the initial gravity component of the penalty calculation by 17.23 percent for those violations subject to the new rule. The inflation adjustment for the penalty provisions set forth in the rule was calculated by comparing the Consumer Price Index-Urban (CPI-U) for June 1996 with the CPI-U for June 2003. While not required by the DCIA, we believe this is consistent with the congressional intent in passing the DCIA and is necessary to effectively implement the mandated penalty increases set forth in 40 C.F.R. Part 19. Accordingly, each penalty policy is now modified to apply the appropriate guidelines set forth below. These new guidelines apply to all penalty policies, regardless of whether the policy is used for determining a specific amount to plead in a complaint or a bottom-line settlement amount. A complete list of all of our existing penalty policies is provided at the end of this memorandum.

A. If all of the violations in a particular case occurred on or before the effective date of the new rule, penalty policy calculations should be consistent with the 1997 Memorandum.

B. For those judicial and administrative cases in which some, but not all, of the violations occurred after the effective date of the new rule, the penalty policy calculations are modified by following these five steps:

1. Perform the economic benefit calculation for the entire period of the violation. Do not apply any mitigation or adjustment factors (such as good faith, ability to pay, or litigation considerations) at this point.

2. Apply the gravity component of the penalty policy in the standard way for all violations as follows. Do not apply any mitigation or adjustment factors at this point.

3. (a) <u>For those penalty policies that were issued prior to January 31, 1997</u>: Calculate the gravity component according to the penalty policy. For violations

that occurred on or after January 31, 1997, through March 15, 2004, multiply the gravity component by 1.1, reflecting the 10% increase. For violations that occurred after March 15, 2004, multiply the gravity component by 1.2895, reflecting both the 10% increase and the 17.23% increases [1.10 x 1.1723 = 1.2895]. For example, if 40% of the violations occurred on or after January 31, 1997, through March 15, 2004, the gravity adjustment factor for those violations would be calculated as follows: [1.1 x .40 = .44]. If 40% of the violations occurred after March 15, 2004, the gravity adjustment factor for those violations would be as follows: [1.2895 x .40 = .52].

(b) For those penalty policies that were issued or revised on or after January 31, 1997, through March 15, 2004: Calculate the gravity component according to the penalty policy. For violations that occurred on or after January 31, 1997, through March 15, 2004, use the gravity component set forth in the penalty policy, as the 10% increase is reflected in those policies. For violations that occurred after March 15, 2004, multiply the gravity component by 1.1723, reflecting the 17.23% increase. For example, if 40% of the violations occurred on or after January 31, 1997, through March 15, 2004, the gravity adjustment factor for those violations would be .40. If 40% of the violations occurred after March 15, 2004, the gravity adjustment factor for those violations would be as follows: [1.1723 x .40 = .47].

(c) Where all the violations in a particular case occurred after March 15, 2004: As discussed in subparagraphs (a) and (b) above, apply the penalty policy in the standard way to calculate the gravity component. Do not apply any mitigation or adjustment factors at this point. For those penalty policies that were issued to prior to January 31, 1997, multiply the gravity component by 1.2895, reflecting both the 10% increase and the 17.23% increase. For those penalty policies that were issued or revised after January 31, 1997, through March 15, 2004, multiply the gravity component by 1.1723, reflecting the 17.23% increase.

4. Add the economic benefit calculation and the total applicable gravity (the gravity-based penalty should be rounded to the nearest unit of 100) from above and adjust the total, as appropriate, pursuant to the mitigation factors in the applicable policy.

PENALTY PLEADING

If all of the violations in a particular case occurred on or before the effective date of the new rule, the pleading practices set forth in the 1997 Memorandum should be applied. If some of the violations in a particular case occurred after the effective date, then any penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of Section 301 of the Clean Water Act, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, assess civil penalties against [name] not to exceed $27,500 per day for each violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), that occurred on or after January 31, 1997 through March 15, 2004; and $32,500 per day for each violation of Section 301 of the Act, 33 U.S.C. § 1311, that occurred after March 15, 2004, up to the date of judgment herein.

If all of the violations in a particular case occurred after the effective date of the new rule, then any penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of Section 301 of the Clean Water Act, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, assess civil penalties against [name] not to exceed $32,500 per day for each violation of Section 301 of the Act, 33 U.S.C. § 1311, up to the date of judgment herein.

ADMINISTRATIVE PENALTY CAPS FOR CWA, SDWA, AND CAA

The Debt Collection Improvement Act and 40 C.F.R. Part 19 raised the maximum penalty amounts that may be sought for individual violations in administrative enforcement actions, as well as the total amounts that may be sought in one administrative enforcement action. This increase is particularly relevant for administrative enforcement actions under the CWA, SDWA, and CAA, which are limited by penalty maximums that may be sought in a single action (commonly called "caps")[1]. For example, prior to the DCIA and 40 C.F.R. Part 19, CWA Class II administrative penalties were authorized up to $11,000 per violation and not to exceed $137,500 in one administrative action; since the effective date of the new rule, the new penalty maximums are now $11,000 and $157,500, respectively. Similarly, Part 19 also raised the total penalty amounts that may be sought in a single administrative enforcement action under the CAA from $220,000 to $270,000 (although higher amounts may still be pursued with the joint approval of the Administrator and Attorney General). Note that the adjusted penalty caps apply if an action is filed or a complaint is amended after March 15, 2004, even if some or all of the violations occurred on or before March 15, 2004.

CHALLENGES IN THE COURSE OF ENFORCEMENT PROCEEDINGS

If a defendant challenges the validity of applying the adjusted penalty provisions on the grounds that EPA did not have the authority to promulgate the rule that adjusted the penalty maximums, please notify the Special Litigation and Projects Division of the challenge, so that OECA and the Region can coordinate our response before a response is filed.

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[1] *See* CWA 33 U.S.C. § 309(g)(2)(A)-(B); CWA 33 U.S.C. § 311(b)(6)(B)(i)-(ii); SDWA 42 U.S.C. § 300g-3(g)(3)(B); SDWA 42 U.S.C. § 300h-2(c)(1)(B), (2)(B); CAA 42 U.S.C. § 113(d)(1); CAA 42 U.S.C. § 205(c).

FURTHER INFORMATION

Any questions concerning the new rule and implementation can be directed to David Abdalla of ORE's Special Litigation and Projects Division at (202) 564-2413 or by email at abdalla.david@epa.gov.

LIST OF EXISTING EPA CIVIL PENALTY POLICIES MODIFIED BY THIS MEMORANDUM

General

Policy on Civil Penalties (2/14/84)
A Framework for Statute-Specific Approaches to Penalty Assessments (2/14/84)
Guidance on Use of Penalty Policies in Administrative Litigation (12/15/95)

Clean Air Act - Stationary Sources

Clean Air Act Stationary Source Civil Penalty Policy (7/23/95) (This is a generic policy for stationary sources).
Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)
Combined Enforcement Policy for Section 112(r)Risk of the Clean Air Act [Risk Management Plan] (8/15/01)

There are a series of appendices that address certain specific subprograms within the stationary source program.

