UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
BP Products North America Inc.,	)	**Docket No. CWA-05-2016-0015**
	)	
Respondent.	)	

ORDER DENYING PETITION TO SET ASIDE CONSENT AGREEMENT AND PROPOSED FINAL ORDER

Pursuant to Section 311(b)(6)(C)(iii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(C)(iii), on February 24, 2017, Carlotta Blake-King, Carolyn A. Marsh, Debra Michaud, and Patricia Walter ("Petitioners") jointly filed a Petition to set aside the Consent Agreement and proposed Final Order agreed upon by the parties to this matter, Complainant, the Director of the Superfund Division, United States Environmental Protection Agency ("EPA"), Region 5, and Respondent, BP Products North America Inc. The Petition alleges that Complainant failed to consider material evidence before issuing the proposed Final Order as required under Section 311(b)(6)(C)(iii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(C)(iii). As the Petition fails to present any relevant and material evidence that was not adequately considered and responded to by Complainant, the Petition is **DENIED** without the need for a hearing. *See* 33 U.S.C. § 1321(b)(6)(C)(iii); 40 C.F.R. § 22.45(c)(4).

A. STATUTORY AND REGULATORY BACKGROUND

The objective of the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or "Act"), is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Act states that "it is the policy of the United States that there should be no discharges[1] of oil[2] or hazardous substances into or upon the navigable waters[3] of the United States." 33 U.S.C. § 1321(b)(1). Accordingly, the Act prohibits "the discharge of oil or hazardous substances . . . into or upon the navigable waters of the United States . . . in such quantities as may be harmful as determined by the

[1] Under the Act, the term "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes . . . discharges in compliance with a permit under section 402 of this Act [42 U.S.C. § 1342]." 33 U.S.C. § 1321(a)(2); *see also* 40 C.F.R. § 112.2.

[2] The Act defines the term "oil" as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil." 33 U.S.C. § 1321(a)(1); *see also* 40 C.F.R. § 112.2.

[3] "Navigable waters" means "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The phrase "waters of the United States" has, in turn, been defined as including waters that are "currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"; "all interstate waters"; intrastate waters "the use, degradation or destruction of which could affect interstate or foreign commerce"; and tributaries of such waters. 40 C.F.R. § 230.3(s).

President under paragraph (4) of this subsection [which directs the President to determine those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States]," subject to certain exceptions. 33 U.S.C. § 1321(b)(3).

To implement this prohibition, the CWA provides that "the President shall issue regulations . . . establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from . . . onshore facilities[4] . . ., and to contain such discharges." 33 U.S.C. § 1321(j)(1)(C). In 1991, the President delegated the authority for promulgating such regulations to the EPA Administrator, Exec. Order No. 12,777 § 2(b)(1), 56 Fed. Reg. 54,757, 54,760 (Oct. 22, 1991), as authorized under the CWA, *see* 33 U.S.C. § 1321(l) ("The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate.").

The relevant regulations, entitled "Oil Pollution Prevention," are codified at 40 C.F.R. Part 112. These regulations "establish[] the requirements for the preparation and implementation of Spill Prevention, Control, and Countermeasure (SPCC) Plans" by subject facilities. 40 C.F.R. § 112.1(e). "The SPCC Plan must address all relevant spill prevention, control, and countermeasures necessary at the specific facility." *Id*.

Section 112.2 of the regulations more plainly defines an SPCC Plan as "the document required by § 112.3 that details the equipment, workforce, procedures, and steps to prevent, control, and provide adequate countermeasures to a discharge." 40 C.F.R. § 112.2. Section 112.3, in turn, provides that "[t]he owner or operator [of] an onshore . . . facility subject to this section must prepare in writing and implement [an SPCC Plan], in accordance with § 112.7 and any other applicable section of this part." 40 C.F.R. § 112.3. Among other elements, an SPCC Plan must

> [p]rovide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in § 112.1(b) . . . . The entire containment system, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs.

40 C.F.R. § 112.7(c).

As to non-compliance with these regulatory requirements, the CWA provides in pertinent part that:

> Any owner, operator, or person in charge of any . . . onshore facility —

[4] The term "facility" is defined as "any mobile or fixed, onshore or offshore building, property, parcel, lease, structure, installation, equipment, pipe, or pipeline (other than a vessel or public vessel) used in oil well drilling operations, oil production, oil refining, oil storage, oil gathering, oil processing, oil transfer, oil distribution, and oil waste treatment." 40 C.F.R. § 112.2. An "onshore facility" means "any facility . . . of any kind located in, on, or under, any land within the United States, other than submerged land." 33 U.S.C. § 1321(a)(10); *see also* 40 C.F.R. § 112.2.

> (i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or
>
> (ii) who fails or refuses to comply with any regulation issued under subsection (j) to which that owner, operator, or person in charge is subject,
>
> may be assessed a class I or class II civil penalty by the . . . [EPA] Administrator.

33 U.S.C. § 1321(b)(6)(A).

The CWA proscribes two classes of administrative civil penalties that can be levied against violators. 33 U.S.C. § 1321(b)(6)(B). Class II penalties are imposed for more egregious conduct, and the procedural protections of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, requiring notice and opportunity for a hearing "on the record" before an Administrative Law Judge, apply to such cases. *See* 33 U.S.C. § 1321(b)(6)(B)(ii). For violations occurring after December 6, 2013, through November 2, 2015, as relevant here, the Act provides that the Class II penalties imposed "may not exceed" $16,000 for each day the violation continues, and the total Class II penalty cannot exceed $187,500. 40 C.F.R. § 19.4.[5]

In determining the appropriate amount of penalty to impose, the CWA requires EPA to consider the "seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require." 33 U.S.C. § 1321(b)(8). However, as observed by the Environmental Appeals Board, "[t]he Act does not . . . 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phoenix Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002)); *see also Tull v. United States*, 481 U.S. 412, 426-27 (1987) (recognizing that the setting of penalties under the CWA is "highly discretionary").

