

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

JACKSON & SON DISTRIBUTORS, INC.,
dba JACKSON AND SON OIL

Seaside, Oregon,

Respondent.

DOCKET NO. CWA-10-2025-0023

**COMPLAINANT'S CORRECTED
REBUTTAL PREHEARING EXCHANGE &
SUPPLEMENTAL PREHEARING
EXCHANGE**

Pursuant to 40 C.F.R. § 22.19 and the Presiding Officer's January 28, 2025 Prehearing Order the U.S. Environmental Protection Agency ("EPA" or "Complainant") submits a Corrected Rebuttal Prehearing Exchange & Supplemental Prehearing Exchange. As stated in the Presiding Officer's January 28, 2025 Prehearing Order and 40 C.F.R. § 22.19(f), the parties may supplement prehearing exchanges without an accompanying motion when supplementation is sought within 60 days of a scheduled hearing. A hearing has not been scheduled for this matter. Accordingly, Complainant respectfully submits a corrected copy of its Rebuttal Prehearing Exchange & Supplemental Prehearing Exchange to correct the following typographical errors and omissions:

- Correction of "fillings" to "filings" on page 23.
- Correction of the date on page 28 from July 1, 2025 to July 1, 2015, consistent with Mr. Smith-Watts' Report (CX 41).
- Deletion of an extraneous word ("provided") in the first full sentence on page 29.
- Correction of page numbers in footnotes 83, 98, 147, 148, 152, 153, and 157.

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I. INFORMATION SUPPLEMENTING COMPLAINANT'S INITIAL PREHEARING EXCHANGE

A. Witnesses

Complainant provided a summary of expected testimony of proposed facts and expert witnesses in Complainant's Initial Prehearing Exchange. Complainant respectfully submits the following supplemental witness list in addition to the witnesses and testimony identified in its Initial Prehearing Exchange:

David Smith-Watts, EPA's National Coordinator for Civil Penalties and Financial Analyses (expert): Mr. David Smith-Watts graduated from Denison University where he received a B.A. in Philosophy, Political Science, and Economics, and from the University of Toledo College of Law where he received a J.D. and Certificate of Specialization in Environmental Law. His resume is submitted as CX 40. Mr. Smith-Watts is employed in the EPA Headquarters Office of Civil Enforcement, Cross-Cutting Issues Staff. In his role as the National Coordinator for Civil Penalties and Financial Analyses, Mr. Smith-Watts provides EPA enforcement case teams with support for the calculation and collection of civil penalties in environmental cases. He is also responsible for maintaining, updating, and advising EPA case teams on EPA's Economic Benefit model ("BEN") and updating the model annually to reflect up-to-date financial data.

Mr. Smith-Watts will testify regarding Complainant's assessment of economic benefit in this case, including EPA's methodology for calculating delayed and avoided costs, important factors in economic benefit calculations, input values for economic benefit calculations, and final economic benefit results in this case. Mr. Smith-Watts has prepared a report calculating Respondent's estimated economic benefit of noncompliance, which is submitted as CX 41.

B. Exhibits

Copies of the following additional documents and exhibits Complainant may introduce into evidence are provided below.

CX 39: “SPCC Renewal Information Collection Request”, pages 1 – 45.

CX 40: “Smith-Watts Résumé”, pages 1 – 3.

CX 41: “Report Calculating the Economic Benefit of Noncompliance”, pages 1 – 17.

Complainant also provides an updated index listing of all of Complainant’s exhibits (CX), below.

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Last, combining multiple PDFs impacted the visibility of text in CX 01, a document that Respondent has had since January 20, 2022.¹ As a result, Complainant resubmits CX 01 and its appendices as an uncombined exhibit.

II. STATEMENT IN RESPONSE TO RESPONDENT’S PREHEARING EXCHANGE

On January 16, 2026, Complainant submitted all elements required by the Presiding Officer’s January 28, 2025, Prehearing Order, including a “narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent’s Answer.”² Respondent’s February 6, 2026, Prehearing Exchange and February 11, 2026, Supplemental Prehearing Exchange fail to provide any information that warrants exhibits or additional witnesses from Complainant to support the conclusion that Respondent has violated Section 311(j)³ of the Clean Water Act (“CWA”) and

¹ CX 02 (SPCC Inspection Report Transmittal Letter).

² Prehearing Order at 3 (January 28, 2025).

³ 33 U.S.C. § 1321(j).

the regulations at 40 C.F.R. Part 112⁴ by failing to prepare and implement a Spill Prevention Control and Countermeasures (“SPCC”) Plan.