Appendix I - Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution (Not Dated)
Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy (7/13/95)
Appendix II - Vinyl Chloride Civil Penalty Policy (Not Dated)
Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy (Revised 5/5/92)
Appendix IV - Volatile Organic Compounds Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance (Not Dated)
Appendix V - Air Civil Penalty Worksheet
Appendix VI - Volatile Hazardous Air Pollutant Civil Penalty Policy (Revised 3/2/88)
Appendix VII - Residential Wood Heaters (Not Dated)
Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under Protection of Stratospheric Ozone (11/24/89)
Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant

or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of Stratospheric Ozone, Subpart B (Not Dated)
Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (6/1/94)
Appendix XI - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart C: Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances (Not Dated)

Clean Air Act - Mobile Sources

Volatility Civil Penalty Policy (12/1/89)
Civil Penalty Policy for Administrative Hearings (1/14/93)
Manufacturers Programs Branch Interim Penalty Policy (3/31/93)
Interim Diesel Civil Penalty Policy (2/8/94)
Tampering and Defeat Device Civil Penalty Policy for Notices of Violation (2/28/94)
Draft Reformulated Gasoline and Anti-Dumping Settlement Policy (6/3/96)

TSCA

Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in *Federal Register* on 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete). This is a generic policy for TSCA sources. There are a series of policies that address certain specific subprograms within TSCA. They are as follows:

Record keeping and Reporting Rules TSCA Sections 8, 12, and 13 (3/31/99)
PCB Penalty Policy (4/9/90)
TSCA Section 5 Enforcement Response Policy (6/8/89), amended (7/1/93)
TSCA Good Laboratory Practices Regulations Enforcement Policy (4/9/85)
TSCA Section 4 Test Rules (5/28/86)
TSCA Title II - Asbestos Hazard Emergency Response Act (AHERA)
Interim Final ERP for the Asbestos Hazard Emergency Response Act (1/31/89)
ERP for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)
Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act - Disclosure Rule Enforcement Response Policy (2/2000)

Safe Drinking Water Act - UIC

Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy -- Underground Injection Control Guidance No. 79 (9/27/93)

Safe Drinking Water Act - PWS

New Public Water System Supervision Program Settlement Penalty Policy (5/25/94)

EPCRA

Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right to Know Act/Enforcement Response Policy for Section 103 of the Comprehensive Enforcement Response, Compensation, and Liability Act (9/30/99)

Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) (Amended)(4/12/01)

Clean Water Act

Revised Interim Clean Water Act Settlement Penalty Policy (3/1/95) (3/3/98)
Clean Water Act Section 404 Civil Administrative Penalty Actions Guidance on Calculating Settlement Amounts (12/21/01)
Civil Penalty Policy for Section 311(b)(3) and Section 311 (j) of the Clean Water Act (8/98)
Pilot Enforcement Approach for MOM [Management, Operation and Maintenance] Cases in Region IV (1/23/03)

RCRA

RCRA Civil Penalty Policy (6/23/03)
Guidance on the Use of Section 7003 of RCRA (10/97)

UST

U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990)
Guidance for Federal Field Citation Enforcement (OSWER Directive- No. 9610-16) (October 1993)

CERCLA

Interim Policy on Settlement of CERCLA Section 106 (b)(1) and Section 107 (c)(3)
Punitive Damage Claims for Noncompliance with Administrative Orders (9/30/97)

FIFRA

General FIFRA Enforcement Response Policy (7/2/90)
FIFRA Section 7(c) ERP (2/10/86)
Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act:
Good Laboratory Practice (GLP) Regulations (9/30/91)
FIFRA Worker Protection Standard Penalty Policy, Interim Final (9/97)

Attachment

cc: (w/attachment)
Regional Counsel, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Office of Enforcement, Compliance, and Environmental Justice, Region III
Director, Office of Enforcement and Compliance Assurance, Region V
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Director, Office of Civil Rights, Enforcement and Environmental Justice, Region X
Regional Media Division Directors
Regional Enforcement Coordinators, Regions I - X
Dana Ott, OGC-CCID
OECA Office Directors
ORE Division Directors
OSRE Division Directors
Bruce Gelber, Chief, EES, DOJ
Deputy and Assistant Chiefs, EES, DOJ

Employees (subpart A of 29 CFR part 2602) by removing all provisions other than those dealing with outside employment. These outside employment provisions, which are now codified at 29 CFR part 4904, have been superseded by OGE's government-wide regulations. Accordingly, the PBGC is removing part 4904 from its regulations.

Because this rule involves agency management and personnel (5 U.S.C. 553(a)(2)), general notice of proposed rulemaking and a delayed effective date are not required (5 U.S.C. 553(b), (d)).

Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 4904

Conflict of interests, Government employees, Penalties, Political activities (Government employees), Production and disclosure of information, Testimony.

■ For the reasons set forth above, 29 CFR chapter XL is amended as follows:

PART 4904—ETHICAL CONDUCT OF EMPLOYEES

■ 1. The authority citation for part 4904 continues to read as follows:

Authority: 29 U.S.C. 1302(b); E.O. 11222, 30 FR 6469; 5 CFR 735.104.

PART 4904—[REMOVED]

■ 2. Part 4904 is removed.

Issued in Washington, DC this 10th day of February, 2004.

Steven A. Kandarian,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 04–3246 Filed 2–12–04; 8:45 am]

BILLING CODE 7708–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 19 and 27

[FRL–7623–5]

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is issuing this final Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the Debt Collection Improvement Act of 1996, to adjust EPA's civil monetary penalties ("CMPs") for inflation on a periodic basis. The Agency is required to review its penalties at least once every four years and to adjust them as necessary for inflation according to a formula specified in the statute. A complete version of Table 1 from the regulatory text, which lists all of the EPA's civil monetary penalty authorities, appears near the end of this rule.

EFFECTIVE DATE: March 15, 2004.

FOR FURTHER INFORMATION CONTACT: David Abdalla, Office of Regulatory Enforcement, Special Litigation and Projects Division, Mail Code 2248A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–2413.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 note, ("DCIA"), each federal agency is required to issue regulations adjusting for inflation the maximum civil monetary penalties that can be imposed pursuant to such agency's statutes. The purpose of these adjustments is to maintain the deterrent effect of CMPs and to further the policy goals of the laws. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. The EPA's initial adjustment to each CMP was published in the **Federal Register** on December 31, 1996, at (61 FR 69360) and became effective on January 30, 1997.

This rule adjusts the amount for each type of CMP that EPA has jurisdiction to impose in accordance with these statutory requirements. It does so by revising the table contained in 40 CFR 19.4. The table identifies the statutes that provide EPA with CMP authority and sets out the inflation-adjusted maximum penalty that EPA may impose pursuant to each statutory provision. This rule also revises the effective date provisions of 40 CFR 19.2 to make the penalty amounts set forth in 40 CFR 19.4 apply to all applicable violations that occur after the effective date of this rule.

The DCIA requires that the adjustment reflect the percentage increase in the Consumer Price Index between June of the calendar year preceding the adjustment and June of the calendar year in which the amount was last set or adjusted. The DCIA defines the Consumer Price Index as the Consumer Price Index for all urban consumers published by the Department of Labor ("CPI–U"). As the initial adjustment was made and published on December 31, 1996, the inflation adjustment for the CMPs set forth in this rule was calculated by comparing the CPI–U for June 1996 (156.7) with the CPI–U for June 2003 (183.7), resulting in an inflation adjustment of 17.23 percent. In addition, the DCIA's rounding rules require that an increase be rounded to the nearest multiple of: $10 in the case of penalties less than or equal to $100; $100 in the case of penalties greater than $100 but less than or equal to $1,000; $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000; $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000; $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and $25,000 in the case of penalties greater than $200,000.

The amount of each CMP was multiplied by 17.23 percent (the inflation adjustment) and the resulting increase amount was rounded up or down according to the rounding requirements of the statute. Certain CMPs were adjusted for the first time and were increased by only 10 percent without being subject to the rounding procedures as required by the DCIA. The table below shows the inflation-adjusted CMPs and includes only the CMPs as of the effective date of this rule. EPA intends to readjust these amounts in the year 2008 and every four years thereafter, assuming there are no further changes to the mandate imposed by the DCIA.

On June 18, 2002, the EPA published a direct final rule and a parallel proposed rule in the **Federal Register** (67 FR 41343). The direct final rule would have amended the Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the DCIA, to adjust EPA's civil monetary penalties for inflation. EPA stated in the direct final rule that if we received adverse comment by July 18, 2002, EPA would publish a timely notice of withdrawal on or before the August 19, 2002 effective date, and then address that comment in a subsequent final action based on the parallel proposal published at (67 FR 41363). EPA subsequently received one adverse comment on the direct final rule from the General Accounting Office ("GAO"), which asserted that EPA had misinterpreted the rounding formula provided in the DCIA. Accordingly, EPA withdrew the direct final rule on August 19, 2002 (67 FR 53743).