In addition, to provide for the rights of "interested persons" to be informed of such administrative penalty actions, the Act mandates that EPA "shall provide public notice of and reasonable opportunity to comment on" a proposed order assessing a Class II penalty prior to its issuance. 33 U.S.C. § 1321(b)(6)(C)(i). Moreover, "[a]ny person who comments on a proposed assessment of a class II civil penalty" is entitled to receive notice of "any hearing," and at such hearing "shall have a reasonable opportunity to be heard and to present evidence." 33 U.S.C. § 1321(b)(6)(C)(ii). The CWA further provides as follows:

> If no hearing is held . . . before issuance of an order assessing a class II civil penalty under this paragraph, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the [EPA] Administrator .

[5] The amounts stated here are those shown in Table 1, 40 C.F.R. § 19.4, reflecting the statutory penalty amounts adjusted 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).

> . . to set aside such order and to provide a hearing on the penalty. *If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator . . . shall immediately set aside such order and provide a hearing* . . . . If the Administrator . . . denies a hearing under this clause, the Administrator . . . shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

33 U.S.C. § 1321(b)(6)(C)(iii) (emphasis added).

B. FACTUAL BACKGROUND

Respondent BP Products North America Inc. ("BP") owns and operates a petroleum refinery located at 2815 Indianapolis Boulevard, in Whiting, Indiana (the "Facility"). Ex. 1 at 5, ¶ 22.[6] BP engages in storing, processing, refining, transferring, using, distributing, or consuming oil or oil products at the Facility.[7] *Id.* at 5, ¶ 26. The Facility is located on the shore of Lake Michigan, which is a navigable in fact water and thus a "navigable water" of the United States. *Id*. at 5-6, ¶¶ 23, 31. As the Facility is located on land within the United States, it is an "onshore facility" as defined by the Act. *Id.* at 5, ¶ 27. Due to the Facility's location, any oil released from the Facility could reasonably be expected to discharge to Lake Michigan. *Id.* at 5, ¶ 30.

Respondent is subject to the regulations set forth at 40 C.F.R. Part 112, including the requirement to prepare and implement an SPCC Plan. Ex. 1 at 6, ¶ 32. At all times relevant hereto, BP had an SPCC Plan for the Facility dated January 2014. *Id.* at 7, ¶ 41.

On March 24, 2014, BP discharged oil into Lake Michigan from the Facility's "Six Separator." Ex. 1 at 6, ¶ 36. The Six Separator is on the receiving end of the Facility's "Once Through Cooling Water" ("OTCW") system. *See id.* at 6, ¶ 35. The OTCW system supplies non-contact cooling water throughout the Facility before it flows through a piping system to the Six Separator for treatment. *Id*. at 6, ¶¶ 34-35. The flow of cooling water from the OTCW system to the Six Separator ranges from 55 to 85 million gallons per day. *Id*. at 6, ¶ 35. The Six Separator is open to the ambient air and works by allowing time for any oil in the flow from the OTCW system to float to the surface based upon the difference in density between oil and water. *Id*. The residence time varies from 50 to 90 minutes.[8] *Id*.

After the discharge occurred, BP conducted an investigation and issued an Incident Investigation Report ("Report"), dated August 20, 2014, that described its findings and recommendations. Ex. 1 at 6, ¶ 37. According to the Report, the cause of the discharge originated at the Facility's Number 12 Pipestill ("No. 12PS"), which fractionates crude oil into various products and sends those products to other refinery units for further processing. *Id.* at 6-

[6] Exhibits 1-7 referenced herein are those attached to EPA's Request to Assign Petition Officer received by this Tribunal on June 12, 2017.

[7] The Facility has a total oil storage capacity of more than seven million gallons. Ex. 1 at 5, ¶ 29.

[8] "Residence time" is the average length of time during which a substance, a portion of material, or an object is in a given location or condition. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/residence_time.

7, ¶¶ 33, 38. A temporary "quench line" connecting the No. 12PS "brine line" to the OTCW system had been installed on October 11, 2013. *Id.* at 7, ¶¶ 38-39. Due to "abnormal conditions" at the No. 12PS, pressure in the brine line exceeded the pressure in the OTCW system, at which time the check valves on the temporary quench line failed, allowing a mixture of brine and crude oil to flow backwards through the quench line into the OTCW system, Separator Six, and Lake Michigan. *Id.* at 7, ¶ 38. The Report identified as a "contributing factor" to the discharge "that the oil flowing into Six Separator from No. 12PS exceeded the oil removal capacity of Six Separator." Ex. 1 at 7, ¶ 40. At the time, the effectiveness of the Six Separator to remove oil entrained in the water had been reduced by the accumulation of solids in the Six Separator. *Id.*

Following the discharge, BP removed the temporary quench line and blocked and sealed other connections to the OTCW system. Ex. 1 at 7-8, ¶¶ 39, 47. It also installed additional alarms upstream of the Six Separator to detect oil in the OTCW system and removed the accumulated sediment in the Six Separator. *Id.* at 8, ¶¶ 47, 48. Finally, it updated its SPCC Plan. *Id.* at 8, ¶ 49.

Based on the March 24, 2014 discharge, EPA determined that BP had "failed to maintain and implement the [Facility's] 2014 SPCC Plan so as to prevent the discharge of oil from the Facility to navigable waters, in violation of 40 C.F.R. § 112.3." Ex. 1 at 9, ¶ 50. EPA further determined that BP had "failed to provide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in 40 C.F.R. § 112.1(b), and failed to address the typical failure mode and the most likely quantity of oil that would be discharged from the oil-filled equipment with the potential to discharge to Lake Michigan, in violation of 40 C.F.R. § 112.7(c)." *Id.* at 9, ¶ 51.