Before specifying its proposed penalty, Complainant first notes that while Respondent asserts in its Prehearing Exchange that “EPA’s communications (including Complainants’ exhibits), actions, inactions and related correspondence... did not request, require or otherwise communicate that an SPCC Plan was required for the Facility,”⁵ Respondent’s attached exhibits state the opposite. In particular, Respondent provides Complainant’s initial Notice of Intent, dated November 15, 2022, which includes an attached list of violations that EPA identified during the September 21, 2021, Inspection (the “Inspection”) of Respondent’s business – Jackson & Son Distributors, Inc., with an assumed business name of Jackson and Son Oil – located at 84721 Happel Lane in Seaside, Oregon (“Facility”). The list of violations includes failure to develop an SPCC Plan at the time of the Inspection.⁶ Mr. Masters and/or Ms. Spaulding will testify about EPA’s enforcement process and the use of a Notice of Intent at the beginning of a formal enforcement process.

In addition to the Notice of Intent, Respondent provides a February 10, 2023, Compliance Plan which states its purpose as “to address certain Clean Water Act requirements associated with EPA’s Spill Prevention Control and Countermeasure (SPCC) regulations (40 CFR Part 112) identified by EPA in its July 2021 inspection report, January 2022 correspondence and November 15, 2022 Notice of Intent.”⁷ This Compliance Plan further indicates that “Jackson will prepare a SPCC plan for the facility”.⁸ Thus Respondent understood EPA’s position regarding

⁴ Initially by Executive Order 11,548 (July 20, 1970) and most recently by Section 2(b)(1) of Executive Order 12,777 (Oct. 18, 1991), the President delegated to the EPA the Section 311(j)(C) authority to issue the regulations at 40 C.F.R. Part 112 for non-transportation-related onshore facilities.

⁵ Respondent’s Initial Prehearing Exchange at 5.

⁶ RX 01 at 3 (“List of Violations”, first row).

⁷ RX 02 (Compliance Plan) at 1.

⁸ *Id.* at 2.

the need for an SPCC Plan for the Facility. Furthermore, and as discussed in Complainant's Initial Prehearing Exchange and in further detail below, Mr. Richard Franklin – the EPA Region 10 Oil Program Coordinator – will testify regarding a 2015 email communication that he sent to the Respondent, which provided Respondent notice of the requirements at 40 C.F.R. Part 112.⁹ Lastly, the SPCC Inspection Report, which was transmitted to Respondent on January 20, 2022,¹⁰ specifically identified failure to have an SPCC Plan.¹¹ Accordingly, taken together, the exhibits submitted thus far in the prehearing exchange process indicate that EPA did indeed communicate the SPCC Plan requirement repeatedly to Respondent.

Respondent also states that Mr. Casey Jackson will testify about “meetings and communications with EPA which formed Jackson’s belief and reliance that EPA agreed with Respondent that it was not required to prepare a written SPCC Plan because a discharge of petroleum from the facility would not impact waters of the U.S.”¹² In fact, the documents and communications with EPA show the exact opposite. As stated in Complainant’s Prehearing Exchange, in the 2015 email to Respondent referenced above, the EPA stated that the SPCC regulations “commonly apply to oil storage and handling facilities such as yours, and are found in the federal regulations at 40 CFR Part 112.”¹³ The EPA further provided a hyperlink to an EPA website “[f]or help with understanding the requirements.”¹⁴ Following this email, it does not appear that Respondent determined whether it was subject to the 40 C.F.R. Part 112

⁹ CX 03 (Franklin Email). CX 03 indicates that Mr. Franklin also communicated with the Respondent in 2015 about potentially conducting a CWA inspection of the Facility. As Mr. Franklin will testify, a 2015 inspection did not occur.

¹⁰ CX 02 (SPCC Inspection Report Transmittal Letter).

¹¹ CX 01 (SPCC Inspection Report) at 3.

¹² Respondent’s Initial Prehearing Exchange at 2.

¹³ CX 03 (Franklin Email).

¹⁴ *Id.*

Program. It is incumbent upon the regulated facility owner/operator to determine whether the SPCC Program is applicable.¹⁵

Mr. Franklin will testify that, at the time of the Inspection, which followed the 2015 email, the Respondent did not have any substantive information besides unsupported assertions to support whether the Facility was subject to the 40 C.F.R. Part 112 regulations. In fact, a document that Respondent showed to the EPA during the Inspection identified two flow paths from the Facility, both of which drain to Circle Creek.¹⁶ Respondent also stated during the Inspection that Circle Creek was not subject to federal jurisdiction;¹⁷ however, Mr. Franklin will testify that Respondent did not have any information to support this assertion.

Following the Inspection, the EPA provided an Inspection Report to the Respondent, which provided the EPA's analysis at that time about potential flow paths.¹⁸ It bears repeating that it was then again incumbent upon the Respondent to determine whether it was subject to the SPCC Program. Mr. Franklin will testify that Respondent did not follow up with him after the Inspection. Mr. Franklin will also testify, based on his over 30 years of experience, the reasonable types of steps facilities typically take to determine whether they are subject to the SPCC Program.