The formula for the amount of the penalty adjustment is prescribed by Congress in the DCIA and these changes are not subject to the exercise of discretion by EPA. However the

rounding requirement of the statute is subject to different interpretations. Some agencies rounded the increase based on the amount of the current penalty before adjustment, while other agencies have rounded the increase based on the amount of the increase resulting from the CPI percentage calculation. Still other agencies first added the CPI increase to the amount of the current penalty and then rounded the total based on the amount of the increased penalty. The penalties in EPA's direct final rule were rounded based on the amount of the increase resulting from the CPI percentage increase because this approach appears to achieve the intent of the DCIA by steadily tracking the CPI over time. However, the GAO's adverse comment asserts that a strict reading of the DCIA requires rounding the CPI increase based on the amount of the current penalty before adjustment.

On July 3, 2003, EPA published a proposed rule that appeared in the **Federal Register** at (68 FR 39882), entitled "Civil Monetary Penalty Inflation Adjustment Rule," as mandated by the Debt Collection Improvement Act of 1996, to adjust EPA's civil monetary penalties for inflation on a periodic basis. EPA subsequently published a technical correction in the **Federal Register** on August 4, 2003 at (68 FR 45788) to correct errors in the language of the proposal that mistakenly referred to the proposed effective date as July 3, 2003. EPA proposed to adopt GAO's interpretation of the DCIA rounding rules and, thus, proposed to round the CPI increases in the proposed rule based on the amount of the current penalty before adjustment.

In accordance with the DCIA, EPA's proposed rule used the CPI–U from June 2002 to calculate the penalty adjustments. EPA also stated in the proposal that it intends to use this formula for calculating future adjustments to the CMPs and will not provide additional comment periods at the time future adjustments are made. EPA received comments on the proposed rule from two commenters.

One commenter supported the "greatest legal increase possible" to discourage polluters from treating the fines as just a "cost of doing business." This final rule enables EPA to impose the maximum fines provided under the law, but is not intended to address when a maximum fine is appropriate. Instead, EPA makes that decision on a case-by-case basis, and considers numerous factors in determining the appropriate penalty in each case, including the gravity of the violation and the extent to which the violator gained an economic benefit as a result of violating the law.

Another commenter argued that any ambiguity in the rounding requirement of the statute was due to a "scrivener's error." This commenter supported an interpretation that penalties be rounded based on the amount of the increase resulting from the CPI adjustment, rather than the amount of the penalty. However, we determined after carefully considering GAO's comment and examining the practices of other agencies, that following the plain meaning of the statutory language is appropriate. As GAO's adverse comment states "[n]othing in the plain language of the statute, nor the legislative history, permits an agency to use the size of the increase to determine the appropriate category of rounding." This commenter also noted that EPA had not published this second round of adjustments within four years of the initial adjustments as set forth in the statute. EPA's earlier direct final rulemaking was delayed due to EPA's need to analyze and reconcile the potential ambiguities arising from the statutory language including review of other agencies rulemakings under DCIA and discussions with other agencies regarding their approaches to interpreting the DCIA. Prior to GAO's involvement in the process, no federal agency had assumed a leadership in providing guidance on how the DCIA rounding rule should be implemented. Since the time that GAO became involved in the process, including the submission of its adverse comment on EPA's direct final rule, EPA has worked with GAO and other agencies to resolve the appropriate interpretation of the statutory language. Finally, the commenter also suggested that all of the penalties should be adjusted from their original base and not their adjusted base. The statute does not provide for a return to the original base penalty in calculating the adjustment but provides that the adjustment "shall be determined by increasing the maximum civil penalty * * * by the cost-of-living adjustment."

As discussed above, EPA's proposed rule used the CPI–U from June 2002 because EPA proposed the rule in 2003. However, since EPA is issuing the final rule in 2004 and DCIA requires EPA to use the CPI–U for June of the calendar year preceding the adjustment, the penalty adjustments in this final rule use the CPI–U for June 2003 which result in an inflation adjustment of 17.23 percent rather than the 14.8 percent adjustment in the proposed rule. Thus, to derive the CMPs for this final rule, the amount of each CMP was multiplied by 17.23 percent and the resulting increase was rounded according to the rounding rules of DCIA as EPA proposed and is adopting in this final rule. As a result of using the June 2003 CPI–U, some of the adjusted CMPs in this final rule are different than those in the July 2003 proposed rule. However, this difference results solely from the requirement in DCIA to use the June 2003 CPI–U and application of the same rounding rules that EPA proposed in July 2003.

Under 5 U.S.C. 553(b)(B), EPA finds that there is good cause to promulgate this rule without providing for further public comment even though the rule uses a CPI–U value different than the CPI–U value used in the proposal. EPA already provided an opportunity for public comment on the rounding rules that EPA has used in this final rule and the DCIA requires that an agency use the CPI–U from June of the year prior to the adjustment. Therefore, further public comment is unnecessary because EPA has no discretion to do other than to use the June 2003 CPI–U.

Statutory and Executive Order Review

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, [58 FR 51,735 (October 4, 1993)] the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866, and is therefore not subject to review by the Office of Management and Budget.

Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Burden means the total time, effort, financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as (1) a small business as defined in the Small Business Administration regulations at 13 CFR Part 121; (2) a small governmental jurisdiction that is a government of a city, county, town school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. EPA is required by the DCIA to adjust civil monetary penalties for inflation. The formula for the amount of the penalty adjustment is prescribed by Congress and is not subject to the exercise of discretion by EPA. EPA's action implements this statutory mandate and does not substantively alter the existing regulatory framework. This rule does not affect mechanisms already in place, including statutory provisions and EPA policies, that address the special circumstances of small entities when assessing penalties in enforcement actions.

Although this rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. Small entities may be affected by this rule only if the federal government finds them in violation and seeks monetary penalties. EPA's media penalty policies generally take into account an entity's "ability to pay" in determining the amount of a penalty. Additionally, the final amount of any civil penalty assessed against a violator remains committed to the discretion of the federal judge or administrative law judge hearing a particular case.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local, or tribal governments or the private sector because the rule implements mandate(s) specifically and explicitly set forth by the Congress without the exercise of any policy discretion by EPA. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

Executive Order 13132: Federalism

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." As this rule will not have substantial direct effects on tribal

governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, Executive Order 13175 does not apply to this rule.

Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. Because this action does not involve technical standards, EPA did not consider the use of any voluntary consensus standards under the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note).

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. Because this action does not involve technical standards, EPA did not consider the use of any voluntary consensus standards under the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note).

Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This action does not require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994).

Congressional Review Act

The Congressional Review Act, 5 U.S.C. § 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

40 CFR Part 27

Administrative practice and procedure, Assessments, False claims, False statements, Penalties.

Dated: February 8, 2004.

Michael O. Leavitt,

Administrator, Environmental Protection Agency.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

■ 1. Revise part 19 to read as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

Sec.

19.1 Applicability.
19.2 Effective Date.
19.3 [Reserved].
19.4 Penalty Adjustment and Table.

Authority: Pub. L. 101–410, 28 U.S.C. 2461 note; Pub. L. 104–134, 31 U.S.C. 3701 note.

§ 19.1 Applicability.

This part applies to each statutory provision under the laws administered by the Environmental Protection Agency concerning the maximum civil monetary penalty which may be assessed in either civil judicial or administrative proceedings.

§ 19.2 Effective Date.

The increased penalty amounts set forth in this part apply to all violations under the applicable statutes and regulations which occur after March 15, 2004.

§ 19.3 [Reserved].

§ 19.4 Penalty Adjustment and Table.

The adjusted statutory penalty provisions and their maximum applicable amounts are set out in Table 1. The last column in the table provides the newly effective maximum penalty amounts.

