UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

December 17, 2009

Ref: 8ENF-L

Honorable Elyana Sutin, Regional Judicial Officer (8RC)
U.S. Environmental Protection Agency, Region VIII
1595 Wynkoop St.
Denver, CO 80202-1129

Re: In the Matter of Fulton Fuel Company
Docket No. CWA-08-2009-0006
Response to Second Order to Supplement the Record

Dear Judge Sutin:

Attached is the Supplemental Declaration of Jane Nakad in response to your Second Order to Supplement the Record issued on November 20, 2009. Ms. Nakad's Supplemental Declaration relates to the penalty issues raised in your Order.

The remainder of this letter relates to information that was requested in your Order about the status of Mr. Richard Beatty, Esq. and whether or not he is representing Respondent in this matter. The last discussion and contact I had with Richard Beatty, Esq. was during a phone conversation shortly after the filing of the Complaint in this matter. Mr. Beatty had represented the Respondent in prior discussions regarding a Clean Water Act, Section 308 Information Request and Response. Therefore, I contacted Mr. Beatty because Respondent's registered agent and president, Mr. William M. Fulton, Jr., had rejected the certified mailing of the Complaint that was contemporaneously accepted via certified mail by Mr. Beatty. In our phone conversation, Mr. Beatty indicated he had gone over the Complaint with Mr. Fulton, but did not affirmatively indicate he was still representing the Respondent. Mr. Beatty also could not explain why Mr. Fulton had rejected service of the Complaint and seemed surprised service had been rejected. Complainant then successfully served the Complaint with the assistance of the Toole County Sheriff who completed personal service upon Mr. Fulton on May 22, 2009.

Complainant has had no further contact with either Mr. Beatty or Mr. Fulton. Complainant's Motion for Default filed on July 9, 2009 was also sent by certified mail contemporaneously to both Mr. Beatty and Mr. Fulton. Again, Mr. Beatty accepted service and Mr. Fulton rejected service. Complainant again enlisted the assistance of the Toole County Sheriff who personally served the Motion for Default upon Mr. Fulton on August 18, 2009.

This letter and Supplemental Declaration of Jane Nakad are being sent to both the Respondent and Mr. Beatty by First Class U.S. mail as the rules do not require that they be sent by certified mail and the Complainant does not wish to go through the high likelihood that a certified mailing would be rejected by Respondent.

It is apparent to the Complainant that the Respondent in this matter is fully aware of the Complaint and the Motion for Default in this matter and is ignoring the administrative process in an attempt to subvert a finding of liability and an administrative penalty in this matter.

Respectfully submitted,

Marc D. Weiner
Enforcement Attorney

Attachment: Supplemental Declaration of Jane Nakad

cc: William M. Fulton, Jr., Registered Agent for Fulton Fuel Company
Richard Beatty, Esq.
Jane Nakad, 8ENF-T
Mark Chalfant, 8ENF-T

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 DEC 17 PM 12:12

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	)	Docket No. CWA-08-2009-0006
	)	
Fulton Fuel Company	)	**SUPPLEMENTAL DECLARATION OF**
127 Main Street	)	**JANE NAKAD**
Shelby, Montana 59474	)	
	)	
	)	
Respondent.	)	

Pursuant to the Second Order to Supplement the Record issued by the Honorable Elyana R. Sutin, Regional Judicial Officer, on November 20, 2009, ordering the Complainant Environmental Protection Agency (EPA) to supplement the record with respect to its penalty, Jane Nakad, EPA Region 8 Technical Enforcement Program, hereby submits the following Supplemental Declaration with regard to the penalty in this matter.

I, Jane Nakad, declare as follows:

1. I am employed by the EPA Region 8 Technical Enforcement Program located at 1595 Wynkoop, in Denver, Colorado.

2. As an EPA representative responsible for calculating penalties for violations of §§ 311(b)(3) and (j) of the Clean Water Act (CWA or the Act), I have personal knowledge of the matters set forth in this Declaration.