Mr. Masters will testify that EPA transmitted the above-mentioned Notice of Intent to Respondent for failure to comply with the SPCC regulations on November 15, 2022 – meaning that EPA was in fact asserting a reasonable expectation of a discharge to jurisdictional waters.

¹⁵ CX 26 (SPCC Guidance for Regional Inspectors) at 50.

¹⁶ CX 01 (SPCC Inspection) at 23; CX 11 (Jurisdictional Analysis Report) at 17.

¹⁷ CX 01 (SPCC Inspection) at 23.

¹⁸ CX 02 (Letter Transmitting SPCC Inspection).

Mr. Masters and Ms. Spaulding will testify that during negotiations with the EPA, Respondent then finalized a Stormwater Pollution Control Plan,¹⁹ which stated that stormwater discharges from the Facility discharge to Circle Creek – meaning that even Respondent acknowledged a connection between the Facility and jurisdictional waters. Yet Respondent still did not develop an SPCC Plan.

Ms. Spaulding will testify that after *Sackett v. EPA*,²⁰ Respondent argued to the EPA that this case meant that the wetlands north of the Facility were no longer jurisdictional. Ms. Spaulding will testify that in July of 2024, the EPA responded to this argument. The EPA then filed an administrative complaint alleging a reasonable expectation of a discharge to the wetlands.²¹ The EPA then filed an amended complaint, alleging a reasonable expectation of a discharge to Circle Creek.²²

Therefore, prior to issuing a Notice of Intent, the EPA consistently informed Respondent of the regulations and its burden to determine whether it is subject to the program. Following issuance of the Notice of Intent, the EPA has informed Respondent repeatedly about the EPA’s determination that it is subject to the regulations. The EPA considers this information relevant to the penalty proposed below.

Lastly, in its Prehearing Exchange, Respondent included, without stating why, a copy of the November 2025 proposed rulemaking updating the definition of “waters of the United States.” The EPA simply restates that it alleges a reasonable expectation of a discharge to Circle Creek—a perennial water body—and that water bodies with standing and/or continuously

¹⁹ CX 11 (Jurisdictional Analysis Report) Appendix F; *see also* RX 08 (Notice of Stormwater Permit Coverage).

²⁰ 598 U.S. 651 (2023).

²¹ Complaint, ¶ 3.10.

²² Amended Complaint, ¶ 3.10.

flowing water year-round are routinely recognized as “waters of the United States.” This was the rationale for the EPA’s motion to amend the complaint.²³

Complainant’s alleged violation in the Second Amended Complaint remains well-supported by the January 16, 2026, Initial Prehearing Exchange. Having reviewed the information provided through the prehearing exchange process, and in accordance with the Presiding Officer’s instructions,²⁴ Complainant now proposes a penalty, as discussed below.

III. SPECIFICATION OF PROPOSED PENALTY

Complainant respectfully requests that this Court assess a penalty of \$243,914 for the violation alleged in the Second Amended Complaint—failure to prepare and implement an SPCC Plan.²⁵ In accordance with the Presiding Officer’s instructions, Complainant sets forth the EPA’s authority to assess a civil penalty, an explanation of the CWA Section 311 statutory penalty factors, the methodology used to calculate the proposed penalty amount, and a detailed application of the statutory penalty factors and methodology to the facts and circumstances of this matter.

A. CWA Penalty Assessment Authority

Complainant alleges that Respondent violated CWA Section 311(j)²⁶ and the regulations at 40 C.F.R. Part 112 by failing to prepare and implement an SPCC Plan.²⁷ Pursuant to CWA Section 311(b)(6),²⁸ the EPA is authorized to assess a Class II administrative civil penalty against persons who have violated CWA Section 311(j).²⁹ CWA Section 311(b)(6)³⁰ authorizes

²³ Complainant’s Motion for Leave to Amend the Complaint (Aug. 15, 2025) at 7; *see also* Complainant’s Reply in Support of Motion for Leave to Amend the Complaint (Sep. 12, 2025) at 4-5.

²⁴ Prehearing Order, at 4 (Jan. 28, 2025).

²⁵ Second Amended Complaint, ¶¶ 3.15 – 3.18.

²⁶ 33 U.S.C. § 1321(j).

²⁷ Second Amended Complaint, ¶¶ 3.15 – 3.18.

²⁸ 33 U.S.C. § 1321(b)(6).

²⁹ *Id.* § 1321(j).