In May 2016, BP and Complainant executed a "Consent Agreement and Final Order" ("CAFO").[9] Ex. 1. The CAFO sought to simultaneously commence and conclude an administrative penalty action against BP under Section 311(b)(6)(A)(ii) of the CWA for the alleged violations as determined by EPA. *See* Ex. 1 at 1, ¶ 1. Under the terms of the CAFO, BP admitted the jurisdictional allegations set forth in the CAFO but "neither admit[ted] nor denie[d] the factual allegations and alleged violations." Ex. 1 at 2, ¶ 7. Nevertheless, BP waived its right to a hearing or to otherwise contest the CAFO, and agreed to pay a civil penalty in the amount of $151,899. Ex. 1 at 2, 9, ¶¶ 8, 52.

Consistent with the Act's requirements, on or about June 1, 2016, EPA provided public notice of its intent to file the proposed CAFO and accept public comments thereon.[10] *See* Ex. 2. Petitioners, among others, timely filed comments on the proposed CAFO ("Comments"). Ex. 3. Complainant subsequently prepared a Response to Comments Regarding Proposed CAFO

[9] The CAFO was executed for BP by Donald Porter, Whiting Refinery Manager, on May 12, 2016, and for EPA by Richard C. Karl, Director for EPA Region 5's Superfund Division, on May 31, 2016. Ex. 1 at 13. While titled "Consent Agreement *and Final Order*," a final order was not actually included with the CAFO filed with this Tribunal. Ex. 1 (emphasis added). It is the execution of a final order by EPA Region 5's Acting Regional Administrator, and its subsequent filing with the Regional Hearing Clerk at EPA Region 5, that will effectuate the parties' Consent Agreement and conclude the proceeding. *See* 40 C.F.R. §§ 22.18, 22.31.

[10] In its Response to the Petition, EPA represents that it provided public notice of and opportunity to comment on the CAFO from June 3, 2016, through July 12, 2016. Response at 3.

("Response to Comments"), which indicated that EPA would not be altering the proposed CAFO. Ex. 4. The Response to Comments was mailed to Petitioners, together with a copy of the proposed CAFO, on or about January 17, 2017, and each Petitioner received the materials by January 30, 2017. Ex. 5-6. On or about February 24, 2017, Petitioners timely filed their Petition seeking to set aside the proposed CAFO and have a public hearing held thereon.[11] Ex. 7.

A Request to Assign Petition Officer ("Request") was issued by EPA Region 5's Acting Regional Administrator on May 17, 2017, and served on Petitioners on May 30, 2017. In the Request, the Acting Regional Administrator stated that after considering the issues raised in Petitioners' Petition, Complainant "decided not to withdraw the CAFO." Accordingly, the Acting Regional Administrator requested assignment of an Administrative Law Judge to consider and rule on the Petition pursuant to Section 22.45(c)(4)(iii) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules," "Rules of Practice," or "Rules"), 40 C.F.R. § 22.45(c)(4)(iii). By Order dated June 16, 2017, the undersigned was designated to preside over this matter, and the Agency was directed to file a response to the Petition. Complainant filed its Response to Petition to Set Aside Consent Agreement and Proposed Final Order ("Response") on July 10, 2017.[12]

C. STANDARD OF REVIEW

As set forth above, the CWA provides as follows:

> If no hearing is held . . . before issuance of an order assessing a class II civil penalty under this paragraph, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the [EPA] Administrator . . . to set aside such order and to provide a hearing on the penalty. *If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator . . . shall immediately set aside such order and provide a hearing* . . . . If the Administrator . . . denies a hearing under this clause, the Administrator . . . shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

33 U.S.C. § 1321(b)(6)(C)(iii) (emphasis added).

The Consolidated Rules also speak to this issue. The Consolidated Rules are a set of procedural rules issued by EPA that establish the process for adjudicating such administrative adjudicatory proceedings as those seeking Class II penalties under 33 U.S.C. § 1321(b)(6), consistent with the APA and the due process rights established under the U.S. Constitution. *See*

[11] In their Petition, Petitioners erroneously cite Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), as the statutory provision underlying their request. Ex. 7 at 1.

[12] It appears from the record that Richard C. Karl, who executed the CAFO as EPA Region 5's Director of the Superfund Division, left that position. In the Request to Assign Petition Officer, the Acting Regional Administrator noted that Complainant, the *Acting* Superfund Division Director, had decided not to withdraw the CAFO. Subsequently, Margaret M. Guerriero, as the Acting Director of EPA Region 5's Superfund Division, submitted the Response to the Petition.

40 C.F.R. § 22.1(a)(6).[13] The Rules provide that "where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order." 40 C.F.R. § 22.13(b); *see also* 40 C.F.R. § 22.18(b)(2), (b)(3) (describing the terms that a consent agreement must include and the need for an executed final order ratifying the parties' consent agreement in order to dispose of a proceeding).

With regard to petitions to set aside a CAFO under the CWA, the Consolidated Rules provide, in relevant part, as follows:

> The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:
>
> (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
>
> (B) Whether complainant adequately considered and responded to the petition; and
>
> (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

40 C.F.R. § 22.45(c)(4)(v).

The Consolidated Rules proceed to identify the proper course of action to take depending upon the Petition Officer's determination as to the appropriateness of a hearing for resolution of the proceeding. In particular, the Consolidated Rules provide that "[u]pon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing." 40 C.F.R. § 22.45(c)(4)(vi). Conversely:

> Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:
>
> (A) File the order with the Regional Hearing Clerk;
>
> (B) Serve copies of the order on the parties and the commenter; and
>
> (C) Provide public notice of the order.