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Civil monetary penalty description	Penalties effective between January 30, 1997 and March 15, 2004	New maximum penalty amount
7 U.S.C. 136l.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—GENERAL—COMMERCIAL APPLICATORS, ETC.	$5,500	$6,500
7 U.S.C. 136l.(a)(2)	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—PRIVATE APPLICATORS—FIRST AND SUBSEQUENT OFFENSES OR VIOLATIONS.	$550/$1000	$650/$1,200
15 U.S.C. 2615(a)	TOXIC SUBSTANCES CONTROL ACT CIVIL PENALTY	$27,500	$32,500
15 U.S.C. 2647(a)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT CIVIL PENALTY	$5,500	$6,500
15 U.S.C. 2647(g)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT—CONTRACTOR VIOLATIONS.	$5000	$5,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE CLAIM.	$5,500	$6,500
31 U.S.C. 3802(a)(2)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE STATEMENT.	$5,500	$6,500
33 U.S.C. 1319(d)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY	$27,500	$32,500
33 U.S.C. 1319(g)(2)(A)	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	$11,000/$27,500	$11,000/$32,500
33 U.S.C. 1319(g)(2)(B)	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	$11,000/ $137,500.	$11,000/ $157,500
33 U.S.C. 1321(b)(6)(B)(I)	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(b)(3)&(j) PER VIOLATION AND MAXIMUM.	$11,000/$27,500	$11,000/$32,500
33 U.S.C. 1321(b)(6)(B)(ii)	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(b)(3)&(j) PER VIOLATION AND MAXIMUM.	$11,000/ $137,500.	$11,000/ $157,500
33 U.S.C. 1321(b)(7)(A)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION PER DAY OR PER BARREL OR UNIT.	$27,500 or $1,100 per barrel or unit.	$32,500 or $1,100 per barrell or unit
33 U.S.C. 1321(b)(7)(B)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(c)&(e)(1)(B).	$27,500	$32,500
33 U.S.C. 1321(b)(7)(C)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(j).	$27,500	$32,500
33 U.S.C. 1321(b)(7)(D)	CLEAN WATER ACT VIOLATION/MINIMUM CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION OR PER BARREL/UNIT.	$110,000 or $3,300 per barrel or unit.	$130,000 or $4,300 per barrel or unit
33 U.S.C. 1414b(d)	MARINE PROTECTION, RESEARCH & SANCTUARIES ACT VIOL SEC 104b(d).	$660	$760
33 U.S.C. 1415(a)	MARINE PROTECTION RESEARCH AND SANCTUARIES ACT VIOLATIONS—FIRST & SUBSEQUENT VIOLATIONS.	$55,000/ $137,500.	$65,000/ $157,500
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(b).	$27,500	$32,500
42 U.S.C. 300g–3(c)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(c).	$27,500	$32,500
42 U.S.C. 300g–3(g)(3)(A)	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(g)(3)(a).	$27,500	$32,500
42 U.S.C. 300g–3(g)(3)(B)	SAFE DRINKING WATER ACT/ MAXIMUM ADMINISTRATIVE PENALTIES PER SEC 1414(g)(3)(B).	$5,000/$25,000	$6,000/$27,500
42 U.S.C. 300g–3(g)(3)(C)	SAFE DRINKING WATER ACT/THRESHOLD REQUIRING CIVIL JUDICIAL ACTION PER SEC 1414(g)(3)(C).	$25,000	$27,500
42 U.S.C. 300h–2(b)(1)	SDWA/CIVIL JUDICIAL PENALTY/VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL (UIC).	$27,500	$32,500
42 U.S.C. 300h–2(c)(1)	SDWA/CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	$11,000/ $137,500.	$11,000/ $157,500
42 U.S.C.300h–2(c)(2)	SDWA/CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	$5,500/$137,500	$6,500/$157,500
42 U.S.C. 300h–3(c)(1)	SDWA/VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	$5,500	$6,500
42 U.S.C. 300h–3(c)(2)	SDWA/WILLFUL VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	$11,000	$11,000
42 U.S.C. 300i(b)	SDWA/FAILURE TO COMPLY WITH IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER.	$15,000	$16,500
42 U.S.C. 300i–1(c)	SDWA/ATTEMPTING TO OR TAMPERING WITH PUBLIC WATER SYSTEM/CIVIL JUDICIAL PENALTY.	$22,000/$55,000	$100,000/ $1,000,000
42 U.S.C. 300j(e)(2)	SDWA/FAILURE TO COMPLY W/ORDER ISSUED UNDER SEC. 1441(c)(1).	$2,750	$2,750
42 U.S.C. 300j–4(c)	SDWA/REFUSAL TO COMPLY WITH REQS. OF SEC. 1445(a) OR (b)	$27,500	$32,500
42 U.S.C. 300j–6(b)(2)	SDWA/FAILURE TO COMPLY WITH ADMIN. ORDER ISSUED TO FEDERAL FACILITY.	$25,000	$27,500
42 U.S.C. 300j–23(d)	SDWA/VIOLATIONS/SECTION 1463(b)—FIRST OFFENSE/REPEAT OFFENSE.	$5,500/$55,000	$6,500/$65,000

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. code citation	Civil monetary penalty description	Penalties effective between January 30, 1997 and March 15, 2004	New maximum penalty amount
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992, SEC 1018—CIVIL PENALTY.	$11,000	$11,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972—CIVIL PENALTY	$11,000	$11,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C ASSESSED PER ORDER.	$27,500	$32,500
42 U.S.C. 6928(c)	RES. CONS. & REC. ACT/CONTINUED NONCOMPLIANCE OF COMPLIANCE ORDER.	$27,500	$32,500
42 U.S.C. 6928(g)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C.	$27,500	$32,500
42 U.S.C. 6928(h)(2)	RES. CONS. & REC. ACT/NONCOMPLIANCE OF CORRECTIVE ACTION ORDER.	$27,500	$32,500
42 U.S.C. 6934(e)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH SECTION 3013 ORDER.	$5,500	$6,500
42 U.S.C. 6973(b)	RES. CONS. & REC. ACT/VIOLATIONS OF ADMINISTRATIVE ORDER	$5,500	$6,500
42 U.S.C. 6991e(a)(3)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH UST ADMINISTRATIVE ORDER.	$27,500	$32,500
42 U.S.C. 6991e(d)(1)	RES. CONS. & REC. ACT/FAILURE TO NOTIFY OR FOR SUBMITTING FALSE INFORMATION.	$11,000	$11,000
42 U.S.C. 6991e(d)(2)	RCRA/VIOLATIONS OF SPECIFIED UST REGULATORY REQUIREMENTS.	$11,000	$11,000
42 U.S.C. 14304(a)(1)	BATTERY ACT VIOLATIONS	$10,000	$11,000
42 U.S.C. 14304(g)	BATTERY ACT/VIOLATIONS OF CORRECTIVE ACTION ORDERS	$10,000	$11,000
42 U.S.C. 7413(b)	CLEAN AIR ACT/VIOLATION/OWNERS & OPERATORS OF STATIONARY AIR POLLUTION SOURCES–JUDICIAL PENALTIES.	$27,500	$32,500
42 U.S.C. 7413 (d)(1)	CLEAN AIR ACT/VIOLATION/OWNERS & OPERATORS OF STATIONARY AIR POLLUTION SOURCES–ADMINISTRATIVE PENALTIES PER VIOLATION & MAX.	$27,500/ $220,000.	$32,500/ $270,000
42 U.S.C. 7413(d)(3)	CLEAN AIR ACT/MINOR VIOLATIONS/STATIONARY AIR POLLUTION SOURCES—FIELD CITATIONS.	$5,500	$6,500
42 U.S.C. 7524(a)	TAMPERING OR MANUFACTURE/SALE OF DEFEAT DEVICES IN VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY PERSONS.	$2,750	$2,750
42 U.S.C. 7524(a)	VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY MANUFACTURERS OR DEALERS; ALL VIOLATIONS OF 7522(a)(1),(2), (4),&(5) BY ANYONE.	$27,500	$32,500
42 U.S.C. 7524(c)	ADMINISTRATIVE PENALTIES AS SET IN 7524(a) & 7545(d) WITH A MAXIMUM ADMINISTRATIVE PENALTY.	$220,000	$270,000
42 U.S.C. 7545(d)	VIOLATIONS OF FUELS REGULATIONS	$27,500	$32,500
42 U.S.C. 9604(e)(5)(B)	SUPERFUND AMEND. & REAUTHORIZATION ACT/NONCOMPLIANCE W/REQUEST FOR INFO OR ACCESS.	$27,500	$32,500
42 U.S.C. 9606(b)(1)	SUPERFUND/WORK NOT PERFORMED W/IMMINENT, SUBSTANTIAL ENDANGERMENT.	$27,500	$32,500
42 U.S.C. 9609(a)&(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS UNDER 42 U.S.C. SECT. 9603, 9608, OR 9622.	$27,500	$32,500
42 U.S.C. 9609(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS—SUBSEQUENT	$82,500	$97,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/VIOLATIONS OF SECT. 9603, 9608, 9622.	$27,500	$32,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/SUBSEQUENT VIOLATIONS OF SECT. 9603, 9608, 9622.	$82,500	$97,500
42 U.S.C. 11045(a)&(b)(1),(2)&(3).	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES.	$27,500	$32,500
42 U.S.C. 11045(b) (2)&(3)	EPCRA CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES—SUBSEQUENT VIOLATIONS.	$82,500	$97,500
42 U.S.C. 11045(c)(1)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11022 OR 11023.	$27,500	$32,500
42 U.S.C. 11045(c)(2)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11021 OR 11043(b).	$11,000	$11,000
42 U.S.C. 11045(d)(1)	EPCRA—FRIVOLOUS TRADE SECRET CLAIMS—CIVIL AND ADMINISTRATIVE PENALTIES.	$27,500	$32,500