³⁰ *Id.* § 1321(b)(6).

assessment of an administrative civil penalty of up to \$10,000 per day for each day during which the violation continues, with a maximum administrative civil penalty of \$125,000.³¹ Pursuant to the Debt Collection Improvement Act of 1996³² and 40 C.F.R. Part 19, the statutory maximum administrative penalty amount has been increased to \$23,647 per day for violations occurring after November 2, 2015, with a maximum administrative civil penalty of \$295,564.³³

Accordingly, and consistent with the explanation of the proposed penalty provided in Paragraph 4.1 of the Second Amended Complaint, Respondent is liable for penalties for violation of CWA Section 311(j)³⁴ in an amount not to exceed \$295,564.

B. Summary of CWA Statutory Penalty Factors and Methodology Utilized in Calculating the Proposed Penalty

Pursuant to 40 C.F.R. § 22.27, if the Presiding Officer determines that a violation has occurred and Complainant seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on evidence in the record and penalty criteria set forth in the applicable statute. CWA Section 311(b)(8)³⁵ identifies the following statutory penalty factors applicable to the instant case:

- [1] the seriousness of the violation;
- [2] the economic benefit to the violator, if any, resulting from the violation;
- [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.³⁶

³¹ *Id.*

³² 31 U.S.C. § 3701.

³³ 90 Fed. Reg. 1375 (Jan. 8, 2025).

³⁴ 33 U.S.C. § 1321(j).

³⁵ *Id.* § 1321(b)(8).

³⁶ *Id.*

40 C.F.R. § 22.27(b) further states that the Presiding Officer shall consider any civil penalty guidance issued under the applicable statute. As stated in Complainant’s Initial Prehearing Exchange,³⁷ the EPA has never issued a penalty policy for use by the EPA in administrative litigation or by Presiding Officers in determining CWA penalties.³⁸ Accordingly, it is appropriate to rely on the statutory factors and their application to the facts of this matter to calculate a penalty for the alleged violation.³⁹

The United States Supreme Court has indicated that “highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act”⁴⁰ and federal courts, the Environmental Appeals Board, and this Tribunal have relied on different penalty calculation methodologies. Federal courts calculating penalties for CWA violations generally apply one of two methods: “bottom-up” or “top-down.”⁴¹ According to the “bottom-up” method, “economic benefit is established, and the remaining...elements...are used to adjust the figure upward or downward.”⁴² By contrast, with the “top-down” method, courts begin with the statutory maximum penalty and reduce that amount as appropriate considering the enumerated statutory factors.⁴³

³⁷ Complainant’s Initial Prehearing Exchange at 34-35.

³⁸ Because the EPA has no CWA penalty pleading policy, *In re Pepperell Associates*, 9 E.A.D. 83 n.22 (EAB 2000), *aff’d*, 246 F.3d 15 (1st Cir. 2001), the Agency does not argue the application of penalty policy calculations at hearing. *See also* CX 20 (CWA Section 311 Penalty Policy) at 3 (“This civil penalty policy is provided for the use of EPA litigation teams in establishing appropriate penalties in settlement...”).

³⁹ *In re Pepperell Assocs.*, 9 E.A.D. at 108 (employing the Presiding Officer’s approach to penalty assessment derived from the statutory factors).

⁴⁰ *Tull v. United States*, 481 U.S. 412, 427 (1987).

⁴¹ *U.S. v. Citgo Petroleum Corp.*, 723 F.3d 547, 551-52 (5th Cir. 2013) (citing *U.S. v. Mun. Auth. Of Union Twp. (Dean Dairy)*, 150 F.3d 259, 266 (3d Cir. 1998)). While *Dean Dairy* applied the bottom-up approach to the statutory penalty factors under CWA Section 309(d), the court in *Citgo* and other federal courts have acknowledged the applicability of the bottom-up and top-down approaches in CWA Section 311 cases. *See U.S. v. HVI Cat Canyon Inc.*, 2023 U.S. Dist. LEXIS 31516, 95-96 (C.D. Cal. Feb. 25, 2023); *U.S. v. BP Exploration & Prod.*, 148 F. Supp. 3d 563, 579-80 (E.D. La. 2015).

⁴² *Citgo*, 723 F.3d 547 at 551-52 (describing the top-down and bottom-up methods).

⁴³ *Id.*; *see also HVI Cat Canyon Inc.*, 2023 U.S. Dist. LEXIS 31516 at 97 (electing to apply the top-down method).

Considering the two methods applied by federal courts to calculate an appropriate penalty in CWA proceedings, Complainant asserts that the “top-down” method is the most appropriate in light of the circumstances of this case. The top-down method is consistent with the general approach applied by courts within the U.S. Circuit Court of Appeals for the Ninth Circuit “because it aligns with congressional intent and the plain language of the CWA and produces results that are more reliable.”⁴⁴ Further, as described below, Respondent has not provided information regarding its economic benefit, and therefore, the EPA can only provide an estimated economic benefit.