3. EPA filed an Administrative Complaint and Opportunity to Request Hearing (Complaint) in this matter on February 19, 2008, citing alleged violations of § 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990. The violations were identified at the North Sunburst B Sand Unit, an oil production facility, which is

located in the Fred and George Creek Field in Toole County, Montana, as the result of a discharge of oil into Fred and George Creek.

4. The Complaint proposes a total penalty of $32,500 based on the discharge of a harmful quantity of oil into or upon Fred and George Creek and its adjoining shorelines in violation of § 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), and the alleged violation of § 311(j) of the Act, 33 U.S.C. § 1321(j), for failure to prepare and implement a Spill Prevention Control and Countermeasure (SPCC) Plan for the North Sunburst B Sand Unit Facility (the Facility) in accordance with regulations set out in 40 C.F.R. Part 112.

5. Pursuant to § 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), EPA must consider: 1) the seriousness of the violations; 2) the economic benefit to the violator; 3) the degree of culpability involved; 4) any other penalty for the same incident; 5) any history of prior violations; 6) the nature, extent and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; 7) the economic impact of the penalty on the violator; and 8) any other matters as justice may require. The proposed penalty in this matter for the harmful discharge of oil is consistent with the CWA statutory factors listed above. In calculating the proposed penalty, I purposefully used the CWA statutory factors because EPA's CWA programs have not adopted pleading (complaint-based) penalty policies, including for violations of CWA §§ 311(b)(3) and (j). EPA guidance specifically bars use of settlement penalty policies in administrative litigation ("Not all EPA programs have penalty policies that establish calculation methodologies [ ] use in determining the penalty amount to plead in an administrative complaint ... these [settlement] policies are not be used in pleading penalties, or in a hearing or at trial.")

OECA Guidance on Use of Penalty Policies in Administrative Litigation, p. 2, fn. 2, December 15, 1995 (Appendix 1). In the declaration below, I turn first to the application of the CWA statutory factors to the Respondent's harmful discharge of oil.

6. As to statutory factor #1 regarding seriousness of the violation, Respondent discharged approximately 10 barrels (420 gallons) of crude oil into Fred and George Creek. The discharge of that harmful quantity of oil impacted one mile of Fred and George Creek causing a sheen upon and discoloration of the surface of the creek and oil stains on the banks. Observations of this harmful impact were documented in photographs on several occasions from June 17, 2004, until May 4, 2006.

7. As to statutory factor #2 regarding economic benefit to the violator, Respondent failed to inspect, document inspections, and maintain or replace flowlines at the Facility. The discharge was the result of corrosion in a flowline. I calculated an economic benefit component of $445 for Respondent's failure to inspect, document inspections, and maintain or replace its flowlines (from one of which the discharge occurred) using two parameters in the BEN model. First, flowlines at this Facility were known to be corroded due to the discharge which occurred, and the successor company which purchased the Facility informed EPA that it estimated that the cost of replacing flowlines at all of the facilities it purchased was approximately $200,000. I estimated that the cost for this Facility was approximately one-tenth (*i.e.* $20,000) of the total estimated expenditure. Therefore, I used a one-time, nondepreciable expenditure of $20,000 in the BEN model. Second, I used a period of non-compliance from the date of the discharge until September 29, 2005, when oil was documented as being on Fred and George Creek and its banks.

Using these fair and reasonable parameters, EPA's economic benefit calculation model generated an economic benefit of $445 for Respondent's failure to inspect, document inspections, and maintain or replace its flowlines.

8. As to statutory factor #3 regarding the degree of culpability involved, the Respondent has owned and/or operated oil production facilities since the 1960's and therefore should have had knowledge of operating practices regarding maintaining its facilities and of oil pollution prevention rules and regulations to prevent discharges of oil from its facilities.

9. As to statutory factor #4 regarding any other penalty for the same incident, EPA is unaware of Respondent having paid any other penalty for this discharge. EPA staff discussed the case with staff of the Montana Department of Environmental Quality and the Montana Oil and Gas Conservation Division who indicated no penalties had been assessed by their respective departments.

10. As to statutory factor #5 regarding any history of prior violations, EPA records indicate that the Respondent had not previously reported any discharges of oil to the National Response Center.