PART 27—[AMENDED]

■ 2. The authority citation for Part 27 continues to read as follows:

Authority: 31 U.S.C. 3801–3812; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note; Pub L. 104–134, 110 Stat. 1321, 31 U.S.C. 3701 note.

■ 3. Section 27.3 is amended by revising paragraphs (a)(1)(iv) and (b)(1)(ii) to read as follows:

§ 27.3 Basis for civil penalties and assessments.

(a) * * *

(1) * * *

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be

subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $6,500 [1] for each such claim [The regulatory penalty provisions of this part effective on January 30, 1997 remain in effect for any violation of law occurring between January 30, 1997 and March 15, 2004.

* * * * *

(b) * * *

(1) * * *

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than 6,500 [2] for each such statement.

* * * * *

[FR Doc. 04–3231 Filed 2–12–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FL–91–200323(a); FRL–7622–1]

Approval and Promulgation of Implementation Plans; Florida: Southeast Florida Area Maintenance Plan Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving revisions to the State Implementation Plan (SIP) submitted by the Florida Department of Environmental Protection (FDEP) on December 20, 2002. This SIP revision satisfies the requirement of the Clean Air Act (CAA) for the second 10-year update for the Southeast Florida area (Dade, Broward, and Palm Beach Counties) 1-hour ozone maintenance plan. For transportation purposes, EPA is also finalizing its adequacy determination of the new Motor Vehicle Emissions Budgets (MVEBs) for the year 2015. EPA has determined that the MVEBs for the year 2015 contained in this SIP revision are adequate for transportation conformity purposes.

DATES: This direct final rule is effective April 13, 2004 without further notice, unless EPA receives adverse comment by March 15, 2004. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Comments may be submitted by mail to: Heidi LeSane, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Comments may also be submitted electronically, or through hand delivery/courier. Please follow the detailed instructions described in Part I.B.1. through 3 of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Heidi LeSane, Air, Pesticides & Toxics Management Division, Air Planning Branch, Regulatory Development Section, U.S. Environmental Protection Agency Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mrs. LeSane's phone number is 404–562–9035. She can also be reached via electronic mail at *lesane.heidi@epa.gov* or Lynorae Benjamin, Air, Pesticides & Toxics Management Division, Air Planning Branch, Air Quality Modeling & Transportation Section, U.S. Environmental Protection Agency Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Benjamin's phone number is 404–562–9040. She can also be reached via electronic mail at *benjamin.lynorae@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. The Regional Office has established an official public rulemaking file available for inspection at the Regional Office. EPA has established an official public rulemaking file for this action under FL–91. The official public file consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public rulemaking file does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public rulemaking file is the collection of materials that is available for public viewing at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 9 to 3:30, excluding Federal holidays.

2. Copies of the State submittal and EPA's technical support document are also available for public inspection during normal business hours, by appointment, at the State Air Agency. Florida Department of Environmental Protection, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida 32399–2400.

3. Electronic Access. You may access this **Federal Register** document electronically through the Regulation.gov Web site located at *http://www.regulations.gov* where you can find, review, and submit comments on Federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and are open for comment.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number by including the text "Public comment on proposed rulemaking FL–91" in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

[1] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

[2] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

EXHIBIT 5

Run Name =	first
Present Values as of Noncompliance Date (NCD),	01-Sep-2005
A) On-Time Capital & One-Time Costs	$1,162
B) Delay Capital & One-Time Costs	$992
C) Avoided Annually Recurring Costs	$1,117
D) Initial Economic Benefit (A-B+C)	$1,288
E) Final Econ. Ben. at Penalty Payment Date,	
01-Sep-2010	**$1,991**
C-Corporation w/ OK tax rates	
Discount/Compound Rate	9.1%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	01-Sep-2010
Capital Investment:	
Cost Estimate	$0
Cost Estimate Date	N/A
Cost Index for Inflation	N/A
Consider Future Replacement (Useful Life)	N/A (N/A)
One-Time, Nondepreciable Expenditure:	
Cost Estimate	$2,500
Cost Estimate Date	27-Jul-2010
Cost Index for Inflation	PCI
Tax Deductible?	y
Annually Recurring Costs:	
Cost Estimate	$500
Cost Estimate Date	27-Jul-2010
Cost Index for Inflation	PCI
User-Customized Specific Cost Estimates:	N/A
On-Time Capital Investment	
Delay Capital Investment	
On-Time Nondepreciable Expenditure	
Delay Nondepreciable Expenditure	

EXHIBIT 6

Penalty Calculation
Bertschinger Oil Company
Inspection Date: 2/6/2008

Quantity Stored: 29,568 gal (AST volume)
Based on Inspection Report.

Impact Category: Major ($20,000 + 17.23% DCIA = $23,446)
Based on No SPCC Plan and inadequate Inspection Procedures.

Potential Impact (Moderate): + 25% = $29,307.50
Close Proximity to Jurisdictional Waters.

Duration of Violation: 60 Months + 30% = $33,410.55
Estimation based on Inspection.

Culpability: +35% = $45,104.24

Mitigation Adjustment: Not known.

History of Prior Violations: Not known.

Economic Benefit: + $1,991.00 = 47,095.24.

Litigation Considerations:.

Preliminary Settlement Amount: $47,095.24

EXHIBIT 7

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	§	
	§	**DECLARATION OF**
	§	**TOM MCKAY**
	§	
	§	**EXHIBIT 7**
BERTSCHINGER OIL CO.	§	
Seminole County, Oklahoma	§	
	§	
	§	**Docket No. CWA 06-2009-4808**
RESPONDENT.	§	

DECLARATION OF TOM MCKAY
EXHIBIT 10

I, **Tom McKay**, do state and declare, **under penalty of perjury, in accord with 28 U.S.C. 1746**, the following to be true and accurate to the best of my personal knowledge,:

I, Tom McKay, am an employee of the National Older Workers Career Center, under a grant with U.S. Environmental Protection Agency (EPA), Region 6, in Dallas, Texas. I have been continuously employed in that capacity since August 15, 2005, as a Senior Environmental Employment Enrollee (SEE) with the Response and Prevention Branch, Superfund Division, performing various assignments in support of EPA's effort to enforce Clean Water Act and Oil Pollution Act Programs. Prior to that, I was employed with the U.S. Department of Interior Fish and Wildlife Service Office of Law Enforcement as a Special Agent. My duties in that regard included investigating violations of the Endangered Species Act, the Migratory Bird Treaty Act and the Lacy Act, among others.