In applying the top-down method, Complainant begins with the statutory maximum penalty and reduces that amount as appropriate to develop an initial amount based on the gravity or seriousness of the violations. This initial gravity amount is subsequently increased or decreased as appropriate based on other statutory factors.

In other matters, this Tribunal has calculated CWA penalties by considering the statutory factors in the context of frameworks outlined in the EPA’s general civil penalty policies,⁴⁵ “GM-

⁴⁴ *HVI Cat Canyon, Inc.*, 2023 U.S. Dist. LEXIS 31516, *95-96 (citing, e.g., *Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F. Supp.2d 789, 799 (C.D. Cal. 2006) (finding “that the top-down approach offers a more reliable and less speculative method of calculating the penalty”); *Cal. Sportfishing Prot. All. v. River City Waste Recyclers, LLC*, 205 F. Supp.3d 1128, 1155 (E.D. Cal. 2016) (“Once the court has calculated maximum civil penalties, the court may proceed to adjust downward from this maximum based on statutory factors.”); *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, No. CY-98-3011, 2001 U.S. Dist. LEXIS 3579, at *24 (E.D. Wash. 2001) (“The Court begins with a ‘top down’ analysis which means that the Court begins with the maximum amount of the penalty and then applies the § 1319(d) factors to determine the appropriate reductions, if any, from the maximum.”); *Hawaii’s Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1394 – 95 (D. Haw. 1993) (Congressional intent manifested itself in a “clear statutory scheme” that requires a straightforward “two-step process” whereby courts first calculate the maximum penalty, and then look to see if any of the § 309(d) factors warrant a departure from the statutory maximum.)).

⁴⁵ See *In re VSS Int’l, Inc.*, 2020 EPA ALJ LEXIS 20, *113 (Sep. 16, 2020) (relying on GM-21 and GM-22 to guide analysis of the statutory factors enumerated in CWA Section 311(b)(8)); *In re Polo Dept., Inc.*, 2015 EPA ALJ LEXIS 6, *38 (Dec. 15, 2015) (“The GM-21 and GM-22 penalty framework also are instructive in calculating the penalty.”).

21”⁴⁶ and “GM-22”.⁴⁷ While designed for settlement purposes,⁴⁸ and not for penalties recovered in administrative litigation, Complainant believes that, in addition to guidance found in GM-21 and GM-22, the Section 311 Penalty Policy is instructive to the extent it elaborates on the statutory factors.⁴⁹ Accordingly, to arrive at a proposed penalty amount in this proceeding, Complainant looks first to the statutory factors and applies guidance found in GM 21 and GM-22 and the Section 311 Penalty Policy where appropriate to further elaborate on the statutory factors.

C. Application of Statutory Factors and Methodology

1. Seriousness of the Violation

The CWA Section 311(b)(8)⁵⁰ statutory penalty factors begin with the seriousness of the violation. GM-21 and GM-22 note that the seriousness of the violation is referred to as a gravity amount.⁵¹ To quantify the gravity of a violation, GM-22 considers actual or possible harm, importance to the regulatory scheme, and the size of the violator.⁵² The seriousness of a violation depends primarily on the “risk of harm inherent in the violation” and “the actual harm that

⁴⁶ “Policy on Civil Penalties” available as CX 21.

⁴⁷ “A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties”, available as CX 21.

⁴⁸ CX 20 (CWA Section 311 Penalty Policy) at 3; *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS at 113 (describing the Section 311 Penalty Policy as “oriented more towards settlement negotiations than to litigation”). The Section 311 Penalty Policy states that EPA litigation teams “may elect to adapt” the methodology applied in the Policy to calculate a penalty in administrative litigation, and that administrative penalty requests should be higher than a settlement amount calculate pursuant to the Policy. *See* CX 20 (CWA Section 311 Penalty Policy) at 7. Because the Section 311 Penalty Policy does not instruct case teams on how to calculate a penalty amount in administrative litigation, as in *VSS Int’l Inc.*, EPA refers to the Policy to help provide context for the statutory factors.

⁴⁹ *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20 at 116 (“...I refer to the Sections 311(b)(3) and 311(j) Policy to the extent that its application is central to the parties’ arguments or circumstances of this case).

⁵⁰ 33 U.S.C. § 1321(b)(8).

⁵¹ CX 21 (GM-21 & GM-22) at 5, 15.