11. As to statutory factor #6 regarding the nature, extent and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, Respondent failed to conduct adequate mitigation and remediation measures for its discharge of oil into Fred and George Creek. Oil and oil sheens were observed on several occasions during a two-year period from February 29, 2004, to May 4, 2006.

12. As to statutory factor #7 regarding the economic impact of the penalty on the

violator. Respondent has not indicated that it is unable to pay the proposed penalty amount.

13. As to statutory factor #8 regarding any other matters as justice may require, EPA is unaware of any such matters.

14. The facts related to the statutory factors outlined in paragraphs 6-13 support the proposed penalty of $11,445, including recovery of $445 in economic benefit for non-compliance, for a Class I statutory maximum penalty for the discharge of a harmful quantity of oil into Fred and George Creek.

15. The proposed penalty in this matter for the failure to prepare and implement a Spill Prevention Control and Countermeasure (SPCC) Plan is consistent with the CWA statutory factors described in paragraph 5. I turn next in my declaration to the application of the CWA statutory factors to Respondent's failure to prepare and implement an SPCC Plan for the Facility.

16. As to statutory factor #1 regarding the seriousness of the violation for failure to prepare an implement an SPCC Plan for the Facility, the Facility has been in operation since 1969 without an SPCC Plan. EPA promulgated the SPCC rules in 1974 to establish procedures, methods, equipment and other requirements to prevent oil spills from polluting the nation's waters. Thus, the Facility operated without developing and implementing an SPCC Plan for roughly 30 years. The Facility included at least one 250 barrel (10,500 gallon) crude oil tank and three producing oil wells. The Facility has creeks within its boundaries and has flowlines spanning those creeks posing a high potential to discharge to waters of the United States. Respondent's failure to implement pollution prevention measures required by the SPCC rules, including inspecting and maintaining flowlines at the Facility, directly resulted in the discharge

of oil into Fred and George Creek.

17. As to statutory factor #2 regarding economic benefit to the violator, I calculated an economic benefit component of $8,371 for Respondent's failure to prepare an SPCC Plan using three parameters in EPA's economic benefit calculation model, BEN. First, Respondent's successor company which purchased the Facility stated in documents submitted to EPA that the SPCC Plan for the Fred and George Creek Field cost $12,500. I used this parameter in the model as a one-time, nondepreciable expenditure. Second, I used an estimated annually recurring cost for reviewing the plan, conducting annual spill prevention briefings and inspections of $1,000, which is the average cost for this type of facility.. Third, because Fulton Fuels had never prepared an SPCC Plan for the Facility, I used a five-year period of non-compliance ending January 1, 2005, when the Facility was sold. Using these fair and reasonable parameters, EPA's economic benefit calculation model generated an economic benefit of $8,371 for Respondent's failure to prepare and implement an SPCC Plan for its Facility.

18. As to statutory factor #3 regarding the degree of culpability involved, the Respondent has owned and/or operated numerous oil production facilities since the 1960's and therefore should have had knowledge of the requirement to prepare and implement an SPCC Plan for its facilities and of oil pollution prevention laws, rules and regulations.

19. As to statutory factor #4 regarding any other penalty for the same incident, the SPCC requirements are non-delegated Federal rules, and no other entity has the authority to assess penalties for the violation of the SPCC regulations.

20. As to statutory factor #5 regarding any history of prior violations, EPA records do

not indicate that EPA has previouly inspected any of the Respondent's facilities nor do they show a history of prior violations.

21. As to statutory factor #6 regarding the nature, extent and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, EPA informed Respondent of the requirement to prepare and implement an SPCC Plan for the Facility after the discharge, and EPA is not aware that Respondent made any effort to prepare an SPCC Plan for the Facility prior to the sale of the Facility in January, 2005.

22. As to statutory factor #7 regarding the economic impact of the penalty on the violator, Respondent has not indicated that it is unable to pay the proposed penalty amount.