40 C.F.R. § 22.45(c)(4)(vii).

[13] The CAFO's reference to Section 22.1(a)(2) of the Consolidated Rules, which concerns the Clean Air Act, appears to be in error. Ex. 1 at 1, ¶ 1.

While the statute requires a proposed CAFO to be set aside "[i]f the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order," 33 U.S.C. § 1321(b)(6)(C)(iii), and the Consolidated Rules require findings as to the "extent to which the petition states an issue relevant and material to the issuance of the proposed final order," 40 C.F.R. § 22.45(c)(4)(v)(A), neither the CWA nor the Rules define the terms "relevant" and "material." Consequently, it is appropriate to look to the Federal Rules of Evidence and federal court practice for guidance. *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 657 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges . . . to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance."); *City of Salisbury*, 10 E.A.D. 263, 285 n.31 (EAB 2002) ("[T]he Agency's trial level administrative law judges may appropriately look to the federal courts for guidance.").

Under the Federal Rules of Evidence, information is "relevant" when "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.[14] Similarly, evidence is deemed "material" when, if presented, it reasonably has the potential to cause a different outcome. *See United States v. Bagley*, 473 U.S. 667, 682 (1981). The context in which evidence is offered will determine its relevance. *99 Cents Only Stores*, 2008 EPA ALJ LEXIS 46, at *7 (Order on Respondent's Motion in Limine).

D. ISSUES RAISED IN THE COMMENTS AND PETITION[15]

In their Comments on the proposed CAFO, Petitioners offered three "recommendations" for changes: (1) that the civil penalty be increased to $187,500; (2) that an additional $100,000 fine be imposed for "absence of a culture of health and safety"; and (3) that the proposed CAFO include "a Supplemental Environmental Project (SEP) Fund." Ex. 3 at 2. In their subsequent Petition, Petitioners request that the proposed CAFO be set aside "on the basis that material evidence was not considered." Ex. 7 at 1. While not a model of organization and clarity, the Petition essentially proffers three issues as material evidence not considered by EPA in approving the proposed CAFO: (1) that the violations are part of the broader "West Calumet environmental crisis"; (2) that BP has a history of violations and is "not managing critical safety information well"; and (3) BP is not engaging in sufficient community outreach and therefore an "independent advisory committee and environmental mentoring program" should be created. Ex. 7 at 1-2. These issues are all addressed below.

[14] This two-part definition of the term "relevant" appears to subsume any independent definition of the term "material," and the latter term does not appear in the Federal Rules. *United States v. Carriger*, 592 F.2d 312, 315 (6th Cir. 1979).

[15] The Petition describes the arguments set forth therein as "additions" to the Comments that Petitioners previously submitted to EPA in response to the public notice of EPA's intent to file the proposed CAFO. Ex. 7 at 3. Petitioners submitted their Comments from various email addresses to EPA on July 12, 2016. Ex. 3. As the text of the emailed Comments is identical, page citations herein to Petitioners' Comments are to the specific email from Carlotta Blake-King (cbk0563@comcast.net) to the Regional Hearing Clerk for EPA Region 5, LaDawn Whitehead (whitehead.ladawn@epa.gov), dated Tuesday, July 12, 2016 at 12:14 PM. *See* Ex. 3.

Issue 1: That the Civil Penalty Should be Increased

In their Comments, Petitioners urged that the penalty imposed for the alleged violations be increased from $151,899 "to the maximum of $187,500," suggesting that Complainant failed in its penalty calculation to consider material evidence regarding the magnitude of the violations to the local community. Ex. 3 at 2. As background, they noted that the Facility is "on the southwestern shore of Lake Michigan and the Indiana Harbor Ship Canal in the communities of Whiting, East Chicago and Hammond, Indiana." *Id.* at 1. Petitioners further asserted that the Facility "is the second largest refinery in the BP refining system, and the sixth largest in the United States. The refinery is close and visible to residents in the Hegewisch and East Side neighborhoods of Chicago, Illinois." *Id*. With respect to Lake Michigan, Petitioners asserted it is the sixth largest freshwater lake in the world[16] and that it provides water to 40 million people, before stating portentously that the March 24, 2014 discharge of oil from the Facility occurred "only two miles from the Hammond Indiana water intake crib, and eight miles from a Chicago water intake crib."[17] *Id*. at 1-2.

In their Petition, Petitioners allege that the violations set forth in the proposed CAFO "involve[] the broader Northwest Indiana and Northeast Illinois communities." Ex. 7 at 1. They assert that "the George Lake Canal branches [Lake George Branch of the Indiana Harbor Ship Canal] are near West Calumet homes" and that West Calumet is suffering an "environmental crisis" involving water, lead, and arsenic, with "no governmental agency taking responsibility" for the "inadequate cleanups." Ex. 7 at 2. They further decry what they perceive as EPA's attempt to separate issues, stating their belief that "the issues are connected" and "there is a connection to BP and their pollution of the neighboring canal." *Id.* BP is "polluting the air and water that threatens our drinking water, wildlife and human health and safety," they declare. Ex. 7 at 3.

In its Response to the Petition, Complainant generally contends that Petitioners have not raised any issues relevant and material to the issuance of the proposed CAFO that have not already been considered. Response at 1. With regard to the proposed penalty amount being insufficient in light of the environmental impact of the violations alleged in the proposed CAFO, Complainant reiterates points made in its earlier Response to Comments. *See* Response at 8 ("Complainant's responses [in its Response to the Petition] are taken largely from Complainant's response to comments.").

Specifically, Complainant advises in its Response to Comments and Response to the Petition that settlements of cases such as the present one are calculated and negotiated based upon a document entitled "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the

[16] Petitioners asserted that freshwater lakes account for only ".007 of all water" on Earth, citing to the "USGS," presumably the United States Geological Survey, for that figure. Ex. 3 at 1.