⁵² CX 21 (GM-22) at 26-27. GM-22 notes a fourth factor relevant to the assessment of a gravity amount—the availability of data from other sources. Specifically, GM-22 references this factor with respect to recordkeeping or reporting violations. While SPCC Plans include record keeping requirements, Complainant does not view this factor as relevant to the overall gravity determination in the instant case and, accordingly, does not discuss it here.

resulted from the violation.”⁵³ In the context of CWA Section 311, this Tribunal has also evaluated the seriousness of the violations based on “whether respondent’s activity resulted or was likely to result in a discharge” and “importance of the requirement to the regulatory scheme.”⁵⁴ To calculate a gravity amount reflective of the seriousness of the violation alleged here, Complainant begins first by evaluating the risk of harm posed by Respondent’s lack of an SPCC Plan followed by importance to the regulatory scheme and size of the alleged violator as outlined in GM-22.⁵⁵

a. *Risk of Harm*

Evaluation of the risk of harm associated with a violation is a complex matter and GM-22 lists additional considerations for the purposes of ranking violations according to seriousness, including the sensitivity of the environment, amount and toxicity of the pollutant involved, and the length of time a violation continues.⁵⁶ In the instant case, Complainant alleges that Respondent failed to prepare and implement an SPCC Plan in violation of 40 C.F.R. § 112.3.⁵⁷ The purpose of an SPCC Plan is to prevent oil spills and, as stated in *In re Crown Central Petroleum*, to protect against a worst-case discharge.⁵⁸ Accordingly, Complainant evaluates the risk of harm created by failure to prepare and implement an SPCC Plan in the context of a potential worst-case spill scenario.

⁵³ CX 21 (GM-22) at 26; *see also In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20 at 122 (applying factors identified in GM-21 and GM-22 to evaluate the seriousness of a CWA 311 violation).

⁵⁴ *In re VSS Int’l, Inc.* 2020 EPA ALJ LEXIS 20 at *122.

⁵⁵ CX 21 (GM-22) at 27.

⁵⁶ *Id.*

⁵⁷ Second Amended Complaint, ¶¶ 3.15-3.18.

⁵⁸ *In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1, 109-10 (Jan. 8, 2002) (“[T]he SPCC regulations are designed to protect against a worst case discharge.”) (citing 40 C.F.R. § 112.2, internal quotations omitted). The SPCC regulations define a “worst case discharge” as “the largest foreseeable discharge in adverse weather conditions as determined using the worksheets in Appendix D to this part.” *Id.*

To evaluate the risk of harm associated with the alleged violation, Complainant first weighs the sensitivity of the environment that would be impacted by a worst-case spill scenario from Respondent's Facility.⁵⁹ As discussed in Complainant's initial prehearing exchange, there is a reasonable expectation that a discharge would impact Circle Creek.⁶⁰ Circle Creek provides ecologically sensitive and critical habitat for Coho salmon, a listed species under the Endangered Species Act.⁶¹ Coho salmon rely on Circle Creek to rear, feed, and spawn.⁶² A worst-case discharge scenario from Respondent's Facility could cause Coho salmon mortality; it could also impact salmon spawning, and development of fish embryos and larvae which the salmon rely on for food.⁶³ As described by one study, the spawning and nursery habitats of wild Pacific salmon are vulnerable to impacts from oil spills because immobility in the embryonic and early larval stages of salmon impact their ability to escape contaminated areas.⁶⁴ Exposure in the early life stages can cause increased mortality and developmental abnormalities.⁶⁵

Further, when evaluating the sensitivity of the environment, this Tribunal and the Environmental Appeals Board have considered "facility design and other features that serve to reduce environmental risk," including the availability of secondary containment.⁶⁶ Thus, the adequacy or inadequacy of Respondent's secondary containment is relevant when considering

⁵⁹ CX 21 (GM-22) at 27; *In re Indus. Chems. Corp.*, 10 E.A.D. 241, 260 (EAB 2002) (discussing proximity to a sensitive ecosystem as relevant to the seriousness of the violation); *In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS at 134.

⁶⁰ Complainant's Initial Prehearing Exchange at 39; CX 12 (Worst-Case Discharge Analysis) at 7.

⁶¹ Complainant's Initial Prehearing Exchange at 39; CX 27 (Salmon Critical Habitat Screenshot).

⁶² Complainant's Initial Prehearing Exchange at 40; CX 27 (Salmon Critical Habitat Screenshot).

⁶³ Complainant's Initial Prehearing Exchange at 39; CX 28 (Calik Study) at 2.

⁶⁴ CX 28 (Calik Study) at 2.