My duties as a SEE Environmental Technician and SPCC Inspector with the EPA include field inspections, Spill Prevention, Control and Countermeasure Plan (SPCC) inspections, and field investigations of oil production bulk storage facilities for enforcement and compliance with Section 311 of the Clean Water Act, 33 U.S.C. 1321, and 40 CFR Part 112. Part of these duties include investigating, noting, observing, sketching, photographing and reporting potential and actual violations at these facilities. The observations I make during an inspection are recorded and noted in an SPCC Inspection Report and Inspection Summary as a routine matter of standard operating procedure. The photographs I take during my inspections are recorded in a Photograph Log which I fill out. The photographs are digital, which I download onto a computer and also copy onto a compact disc to be placed in an enforcement file along with the original Inspection Report and Inspection Summary from the inspection of an oil production bulk storage facility.

I reviewed the document identified as Complainant's Proposed Evidentiary Exhibit 1. I recognize this document as a true and correct copy of the SPCC Inspection Report which I

prepared while inspecting the oil production bulk storage facility for the Wooten Tank Battery Lease in Seminole County, Oklahoma on February 6, 2008. The handwriting in the Inspection Report is mine and includes the notes and recordings that I wrote down contemporaneously while conducting an inspection of the facility. However, on the right margin of the first page of the report contains a handwritten portion of a telephone number which is not my handwriting. The remaining copy of the document, however, was written by me. I prepare SPCC Inspection Reports like this one as a routine matter of standard operating procedure while conducting an SPCC inspection of oil production bulk storage facilities.

I also reviewed the document identified as Complainant's Proposed Evidentiary Exhibit 2. I recognize this document as a true and correct copy of the Inspection Summary which I prepared after inspecting the Wooten Tank Battery lease facility. I prepare Inspection Summaries like this one as a routine matter of standard operating procedure after inspecting oil production bulk storage facilities.

My review of a copy of the SPCC inspection report and summary refreshed my memory, and I remember inspecting that facility on that date. At the beginning of my inspection, I met Mr. Richard Bertschinger who identified himself as being with Bertschinger Oil Co. During my inspection of the Wooten Tank Battery lease facility with Mr. Bertschinger, I discovered the facility did not have a written SPCC Plan.

While conducting the inspection, I observed several above-ground storage tanks, transferring and gathering in-plant piping and valving related to the production and storage of oil. While walking the area, I also noted during my inspection the closest drainage or tributary to the facility, which was approximately 500 feet away from an unnamed creek that connects to Negro Creek, which flows into the Canadian River. Negro Creek is close to the area.

My inspection of the facility also included an observation of its physical condition. I noted that the facility had a secondary containment. I observed some loose oil at the base of oil above-ground storage tanks and at their valve connections. I observed some leaking oil and stains at the load line valve connections. I also observed vegetation within the secondary containment. I wrote down my observations in the Inspection Report all while conducting the inspection. I then prepared a file and placed the Inspection Report and Inspection Summary in the file for evaluation and possible enforcement by the Oil Pollution Act Program Coordinators.

Executed this 27th day of July, 2010, in Edmond, Oklahoma,

Tom McKay

State of Oklahoma
County of OKLAHOMA

Before me, Lynn Pahdoco on this day personally appeared TOM MCKAY known to me and proved to me through his state-issued driver's license and/or U.S. EPA Identification Card to be the person whose name is subscribed to the foregoing Declaration of Tom McKay and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 27th day of July, 2010.

Lynn Pahdoco
Notary Public

NOTARY SEAL PUBLIC
LYNN PAHDOCO
Notary Public
State of Oklahoma
Commission # 00013719 Expires 08/26/12

EXHIBIT 8

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	§	
	§	**DECLARATION OF**
	§	**BRYANT SMALLEY**
	§	
	§	**EXHIBIT 8**
BERTSCHINGER OIL CO.	§	
Wooten Tank Battery Lease	§	
	§	
	§	**Docket No. CWA 06-2009-4808**
RESPONDENT.	§	

DECLARATION OF BRYANT SMALLEY
EXHIBIT 8

I, **Bryant Smalley**, do state and declare, **under penalty of perjury, in accord with 28 U.S.C. 1746**, the following to be true and accurate to the best of my personal knowledge,:

I, Bryant Smalley, am an employee of the U.S. Environmental Protection Agency (EPA), Region 6, in Dallas, Texas. I have been continuously employed with the EPA since July 9, 2000. My current position is as an Oil Pollution Act (OPA) Program Enforcement Officer. I have been at this position continuously since October 6, 2003. Prior to that, I was employed as a Clean Air Act Enforcement Officer at EPA Region 6, in Dallas, Texas. I held that position from July 9, 2000 until October 6, 2003.

My duties as an OPA Program Enforcement Officer include enforcement and compliance with Section 311 of the Clean Water Act, 33 U.S.C. 1321, and 40 C.F.R. Part 112. Part of these duties include investigating potential and actual violations, evaluating information from inspections of oil production facilities and bulk storage facilities on potential and actual violations, calculating penalties for settlement, making recommendations on penalties, preparing draft settlement agreements and Complaints, and negotiating penalties in settlement of violations with facility owner/operators alleged to have violated provisions of Section 311 of the Clean Water Act, 33 U.S.C. 1321 and 40 C.F.R. Part 112. In particular, I am responsible for calculating and recommending penalties for violations of Sections 311(b)(3) and 311(j) of the Clean Water Act, 33 U.S.C. 1321(b)(3) and 1321(j), and 40 C.F.R. Part 112 (including failure to properly prepare and implement a Spill Prevention, Control and Countermeasures ["SPCC"] Plan) as promulgated under Section 311(j)(1)(C) of the Clean Water Act, 33 U.S.C. 1321(j)(1)(C).

My duties over the past six and a half years have also included reviewing and ensuring compliance, as well as the cost of compliance, in cases involving the failure to prepare and implement an SPCC Plan. Part of this review includes ensuring the violator has complied with 40 C.F.R. 112.3, as promulgated under Section 311(j), 33 U.S.C. 1321(j), after the violator is

notified of having been in violation of those provisions. In so doing, I review whether they have complied with 40 C.F.R. 112.3 by having prepared and implemented an SPCC Plan and by reviewing the cost of coming into compliance. In almost all cases that I have reviewed that involve the failure to prepare and implement an SPCC Plan, the cost of coming into compliance usually includes the cost of having a licensed professional engineer prepare and certify an SPCC Plan for the facility, as well as the cost of implementing and maintaining such SPCC Plan. In the past five years, I have reviewed several hundred such cases, involving the failure to properly prepare and implement an SPCC Plan, ensuring the violator comes into compliance as part of the settlement agreement and reviewing the cost of compliance.

I investigated and evaluated the SPCC Inspection Report in the Bertschinger Oil Co. file. On September 8, 2009, the EPA mailed to Mr. Bertschinger, of Bertschinger Oil Co., a letter and a copy of the Administrative Complaint and Opportunity to Request a Hearing and Conference (Complaint). Prior and subsequent to that mailing, I had attempted to engage Mr. Bertschinger in settlement negotiations to no avail. Mr. Bertschinger was unresponsive until I was able to successfully contact him on April 8, 2010, at which time he expressed unwillingness to enter into settlement negotiations. I have not received any information from Bertschinger Oil Co. to indicate it has come into compliance with Section 311(j)(1)(C) of the Clean Water Act, 33 U.S.C. 1321(j)(1)(C), and 40 C.F.R. Part 112 by preparing an SPCC Plan for, and addressing the loose oil and stains at the base of the above-ground storage tanks and valving and piping connection leaks at, its Wooten Tank Battery Lease facility in Seminole County, Oklahoma.