23. As to statutory factor #8 regarding any other matters as justice may require, EPA is unaware of any such matters.

24. The facts related to the statutory factors discussed above in paragraphs 17-24 support the proposed penalty of $21,055, including recovery of $8,731 in economic benefit for non-compliance, for the failure to prepare and implement an SPCC Plan at its Facility.

25. The total penalty proposed is $32,500 for the discharge of oil into Fred and George Creek and for the failure to prepare and implement an SPCC Plan for its Facility.

I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

Dated: December 17, 2009

Jane Nakad

Jane Nakad
U.S. EPA, Region 8,
Technical Enforcement Program

Appendix 1

EC-G-1998-12

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

December 15, 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on Use of Penalty Policies in Administrative Litigation

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

A. Introduction

This document provides guidance on how penalty amounts should be pled and argued in administrative litigation and how penalty policies should be used in this process.

B. Background

On September 29, 1995, Chief Administrative Law Judge Lotis issued an Initial Decision in In Re: Employers Insurance of Wausau, ruling that EPA must present evidence other than the PCB Penalty Policy in order to support its proposed penalty. We think the decision in the Wausau case is inconsistent with decisions on the use of penalty policies by the Environmental Appeals Board, in particular DIC Americas, Inc., TSCA Appeal No. 94-2 (September 27, 1995). The Agency is appealing the Wausau decision to the Environmental Appeals Board. Accordingly, this document is being issued in response to the Wausau decision to provide guidance on our administrative penalty pleading practices and use of penalty policies. After we receive a decision from the Environmental Appeals Board on our appeal we may revise this guidance as appropriate.

C. Use of Penalty Policies in Administrative Litigation

1. Federal environmental statutes set forth various factors which EPA or a court must consider in establishing penalties. EPA's penalty policies are based on the statutory penalty factors. The policies provide EPA enforcement staff with a logical calculation methodology for determining appropriate penalties. The policies help EPA apply the statutory penalty factors in a consistent and equitable manner so that members of the regulated community are treated similarly for similar violations across the country. As policies, they are not substantive rules under the Administrative Procedure Act.[1]

2. The penalty amount sought in the administrative complaint is based on the relevant statutory factors. The penalty amount pled should be calculated pursuant to any applicable penalty policy and the specific facts of the case.[2] If there is no applicable policy, the penalty amount to be pled in the complaint should be based on the statutory factors governing penalty assessment, case law interpreting such factors, and the facts of the particular case.[3]

3. The administrative complaint should explain that the penalty requested is based on the statutory provisions governing penalty assessment and it was calculated using a policy that applies the statutory factors. Accordingly, the administrative complaint should contain a paragraph similar to this model:

> The proposed civil penalty has been determined in accordance with [cite to relevant statutory penalty provision]. For purposes of determining the amount of any penalty to be assessed, [section of the Act] requires EPA to take into

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[1] The policies are a mix of legal interpretations, general policy, and procedural guidance in how EPA should allocate its enforcement resources and exercise its enforcement discretion. As such, they are exempt from the notice and comment rulemaking requirements of the Administrative Procedures Act, 5 U.S.C. § 553

[2] Not all EPA programs have penalty policies that establish calculation methodologies for use in determining the penalty amount to plead in an administrative complaint. For example, the May 1995 *Interim Revised Clean Water Act Settlement Policy* and the May 1994 *Public Water System Supervision Settlement Penalty Policy* only establish how the Agency expects to calculate the minimum penalty for which it would be willing to settle a case; these policies are not to be used in pleading penalties, or in a hearing or at trial.

[3] The Region should not use the policy in a particular case if the penalty amount produced by the calculation methodology produces an amount that appears inconsistent with the statutory penalty factors or otherwise unreasonable. In such a case, the Region must consult with OECA prior to deviating from the policy. See *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases*, memo issued by the Assistant Administrator, on July 11, 1994, especially page 3, and page 2 of the redelegation issued the same date, and subsequent program specific implementing guidances.

account [enumerate statutory penalty factors]. To develop the proposed penalty in this complaint, complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's [name of relevant penalty policy, if applicable], a copy of which is enclosed with this Complaint. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