⁶⁵ *Id.*

⁶⁶ *In re Indus. Chems. Corp.*, 10 E.A.D. 241 at 260 ("While proximity to a sensitive ecosystem is certainly relevant to the seriousness of the violation criterion of the statutory penalty factors..., so too, in our view, are facility design and other features that serve to reduce environmental risk...") (internal quotation marks and citations omitted); see also *In re VSS*, 2020 EPA ALJ LEXIS 20 at 134-35.

risk of harm in the context of a sensitive environment.⁶⁷ Here, Respondent completely lacked secondary containment for two 10,000-gallon single-walled tanks until November 30, 2024.⁶⁸ SPCC Plans include a requirement to consider secondary containment for the facility as an additional measure to contain oil in the event of a worst-case discharge.⁶⁹ Accordingly, by failing to consider secondary containment through preparation of an SPCC Plan for the Facility, Respondent further increased the risk of harm.

In addition to the sensitivity of the environment, Complainant asserts that the toxicity of the pollutants involved—gasoline and/or diesel—further contribute to the risk of harm. GM-22 notes that “[v]iolations involving highly toxic pollutants are more serious and should result in relatively larger penalties.”⁷⁰ As discussed in Complainant’s Initial Prehearing Exchange, a discharge from the Facility could impact human health due to the Facility’s proximity to businesses.⁷¹ Gasoline, which is stored at Respondent’s Facility, is a highly volatile compound. Acute exposure could lead to nausea, skin and eye irritation, headaches, fatigue, dizziness, and respiratory difficulties.⁷² A lumberyard is located adjacent to the Facility to the north.⁷³ As described in Dr. Marshalonis’s report, a spill from the Facility could generate a wave of overland flow capable of traveling over the lumberyard’s surface.⁷⁴ Thus, a discharge from the Facility could cause other businesses and employees to be exposed to toxic compounds.

⁶⁷ *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20 at 134-35 (“I also note that, in addition to proximity to a sensitive environment, it is necessary to consider...adequacy of containment.”) (internal quotations omitted).

⁶⁸ CX 01 at (SPCC Inspection) at 24; CX 24 (Compliance Plan Schedule); Complainant’s Initial Prehearing Exchange at 21-22.

⁶⁹ 40 C.F.R. § 112.7(c).

⁷⁰ CX 21 (GM-22) at 27.

⁷¹ Complainant’s Initial Prehearing Exchange at 40; *Volatile Organic Compounds Impact on Indoor Air Quality*, EPA, <https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality> (last updated July 24, 2025) (last visited Feb. 20, 2026).

⁷² Complainant’s Initial Prehearing Exchange at 40.

⁷³ *Id.*

⁷⁴ CX 12 (Worst-Case Spill Report) at 16.

Next, Complainant asserts that the violation is serious in light of the volume of oil stored at the Facility.⁷⁵ From the time of September 21, 2021, Inspection through November 30, 2024, Respondent had an aboveground storage capacity of approximately 107,500 gallons of oil.⁷⁶ After November 30, 2024, as indicated by Respondent's December 2024 SPCC Plan, Respondent's storage capacity was approximately 102,500 gallons of oil.⁷⁷ The volume of oil stored at the Facility is well above the 1,320-gallon threshold amount required to be subject to the 40 C.F.R. Part 112 regulations.⁷⁸ In addition, Dr. Marshalonis evaluated discharge scenarios of 20,000 gallons and 40,000 gallons⁷⁹ to determine whether there is a reasonable expectation that a discharge from the Facility could impact Circle Creek.⁸⁰ Even using the more conservative 20,000-gallon spill scenario, Complainant estimates that between 242 and 3,232 gallons of gasoline could reach Circle Creek.⁸¹ Accordingly, the volume of oil stored at the Facility further contributes to the risk of harm.

Lastly, Complainant considers the length of time a violation continues relevant to the risk of harm.⁸² The Environmental Appeals Board has stated that “[a] general rule of thumb is that ‘the longer a violation continues uncorrected, the greater the risk of harm.’”⁸³ To Complainant's

⁷⁵ CX 21 (GM-22) at 27 (stating that “[a]djustments for the concentration of the pollutant may be appropriate”).

⁷⁶ CX 01 (SPCC Inspection) at 2. As stated in Complainant's Initial Prehearing Exchange, Mr. Franklin will testify that the aboveground storage tanks that Respondent contracted for integrity testing on April 5, 2023, were the same tanks present at the time of the Inspection. Powers Engineering and Inspection, Inc. conducted integrity testing of seven aboveground storage tanks that were present at the time of the Inspection: a 2,500-gallon diesel tank; a 3,000-gallon gasoline tank; a 2,000-gallon gasoline tank; two 20,000-gallon gasoline tanks; and two 20,000-gallon diesel tanks. The total storage capacity of these tanks plus the two 10,000-gallon diesel tanks is 107,500 gallons. *See* Complainant's Initial Prehearing Exchange at 15-16; CX 04 – 10 (Powers Engineering Inspection Reports).

⁷⁷ CX 23 (December 2024 SPCC Plan) at 8, Table 2; CX 24 (Compliance Plan Schedule).