[17] "Water intake cribs" are "offshore structures that collect water from close to the bottom of a lake to supply a pumping station onshore." Water cribs, WIKIPEDIA, https://en.wikipedia.org/wiki/Water_crib#cite_note-1 (last visited Mar. 13, 2018). A number of water intake cribs exist and operate in Lake Michigan to supply the City of Chicago and surrounding region with drinking water. *See, e.g.*, *Water Intake Cribs one of City's Best-Kept Secrets*, NWI TIMES (Aug. 20, 2000), http://www.nwitimes.com/uncategorized/water-intake-cribs-one-of-city-s-best-kept-secrets/article_9911c99a-232f-53f6-a695-83f14800071b.html.

Clean Water Act," dated August 1998 ("Penalty Policy" or "Policy").[18] Ex. 4 at 1-2; Response at 9. That Penalty Policy, it maintains, "is consistent with and takes into consideration the statutory criteria for assessing a civil penalty described in Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8)." Ex. 4 at 2; Response at 9. Complainant asserts that under the Policy, the amount of the penalty depends on a number of factors, including "the duration and extent of the alleged violations and their environmental impact," and that "penalties imposed in CAFOs vary widely for reasons unique to each situation." Ex. 4 at 2; Response at 9-10. Complainant demurs from disclosing the details of its penalty calculations for the violations at issue in the proposed CAFO, asserting that "[d]ue to the confidential nature of settlement negotiations, there are legal constraints on the information that EPA can share concerning the details of penalty calculations and negotiations." Ex. 4 at 2; Response at 10. However, Complainant represents that the penalty contained in the proposed CAFO is consistent with the Penalty Policy and that it is "satisfied that the civil penalty being paid by Respondent is adequate to deter future violations and is further supported by conserving the resources required by prolonged litigation and avoiding uncertainty regarding the outcome at an administrative hearing or trial." Ex. 4 at 2; Response at 10.

Complainant also explains that the March 2014 oil discharge itself is not the basis for the penalty assessed in the proposed CAFO, as "the USCG [U.S. Coast Guard] had lead enforcement authority over the discharge and assessed a $2,000 class I administrative penalty against Respondent for the discharge under Section 311(b)(6)(A)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(i)." Response at 10; *see also* Ex. 4 at 2. Rather, Complainant asserts, the proposed CAFO would assess an $151,899 Class II civil administrative penalty against Respondent for alleged violations of 40 C.F.R. Part 112 based on its purported failure to maintain and implement its SPCC Plan and failure to provide appropriate containment and diversionary structures to prevent a discharge. Response at 10; Ex. 4 at 2.

It would certainly have been preferable to see a more detailed explanation of Complainant's penalty calculations, and in particular an account of precisely how the environmental impact of the alleged violations on the community, if any, was considered therein under the factors of the "seriousness of the violation or violations" and/or "any other matters as justice may require." Nevertheless, while not ideal, it is indisputable that Complainant did, in fact, consider and respond to the issues regarding the penalty amount raised in the Comments and the Petition. And as the Petitioners provide no evidence in support of their assertions that the alleged violations and their purported environmental impact on the community warrant a higher penalty, or any rebuttal of Complainant's contention that it properly followed the Penalty Policy, which is itself based on the required statutory factors, it cannot be said that the Petition has met its burden of demonstrating that this issue constitutes material and relevant evidence that Complainant failed to consider in agreeing to the proposed CAFO. Therefore, the Petition having presented no material or relevant evidence that Complainant failed to consider, this claim must be **DENIED**.

[18] Complainant cites this document as being accessible at https://www.epa.gov/sites/production/files/documents/311pen.pdf. Response at 9 n.11.

Issue 2: That an Additional $100,000 Fine be Imposed for the Absence of a Culture of Health and Safety

In their Comments, Petitioners argued that an additional $100,000 fine should be imposed against BP for the "absence of a culture of health and safety," expressing the belief that the penalty assessed in the proposed CAFO "is not an adequate amount to pressure BP to improve operations to prevent future oil spills." Ex. 3 at 2. According to Petitioners, BP has exhibited a "pattern of poor, ineffective responses to oil pollution [that] was amplified by the worst offshore oil spill in U.S. history – the BP Gulf of Mexico Deepwater Horizon spill in April 2010." *Id.* at 1. Petitioners noted that the March 2014 oil spill in Lake Michigan resulted from a failure of a "temporary" quench line that had, in fact, been in place for five months and was part of a system handling 55 to 85 gallons of oil per day. *Id.* Further, Petitioners asserted, the oil spilled involved not "conventional heavy crude," as first reported, but rather "more serious tar sands" crude oil. *Id.* Petitioners characterized BP's containment plan as "woefully inadequate" and stated that Keith Matheny of the Detroit Free Press reported that "the U.S. Coast Guard and other responders are not adequately equipped or prepared for a 'heavy oil' spill on the Great Lakes."[19] *Id.* at 1-2. Thus, Petitioners urged, the March 2014 spill was "a Great Lakes wake-up call." *Id.* at 1.

Petitioners also complained that BP held only one "Citizens Advisory Committee meeting" after the March 2014 spill and that the U.S. Coast Guard fined BP only $2,000, instead of the maximum penalty of $40,000, for causing the spill. Ex. 3 at 1-2. Such a nominal sanction, they suggested, is consistent with the Facility's "frontline regulator," the Indiana Department of Environmental Management, imposing no fines against BP over the years, despite multiple violations of its water pollution permit and regulations.[20] *Id.* at 2.