4. As further support of the penalty proposed in the complaint, a case "record" file should document or reference all factual information on which EPA relied to develop the penalty amount pled in the complaint. If the Agency has an applicable penalty policy (other than an exclusive settlement-policy), the file should contain a computation worksheet setting forth how the penalty was calculated in the specific case, along with a narrative description of the specific calculation. This narrative description need not be lengthy, but it should explain how any applicable penalty policy methodology was applied to the specific facts in the case.[4] If there was no applicable penalty policy, the record file should contain a narrative description of how the statutory penalty factors were applied to develop the amount pled in the complaint. In short, the record file should document the facts and rationale which formed the basis for the penalty amount pled in the administrative complaint. In the prehearing exchange, EPA counsel may provide the respondent with copies of relevant documents from the case record file.[5]

5. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 CFR §22.24, the complainant (usually the Region), has the burden of presenting why the proposed penalty is appropriate. This burden of persuasion may be subdivided into three tasks or parts:

a) why any applicable penalty policy is a reasonable approach to use in the instant case;

b) proving the facts relevant to penalty assessment; and

c) why the particular facts merit the penalty proposed in the complaint.

Each of these three tasks is discussed below.

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[4] See, e.g., the *RCRA Civil Penalty Policy*, October 1990, pages 6 to 8, 41 to 47.

[5] The case record file only should contain final documents, and not preliminary, draft, or confidential documents. For example, documents evaluating the appropriate enforcement action, planning legal strategy, or establishing a settlement penalty amount are not part of the record file and should not be released.

a. Presenting any applicable penalty policy as a reasonable approach. In the prehearing exchange or at the hearing, EPA counsel should briefly explain why the applicable penalty policy is a reasonable way to apply the statutory factors. This explanation is a legal and policy analysis, which can be presented primarily, if not entirely, in briefs based on the written policy. Administrative law judges, however, may prefer some parts of this analysis to be presented through testimony or affidavits. If the Presiding Officer or respondent challenges the rationale or the basis for the penalty policy, complainant should provide a detailed explanation of why the penalty policy is a fair and logical way to apply the statutory factors.[6] Since penalty policies are not binding rules, such challenges must be responded to on the merits. Counsel should explain how the penalty policy provides a consistent, fair and logical framework for quantifying the statutory penalty factors to the particular circumstances of the instant case. Of course, the Presiding Officer is free to adopt a different framework other than the penalty policy for applying the statutory factors and ultimately arriving at a penalty amount.

b. Proving the facts relevant to penalty assessment. In the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence. The relevant facts will depend on the circumstances of the specific case and the statutory penalty factors. Such facts usually include the number, duration, and types of violations, any economic benefit resulting from the violations, the pollutants involved, and the environmental impact of the violations. Some of these facts may have been established in proving the violations.

c. Why the particular facts merit the penalty proposed in the complaint. This task requires the complainant to persuade the Presiding Officer why the penalty requested in the complaint is appropriate based on the statutory penalty factors and the facts in the case. If a penalty policy was used to calculate the penalty, an explanation of the calculation methodology should be presented. This task is primarily, if not exclusively, a legal and policy analysis and should be done through briefs or argument. If the Presiding Officer requires testimony regarding such analysis, the Region may identify a Regional enforcement person experienced in using and understanding the applicable penalty policy, and capable of discussing the nature and seriousness of the violations in the instant case. This expert should not be the counsel in the case.

If you have any questions regarding this guidance, you may call David Hindin at 202 564-6004, or Scott Garrison at 202 564-4047.

cc: Sylvia K. Lowrance; ORE Division Directors
ORE Branch Chiefs; Workgroup members

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[6] Regions should consult with ORE on how to respond to such challenges.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the SUPPLEMENTAL DECLARATION OF JANE NAKAD were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1159

and via U.S. first class mail to:

Mr. William M. Fulton, Jr., Registered Agent
Fulton Fuel Company
127 Main Street
P.O. Box 603
Shelby, MT 59474

And

Mr. Richard L. Beatty, Esq.
153 Main Street
P.O. Box 904
Shelby, MT 59474

12/17/09
Date

Judith M McTiernan
Signature