In an effort to aid the Regional Judicial Officer in assessing an administrative penalty under Section 311(b)(6)(A)(ii) and 311(b)(B)(i) of the Clean Water Act, 33 U.S.C. 1321(b)(6)(A)(ii) and 1321(b)(6)(B)(i), I calculated a proposed penalty. I have reviewed the document identified as Complainant's Proposed Evidentiary Exhibit 8 and recognize it as the preliminary penalty calculation which includes my proposed penalty calculation. As indicated in Exhibit 6, I calculated the preliminary penalty to be $47,095.24. Since this amount is above the statutory maximum for multiple violations, my conclusion for purposes of aiding the Regional Judicial Officer in assessing a civil penalty is that the penalty should be **$22,000**.

I used the EPA "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act," dated August, 1998 ("Penalty Policy" and Complainant's Proposed Evidentiary Exhibit 3) and the September 21, 2004 EPA Memorandum, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004," ("DCIA Policy" and Complainant's Proposed Evidentiary Exhibit 4) as guides to calculate the proposed penalty. These policies are the ones I have used for the past six and a half years to calculate proposed penalties in the enforcement of Oil Pollution Act cases with violations of Sections 311(b)(3) and 311(j), 33 U.S.C. 1321(b)(3) and 1321(j), and regulations found at 40 C.F.R. Part 112. The purpose of the Penalty Policy is to help guide EPA in recommending and assessing administrative penalties for the settlement of such cases. It is not intended as a guide to propose and recommend an administrative penalty for pleading purposes. However, EPA does not have a penalty policy for Oil Pollution Act enforcement cases solely for pleading purposes. As such, I used both policies to assist me in calculating the proposed penalty in this Class 1 case in an effort to aid the Regional Judicial Officer in assessing an appropriate penalty.

The Penalty Policy takes into account the statutory factors found in Section 311(b)(8) of the Clean Water Act, 33 U.S.C. 1321(b)(8). These statutory factors include 1) the seriousness of the violation; 2) the degree of culpability involved; 3) the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; 4) any history of prior violations; 5) any other penalty for the same incident; 6) any other matters as justice may require; 7) the economic impact of the penalty on the violator, and; 8) the economic benefit to the violator, if any, resulting from the violation.

In using the Penalty Policy as a guide, I prepared a penalty calculation, which I recognize as the document identified as Complainant's Proposed Evidentiary Exhibit 6. I prepare handwritten or printed penalty calculations as a routine matter of standard operating procedure for settlement agreements, judicial referrals and Class I and Class II penalty assessments. Use of the penalty calculation in this case is not meant to calculate a proposed bottom-line settlement amount, but is instead meant to calculate a proposed penalty amount to assist the Regional Judicial Officer in assessing a penalty under Section 311(b)(6)(A)(ii) of the Clean Water Act, 33 U.S.C. 1321(b)(6)(A)(ii). The penalty calculation summarizes how I arrived at the preliminary penalty calculation of $47,095.24.

The Complaint alleges that Bertschinger Oil Co. violated 40 C.F.R. 112.3, as promulgated pursuant to Section 311(j) of the Clean Water Act, 33 U.S.C. 1321(j), by failing to prepare a written SPCC Plan for its oil production facility in Seminole County, Oklahoma. According to the Inspection Report, the facility stores oil, has a total storage capacity of 29,586 gallons, and is approximately 500 feet away from an unnamed creek that flows into Negro Creek, a navigable water of the U.S. The Inspection Report also noted that there Bertschinger Oil Co. did not have schedule to provide periodic visual inspections of containers and valves and piping at the facility.

Taking these facts into account, I started with Step 1.a (Seriousness) of the Penalty Policy, which includes a matrix of certain factors depending on storage capacity and extent of noncompliance. With respect to the extent of noncompliance, the Penalty Policy includes explanations and examples of what constitute minor noncompliance, moderate noncompliance and major noncompliance in Step 1.a of the Penalty Policy.

Minor noncompliance includes those violations that have only a minor impact on the ability to prevent or respond to worst case spills. Examples of minor noncompliance include failure to review the plan after three years, failure to amend the plan after minor facility change, and failure to have an amendment certified. Moderate noncompliance includes those violations that have a significant impact on the ability to prevent or respond to worst case spills. Examples of moderate noncompliance include unavailability of the plan during the normal 8-hour work day; inadequate or incomplete plan; no plan, but adequate secondary containment, and; failure to certify the plan. Major noncompliance includes those violations that undermine the ability to prevent or respond to worst case spills. Examples of major noncompliance include no SPCC Plan and no secondary containment; inadequate or incomplete plan implementation resulting in grossly inadequate or no secondary containment or hazardous site conditions.

The storage capacity in the instant case is approximately 29,568 gallons. The facility has no SPCC Plan; and although it has secondary containment, it does not have a schedule that provides

for periodic visual inspection of containers, valves and piping. In fact, the Inspection Report noted observations of loose oil and oil stains at the base of the above-ground storage tanks and by the valve and piping connections, indicating a lack of periodic visual inspections and thereby increasing the risk of a catastrophic spill from the facility.

Using the matrix in Step 1.a of the Penalty Policy, a facility with a storage capacity of less than 42,000 and with major noncompliance falls under a settlement penalty range between $8,000 to $20,000. In this case, I chose the top of the penalty range (because of the lack of an SPCC plan coupled with inadequate inspection procedures) and calculated the penalty thus far to be $20,000. The DCIA Policy requires an upward adjustment of 17.23% of this amount for a total of $23,446.

Step 1.b of the Penalty Policy provides for the adjustment of the penalty depending on the potential environmental impact of a worst case discharge. A major impact includes a discharge that would likely have a significant effect on human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife, due to factors such as proximity to water or adequacy of containment. Step 1.b recommends an upward adjustment of the penalty in Step 1.a. of 25% to 50% for a major impact. A moderate impact includes a discharge that would likely have a significant effect on navigable waters, adjoining shorelines, or vegetation due to factors such as proximity to water or adequacy of containment. Step 1.b recommends an upward adjustment of the penalty in Step 1.a. of up to 25% for a moderate impact. A minor impact recommends no adjustment.

In the instant case, it is unknown whether an actual or potential drinking water supply is nearby. However, the Inspection Report notes that the facility is approximately 500 feet from an unnamed creek that flows into Negro Creek, which also flows into the Canadian River, both navigable waters. A worst case discharge of the total capacity of the facility, or 29,568 gallons, is very likely to have a significant impact on Negro Creek and the Canadian River. As such, the impact is moderate, recommending an upwards adjustment of the penalty in Step 1.a of the Penalty Policy of at least 25%. Therefore, in an attempt to be fair and equitable, an upward adjustment of only 25% was applied to the amount in Step 1.a., resulting in the total penalty thus far being $29,307.50.

Step 1.c of the Penalty Policy recommends adjustment of the amount from Step 1.b to account for the duration of the violation. According to a copy of the SPCC Plan (Complainant's Proposed Evidentiary Exhibit 1), the facility lacked a written SPCC Plan and adequate inspection procedures. It is unknown how long the Respondent in the instant case has been operating the facility prior to the date of inspection. For each month that the violation continued, Step 1.c of the Penalty Policy recommends an upward adjustment of one half of one percent from the amount calculated in Step 1.b. For violations concerning the failure to prepare an SPCC plan and inadequate inspection procedures, an upward adjustment of 30% was applied to the amount in Step 1.b.

Step 2 (Culpability) of the Penalty Policy provides for consideration of the degree to which the Respondent should have been able to prevent the violation, considering sophistication of the Respondent and the resources and information available to it, and any history of regulatory staff explaining to the respondent its legal obligations or notifying Respondent of violations. EPA has

no evidence of Respondent's sophistication, its resources and the information available to it. It also has no concrete evidence of any history of regulatory staff explaining to Respondent its legal obligations or notifying it of violations. However, the fact that the facility has a total storage capacity of 29,568 gallons and is within 500 feet from an unnamed creek that flows into Negro Creek, Respondent either knew or should have known that a written SPCC Plan and adequate inspection procedures were necessary to prevent a potential worst case discharge.

Step 2 recommends increasing the amount in Step 1.c by as much as 75% depending on the degree of Respondent's culpability. Rather than make the maximum upward adjustment of 75%, I made an upward adjustment of only 35% for this step due to unknown information as explained above and the fact that Respondent knew or should have known of its legal obligations to comply with the law.