In their Petition, Petitioners maintain that "[t]here are too many accidents at BP for the public to tolerate the cavalier attitude by government regulators assigned to BP." Ex. 7 at 1. Citing what appears to be a newspaper article for support, Petitioners assert that an internal investigation report concluded that BP was "not managing critical safety information well" and

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[19] Petitioners did not provide a citation this article, but this Tribunal located it at the following address: https://www.freep.com/story/news/local/michigan/2014/09/11/coast-guard-we-cant-adequately-respond-to-great-lakes-heavy-oil-spill/15422415/.

[20] In support of this assertion, Petitioners quote an article, published by the Better Government Association at http://www.bettergov.org/bad_communication_over_bp_spill/, as follows:

> The Better Government Association's Brett Chase wrote, ". . . the company paid no fines over the past dozen years for multiple violations of water pollution permits. A review of government inspection reports by the Better Government Association found that despite more than a dozen violations of water pollution regulations since 2002, BP wasn't fined once by its frontline regulator, the Indiana Department of Environmental Management."

Ex. 3 at 2 (citing http://www.bettergov.org/bad_communication_over_bp_spill/). However, the quoted language does not appear in the article cited by Petitioners. Substantively similar language does appear in an article entitled "Oil and Water," which is accessible on the website for the Better Government Association at https://www.bettergov.org/news/oil-and-water.

that an accident that occurred at the Facility in January 2014 "was a near-miss that could have caused an explosion and fatalities."[21] *Id.* at 1-2.

In its Response to the Petition, Complainant characterizes the foregoing issues as being "outside the scope of the CAFO" and not "relevant and material to the issuance of the CAFO." Response at 5-6. In particular, Complainant argues that while the report of the purported incident in January 2014 is "troubling," it "is not relevant and material to Respondent's failure to have adequate measures in place to prevent the oil discharge to Lake Michigan that occurred on March 24, 2014," which is the basis for the alleged violations at issue. *Id.* Complainant continues that BP "has taken actions to address the alleged inadequate secondary containment and deficiencies with its SPCC Plan," as described in the proposed CAFO, and Complainant believes that the agreed upon penalty is consistent with the Penalty Policy and "adequate to deter future violations." *Id*. at 6.

In its Response to Comments, Complainant specifically noted Petitioners' request that an additional fine of $100,000 be levied against BP on account of the purported "absence of a culture of health and safety" at the Facility. Ex. 4 at 1. In addressing the issue, Complainant pointed out that the maximum penalty it was authorized to impose under the CWA was $16,000 per day for each day of violation up to a maximum penalty of $187,500. *Id.* (citing 33 U.S.C. § 1321(b)(6)(B)(ii), 40 C.F.R. Part 19). Complainant also asserted:

> Some commenters provided a "track record" or list of what appears to be alleged environmental and safety issues relating to BP's operations from 2001 to 2015. This list covers a wide range of issues, including various environmental and other laws and enforcement actions at facilities operated by BP across the country. None of the issues appear to relate to the allegations described in the CAFO. Additionally, many of the issues describe enforcement actions that have been resolved through settlements and are well outside the applicable five year statute of limitations. *See* 28 U.S.C. § 2462.

Id. at 2.

Petitioners' request to impose an additional $100,000 sanction on BP for what they view as a culture of indifference to health and safety based upon a series of violations over many years is understandable. However, they fail to cite any legal authority allowing EPA to unilaterally impose such a separate and additional penalty. To the contrary, it is certain that EPA is limited to imposing the maximum penalty permitted under the Act for the violations alleged and determining the penalty based upon the statutory factors. Among those factors are "any history of prior violations" and "any other matters as justice may require." 33 U.S.C. § 1321(b)(8). Complainant has alleged in both its Response to Comments and Response to the Petition that it utilized the Penalty Policy, which takes those factors into account, in determining the penalty assessed in the proposed CAFO. Ex. 4 at 2; Response at 9-10. Petitioners have not offered any argument or evidence to suggest otherwise. For these reasons, the undersigned finds that this issue does not

[21] Complainant states in its Response to the Petition that it located the article referenced by Petitioners and that it is accessible at http://www.nwitimes.com/business/near-miss-at-bp-whiting-refinery-in-was-potentially-deadly/article_2406bd02-9738-59f4-bb7d-40039bc666b7.html. Response at 5, n.8.

present any fact or argument relevant and material to the proposed CAFO that was not considered by Complainant, and that this claim must therefore be **DENIED**.

Issue 3: That the Proposed CAFO Should Include a Supplemental Environmental Project Fund

Under this heading in their Comments, Petitioners urged that a Supplemental Environmental Project ("SEP") fund be incorporated into the CAFO for local projects and that local residents be included in the projects. Ex. 3 at 2. In association with these requests, they made two claims regarding the way funding for SEPs is distributed. Specifically, they asserted that EPA and the Department of Justice dispersed SEP funds to "those that do not reside in environmental justice areas"[22] and that the National Fish and Wildlife Federation did not "fulfill[] the responsibility to include residents in projects in the Lake George Branch of the Indiana Harbor Ship Canal." *Id.*

In its Response to the Comments, Complainant addressed the absence of a SEP in the parties' settlement agreement by making three points. First, Complainant noted that federal law requires civil penalties paid pursuant to Section 311 of the CWA to be deposited in the Oil Spill Liability Trust Fund ("OSLTF"), which is administered by the U.S. Coast Guard ("USCG"). Ex. 4 at 3 (citing 26 U.S.C. § 9509(b)(8)); *see also* Response at 11. According to Complainant, expenditures from the OSLTF are primarily used for removal costs incurred by EPA and USCG in responding to discharges, state access for removal activities, payments to federal, state, and Native American tribe trustees to conduct natural resource damage assessments and restorations, and payment of claims for uncompensated removal costs and damages. Ex. 4 at 3 (citing *Oil Spill Liability Trust Fund*, U.S. EPA, https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/oil-spill-liability-trust-fund (last visited Mar. 20, 2018)); *see also* Response at 11.