Step 3 (Mitigation) of the Penalty Policy provides consideration of the nature, extent, and degree of success of any efforts to minimize or mitigate the effects of a discharge. The Penalty Policy recognizes that a violation of an SPCC regulation increases the threat of a discharge rather than actually causing a discharge, and recommends taking this factor into account. Step 3 of the Penalty Policy recommends using three factors for considering mitigation: 1) whether the violator qualifies for application of EPA's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy" (60 Federal Register 66706, December 22, 1995) ("Audit Policy"); 2) whether the violator comes into compliance before being notified of its violation, and; 3) whether the violator comes into compliance after notification of its violation within a reasonable period of time not to exceed six months. Step 3 of the Penalty Policy recommends adjusting downward the penalty in Step 2 when considering applicable mitigating factors.

The Audit Policy provides that it should be used in settlement negotiations only. It specifically states that "it is not intended for use in pleading, at hearing or at trial." Therefore, I did not apply it in calculating the penalty under Step 3 of the Penalty Policy. In addition, Respondent has not provided evidence that it has come into compliance since it was notified of the violation in February, 2008. As such, no downward adjustment for mitigating circumstances is warranted under Step 3 of the Penalty Policy.

Step 4 (Prior Violations) of the Penalty Policy provides for consideration of past SPCC and discharge violations, and any other violation of an environmental statute that relates to the Respondent's ability to prevent or mitigate a discharge in violation of Section 311(b)(3) of the Clean Water Act, 33 U.S.C. 1321(b)(3). Step 4 of the Penalty Policy recommends an upward adjustment of the penalty in Step 3 if there is a history of such violations. EPA is not aware at this time of any evidence of past violations by Respondent within the past five years. As such, no upward adjustment was made under Step 4 of the Penalty Policy.

The "Adjustments to Gravity" section of the Penalty Policy includes consideration of the following statutory factors: a) other penalty for same incident; b) other matters as justice may require, and; c) economic impact of penalty on violator. The Penalty Policy provides the example of a penalty paid to a State or Local government for a violation arising out of the same incident. When considering "the other penalty for same incident," the Penalty Policy recommends using the prior penalty to offset the statutorily available federal penalty. In the

instant case, EPA is unaware of any penalty Respondent has paid to the State of Oklahoma or a local government for its failure to prepare an SPCC Plan and provide adequate inspection procedures. As such, I did not offset the penalty amount in Step 4 for this consideration.

The Penalty Policy recommends consideration of "other matters as justice may require." One such matter is Respondent's lack of response since service of the Complaint on September 10, 2009. More importantly, Respondent has not shown that it has come into compliance since it was notified of the violation. As such, no downward adjustment of the penalty amount in Step 4 is warranted. If anything, an upward adjustment of the penalty amount in Step 4 is warranted. However, since the calculated penalty thus far is considerably higher than the $22,000 statutory maximum penalty allowed for multiple violations under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. 1321(b)(6)(B)(i), I made no further adjustment to the gravity for this consideration.

The Penalty Policy recommends consideration of the "economic impact of penalty on the violator." EPA is unaware of what economic impact, if any, a penalty will have on Respondent. EPA had previously offered to settle with Respondent for $1,600 in the form of an expedited settlement agreement for its failure to prepare an SPCC Plan and provide adequate inspection procedures as long as Respondent provided evidence of addressing the violations and coming into compliance with the regulations. Respondent has not demonstrated an inability to pay that amount. Respondent has never provided any evidence of having come into compliance nor of its inability to pay that amount. With no evidence that the penalty will have any impact, I did not adjust the penalty in Step 4 upward or downward.

The Penalty Policy recommends taking into consideration the economic benefit by avoiding or delaying necessary compliance costs, by obtaining an illegal profit, by obtaining a competitive advantage, or by a combination of these factors. The Penalty Policy recommends calculating the economic benefit or savings accruing to the violator and adding that amount to the gravity figure determined above.

I used EPA's "BEN" computer model to calculate the economic benefit in this case. BEN is a computer model routinely used by EPA to calculate a violator's economic savings from violating the law. As part of my duties, I have been trained to use the BEN computer model for this purpose. The BEN computer model requires the use of certain information in order to calculate the economic benefit to the violator. This information includes the following: a) penalty payment date; b) one-time, non-depreciable expenditure for preparing an SPCC Plan, and; c) annual recurring costs, such as the cost of training employees on the requirements of the Plan and required inspections of the facility.

Since the Respondent has provided no evidence in this case, I was forced to enter certain information based on assumptions or averages from cases similar to this one. These assumptions and averages are based on the several hundred SPCC cases that I have worked on in the past six and a half years. The penalty payment date is unknown at this time. However, for purposes of convenience, I chose a non-compliance date of September 1, 2005, approximately two and a half years prior to the SPCC inspection date of February 6, 2008. I then used a penalty payment date of September 1, 2010, for convenience as it is a date within a short period of time after the filing of the Motion for Assessment of Civil Penalty. If the penalty payment is extended to a later

date, the calculation would increase based on accrued interest calculated by the BEN computer model.

The avoided cost of having a professional engineer prepare and certify an adequate SPCC Plan is considered a one-time, non-depreciable expenditure. Respondent's cost of having an SPCC Plan adequately prepared and certified by a professional engineer is unknown. My experience in working on several hundred SPCC cases includes ensuring compliance and reviewing the cost of compliance, such cost including the cost of preparing and certifying an adequate SPCC Plan. My experience with these cases indicates the cost of preparing and certifying an adequate SPCC Plan ranges from $500 to $4,000. An average cost for a facility such as this is $2,500. As such, I entered the figure of $2,500 into the BEN computer model as a one-time, non-depreciable expenditure.

Based on my experience of having worked on several hundred SPCC cases, annual recurring costs usually include the cost of training employees on the requirements of the Plan and conducting periodic inspections of the facility. Based on this experience, the predicted average annual cost of implementing a Plan for a facility of this size is approximately $500. As such, I entered a figure of $500 into the BEN computer model as an annual recurring cost.

With these figures, the BEN computer model calculated the Final Economic Benefit to be $1,991 with the penalty payment date as September 1, 2010. This calculated amount assumes that the facility has been brought into compliance by September 1, 2010. If the facility is not brought into compliance, then the economic benefit amount would be greater.

I have reviewed the document identified as Complainant's Proposed Evidentiary Exhibit 5. I recognize this document as the Economic Benefit Calculation Sheet which I prepared when calculating the economic benefit to Respondent for having avoided or delayed necessary compliance costs. This document includes the figures and calculation of the BEN computer model. As a routine matter of standard operating procedure I prepare and include documents such as this in Class I and Class II Oil Pollution Act enforcement cases when using the BEN computer model.

As noted above, the Penalty Policy recommends adding the economic benefit figure to the gravity figure of the penalty calculation. This would require adding $1,991.00 to the already-calculated penalty amount of $45,104.24, bringing the total calculated penalty to $47,095.24. However, since Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. 1321(b)(6)(B)(i), provides for a statutory maximum penalty of $22,000 for two violations, EPA is seeking the statutory maximum penalty of $22,000.

As explained above, the statutory factors found at Section 311(b)(8), 33 U.S.C. 1321(b)(8) and the guidelines in the Penalty Policy have been taken into consideration in calculating a penalty for this case and seeking the statutory maximum penalty of **$22,000**.

Executed this 28th day of July 28, 2010, in Dallas, Texas,

Bryant Smalley

State of Texas
County of Dallas

Before me, Lara Elysa Bowman, on this day personally appeared BRYANT SMALLEY known to me and proved to me through his state-issued driver's license and/or U.S. EPA Identification Card to be the person whose name is subscribed to the foregoing Declaration of Bryant Smalley and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 28th day of July, 2010.

Notary Public

NOTARY PUBLIC STATE OF TEXAS

LARA ELYSA BOWMAN
NOTARY PUBLIC
STATE OF TEXAS
MY COMM. EXP. 05-07-2014