Second, Complainant explained:

> A SEP is an environmentally beneficial project or activity that is not required by law, but that a respondent agrees to undertake as part of a settlement or enforcement action. SEPs are projects that go beyond what could legally be required in order for the respondent to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. While EPA encourages the use of SEPs that are consistent with the 2015 SEP Policy, EPA cannot require a respondent to perform a SEP, or dictate any particular SEP.

[22] To support this assertion, Petitioners referred to a "DJ.Ref. No. 90-5-2-1-05860 – May 8, 2013 letter from Carolyn A. Marsh to US DOJ, United States v. Dominion Energy Inc., Dominion Energy Brayton Point LLC, and Kincaid Generation LLC, Civ. No. 13-cv-3086 (C.D. Ill.)." Ex. 3 at 2. This Tribunal was unable to locate a copy of any such letter. Environmental justice areas are those that bear a disproportionate share of adverse human health and environmental impacts, often where the nation's minority, low-income, tribal, or indigenous populations reside. *See Factsheet on the EPA's Office of Environmental Justice*, https://www.epa.gov/sites/production/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf.

Ex. 4 at 3 (citing Cynthia Giles, *Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy* (Mar. 10, 2015), https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf); *see also* Response at 11.

Third, Complainant argued that even in the absence of a SEP, settlements such as the one at issue "provide substantial benefits to communities and the environment" by deterring future violations and ensuring a level playing field for members of the regulated community. Ex. 4 at 3; *see also* Response at 11-12.

Upon review, it is clear that Petitioners' request for a SEP "fund" reflects a fundamental misunderstanding as to what SEPs are and how civil penalties may be expended. As Complainant has explained, EPA lacks the authority to demand a SEP or control the distribution of civil penalty funds. Petitioners simply cannot prevail on their claim to set aside the agreed upon settlement because of Complainant's failure to impose an obligation that it had no authority under the CWA to unilaterally impose or to direct the distribution of the assessed civil penalty in a manner inconsistent with federal law. Because of Complainant's lack of authority in this regard, Petitioners' requests necessarily are immaterial to the issuance of the proposed CAFO in this matter.

Furthermore, even if Complainant possessed the authority to fulfill Petitioners' request to include a SEP as an element of the parties' settlement agreement, federal courts have often held that decisions to settle, and the terms thereof, are areas in which agencies enjoy broad discretion. *See, e.g.*, *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030-31; (D.C. Cir. 2007) ("Although the Supreme Court's decision in *Chaney* applies directly to agency decisions not to enforce a statute, we have also applied it to an agency's decision to settle an enforcement action.") (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). Thus, Complainant would have discretion with respect to a SEP, as long as the terms were consistent with applicable law and policy. For the foregoing reasons, the undersigned finds that this issue does not present any new fact or argument that is relevant and material to the proposed CAFO, and that this claim must therefore be **DENIED**.

Issue 4: That an Independent Advisory Committee and Environmental Monitoring Program for Respondent's Wastewater Treatment Plant Should be Created

The heading for this section of the Petition states that "[a]n independent advisory committee and environmental monitoring program for Respondent's wastewater treatment plant should be created." Ex. 7 at 2. Yet the remainder of the section provides no further evidence or argument in support of the claim. Rather, Petitioners appear to respond to the discussion in Complainant's Response to Comments of the community outreach activities in which BP engages and the webpage on which BP describes those activities. *See* Ex. 4 at 5. Specifically, Petitioners protest that BP's website uses a brief "flash notice" to indicate that it is attaching a cookie[23] to the computer of a visitor to the website, making "one afraid" to use it. Ex. 7 at 2.

[23] In the computing sense, the term "cookie" has been defined as "a small file or part of a file stored on the World Wide Web user's computer, created and subsequently read by a website server, and containing personal information (such as a user identification code, customized preferences, or a record of pages visited)," MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cookie, or "[a] packet of data sent by an Internet server

Petitioners then question BP's purported current community outreach, asserting that it ceased publishing quarterly operations and accident reports for the Facility and holding quarterly "Citizens Advisory Committee" meetings – which, Petitioners state, were required under a "consent decree remediation case" involving the previous owner of the Facility – after determining in 2014 that such measures were unnecessary. *Id*. at 2-3. Petitioners do not provide any additional information about this consent decree or explain how it relates to the proposed CAFO.

In its Response, Complainant argues that Petitioners' statements concerning this topic "do not provide any relevant and material issues related to the issuance of the CAFO." Response at 8. It also maintains:

> [These statements] are outside the scope of EPA's authority under this class II administrative penalty proceeding. Complainant brought this enforcement action under Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), which allows Complainant to assess a civil administrative penalty against, among other things, any operator of any facility who fails to comply with the oil pollution prevention regulations. Under 40 C.F.R. § 22.18(c), payment of a penalty proposed in a CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO. EPA does not have authority under Section 311(b)(6) of the CWA (Administrative Penalties) or the Rules of Practice to establish advisory committees and independent monitoring programs, or fund such committees or programs. Federal law directs where civil penalties are to be applied. All civil penalties paid pursuant to Section 311 of the CWA must be deposited in the Oil Spill Liability Trust Fund (OSLTF), which is administered by the U.S. Coast Guard (USCG). *See* 26 U.S.C. § 9509(b)(8). Similarly, EPA cannot require Respondent to conduct outreach activities, and has no control over Respondent's website.

Id.

The reasoning behind denying Petitioners' claim with regard to a SEP similarly applies in this instance. As Complainant advises, it lacks the legal authority to pursue the course of action that Petitioners request. The Petition provides no argument in opposition to this claim. Moreover, even if Complainant possessed such authority, as discussed above, it enjoys broad discretion in negotiating the terms of a settlement. There being no material and relevant issue here that has not been considered by Complainant, this claim is **DENIED**.

E. REQUEST FOR A PUBLIC HEARING

In their Comments, Petitioners requested a "public meeting," before continuing as follows:

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to a browser, which is returned by the browser each time it subsequently accesses the same server, used to identify the user or track their access to the server," OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries/definition /cookie.

> [W]e believe the CAFO penalty is not an adequate amount to pressure BP to improve operations to prevent future oil spills. The revelations read in the media that there is no Lake Michigan or Great Lakes coordinated first responder oil spill clean-up plan, necessitates that a public hearing is in the public's interest to determine the CAFO. As commenters, we petition that the consent agreement and proposed final order be set aside on the basis that material evidence should be considered in a public hearing.

Ex. 3 at 2-3. Similarly, Petitioners request in their Petition that a public hearing be held:

> In view of the recent legal battles regarding the East Chicago, Indiana, West Calumet water and housing crisis, we feel a public hearing is necessary to understand the chemical, air and water violations of the proposed CAFO that we maintain involves the broader Northwest Indiana and Northeast Illinois communities.
>
> The USEPA and Justice Department position is that citizens did not provide feedback offered during a public comment period on the East Chicago USS Lead Superfund site and missed their chance to weigh in on the environmental cleanup of their neighborhood and cannot legally do so now while the work is on-going.[24]
>
> * * *
>
> Since the USEPA and Justice Department can deny us our legal rights to be involved in a consent decree cleanup and restoration plans because of the lack of feedback during a comment period, then we must insist that a public hearing be held on the proposed BP & USEPA consent decree agreement final order. If the public is not informed of the meaning of this consent decree agreement through a public hearing, the consequences can be catastrophic against the public.

Ex. 7 at 1-2. Petitioners proceed to reiterate the need for a public hearing "to understand the proposed consent decree agreement CAFO" throughout the remainder of their Petition. *See* Ex. 7 at 2-3.

Complainant counters in its Response that while Petitioners request a public hearing to understand the proposed CAFO, Section 311(b)(6)(B)(ii) of the CWA and the Rules of Practice "provide for a hearing on the merits of the CAFO," the purpose of which would be to adjudicate whether Complainant has sufficiently proven that BP committed the violations as alleged in the proposed CAFO and that the proposed penalty is appropriate. Response at 6. Complainant continues that "Petitioners have not identified any document or witnesses to be introduced or description of information to be presented that are relevant and material to the allegations in the CAFO." *Id.* at 13. Referring generally to the comments submitted in response to the public

[24] To support this assertion, Petitioners refer to what appears to be a newspaper article by Sarah Reese in the Northwest Indiana Times entitled "Govt: E.C. residents missed day in court." This Tribunal located an article seeming to match that cited by Petitioners, which is accessible at http://www.nwitimes.com/news/local/lake/government-superfund-residents-shouldn-t-get-say-in-court/article_0f4d2619-08bf-59cc-bf79-7a4c9b6d677d.html.

notice of its intent to file the proposed CAFO, Complainant concludes that "the commenters have not presented any relevant material information that Complainant has not already considered relating to the CAFO." *Id*. at 12.

As indicated above, the Consolidated Rules governing this proceeding provide that:

> The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:
>
> (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
>
> (B) Whether complainant adequately considered and responded to the petition; and
>
> (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

40 C.F.R. § 22.45(c)(4)(v).

Upon consideration, the undersigned finds that resolution of this proceeding by the parties is appropriate without a hearing. First, it appears that Petitioners seek a public forum, at least in part, for the parties to explain the meaning of the proposed CAFO to the public. As noted by Complainant, however, the applicable law does not provide for a meeting of that nature. Rather, it provides for a hearing at which evidence is presented for the purpose of determining whether Complainant has met its burden of proving that BP committed the alleged violations and that the proposed penalty is appropriate based on applicable law and policy. Petitioners have not specifically identified any testimonial or documentary evidence they would present at any such hearing. Further, neither the Comments nor the Petition offers any relevant and material evidence or arguments that have not already been adequately addressed by Complainant. Petitioners do not appear to contest BP's liability, and most of their arguments regarding penalty do not involve any disputed facts that might be adjudicated at a hearing. For the foregoing reasons, resolution of this proceeding without a hearing is deemed to be appropriate.

F. FINDINGS

For the reasons stated above, the undersigned finds as follows:

1. The Petition fails to state an issue that is relevant and material to the issuance of the proposed final order.

2. Complainant adequately considered and responded to the issues raised in the Petition.

3. Resolution of this proceeding without a hearing is appropriate.

Given this Tribunal's finding that a resolution of this proceeding without a hearing is appropriate, EPA Region 5's Regional Administrator may issue the proposed final order. *See* 40

C.F.R. § 22.45(c)(4)(viii). Such final order shall become final 30 days after both this Order and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court within the 30-day period, with notice simultaneously sent by certified mail to the Administrator of EPA and the Attorney General. *See id.* Written notice of appeal also shall be filed with the Regional Hearing Clerk and sent to the parties. *Id.*

SO ORDERED.[25]

Susan L. Biro
Chief Administrative Law Judge

Dated: May 8, 2018
Washington, D.C.

[25] In accordance with Section 311(b)(6)(C)(iii) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(iii), and Section 22.45(c)(4)(vii) of the Rules of Practice, 40 C.F.R. § 22.45(c)(4)(vii), notice of this Order will be published in the Federal Register. This Tribunal sincerely regrets the delay in issuance of this Order and publication of such notice resulting from staffing limitations and obtaining guidance and approval for publication.

In the Matter of *BP Products North America Inc.*, Respondent.
Docket No. CWA-05-2016-0015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order**, dated May 8, 2018, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original and One Copy by U.S. Mail and Email to:
LaDawn Whitehead
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Dated: May 8, 2018
Washington, D.C.