⁷⁸ 40 C.F.R. §112.1(d)(2)(ii) (stating that the 40 C.F.R. Part 112 regulations do not apply to facilities where the aggregate aboveground storage capacity is 1,320 U.S. gallons or less).

⁷⁹ Complainant's Prehearing Exchange at 21. *see supra* note 74 regarding lack of secondary containment for two 10,000-gallon tanks; *see also* CX 24 (Compliance Plan Schedule).⁸⁰ CX 12 (Worst-Case Discharge Report) at 38.

⁸⁰ CX 12 (Worst-Case Discharge Report) at 38.

⁸¹ *Id.*

⁸² CX 21 (GM-22) at 27.

⁸³ *In re San Pedro Forklift*, 15 E.A.D. 838, 881 (Apr. 22, 2013) (quoting GM-22 at 27); *see also In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS 20 at 136.

knowledge, Respondent did not prepare an SPCC Plan prior to December 2024⁸⁴ despite conducting oil distribution operations since 1984⁸⁵ – an industrial activity that is regularly subject to the 40 C.F.R. Part 112 regulations.⁸⁶ As stated above, and as described in Complainant’s Initial Prehearing Exchange, EPA notified Respondent of the SPCC Program and the 40 C.F.R. Part 112 regulations in 2015.⁸⁷ It is incumbent upon the regulated facility owner/operator to determine whether the SPCC Program is applicable.⁸⁸ An owner or operator of a facility “cannot abrogate his responsibility and be absolved from liability by...operating the facility without exercising some common sense as to the mechanical and structural aspects of the facility.”⁸⁹ Thus, the purpose of Section 311 and 40 C.F.R. Part 112—prevention of oil spills—require that an owner have at least some basic knowledge of their facility and locational setting from which to inform the reasonably be expected to discharge standard.⁹⁰ At the time of the Inspection, which followed the 2015 email, and as described above, Respondent did not have any substantive information besides unsupported assertions to substantiate whether the Facility was subject to the 40 C.F.R. Part 112 regulations nor has Respondent since shared any such supporting information with EPA. EPA provided compliance assistance via its 2015 email⁹¹ and

⁸⁴ CX 23 (December 2024 SPCC Plan) at 5. Complainant acknowledges that Respondent includes reference to an October 2024 SPCC Plan in paragraph 9 of its affirmative defenses in its Answer to the Second Amended Complaint (Jan. 6, 2026). However, as discussed in Complainant’s Initial Prehearing Exchange, the SPCC Plan transmitted to Complainant has a November header and signature block for management approval dated December 16, 2024. Further, as explained on page 33 of Complainant’s Initial Prehearing Exchange, the SPCC Plan does not include any record of updates in accordance with 40 C.F.R. § 112.5 nor does it include completed amendment logs in Appendix A.

⁸⁵ CX 01 (SPCC Inspection) at 4.

⁸⁶ *In re VSS Int’l, Inc.* 2020 EPA ALJ LEXIS 20 at *144 (weighing the Respondent’s operation of the Facility “for more than three decades” as a factor relevant to determining culpability under the Penalty Policy); *see also* CX 25 (EPA SPCC Facility Owner/Operator’s Guide) at 3.

⁸⁷ CX 03 (Franklin Email).

⁸⁸ CX 26 (SPCC Guidance for Regional Inspectors) at 50.

⁸⁹ *In re Pepperell*, 9 E.A.D. at 95.

⁹⁰ *Id.*

⁹¹ CX 03 (Franklin Email).

by transmitting an Inspection Report outlining potential flow paths.⁹² Respondent has even obtained stormwater coverage, which states that stormwater from the Facility will discharge to Circle Creek.⁹³ A Respondent cannot simply stick its head in the sand as a means of abrogating its responsibility to correct ongoing violations. Accordingly, Complainant asserts that the alleged violation was ongoing and uncorrected from at least 2015 until December of 2024, thereby increasing the risk of harm.

After evaluating the factors relevant to risk of potential harm arising from the alleged violation, including the amount and toxicity of the pollutant, sensitivity of the environment, and length of time the violation continues, Complainant asserts that Respondent's violation created a high risk of potential harm.

b. *Importance to the Regulatory Scheme*

Complainant's assessment of the seriousness of the violation next considers the importance of the requirement in achieving the goal of the statute or regulation.⁹⁴ Complainant alleges that Respondent violated 40 C.F.R. § 112.3 by failing to prepare and implement an SPCC Plan.⁹⁵ CWA Section 311 sets forth that it is "hereby the policy of the United States that there shall be no discharges of oil or hazardous substances into or upon the navigable waters of the United States..."⁹⁶ Preparation of an SPCC Plan is central to this policy declaration.⁹⁷

As outlined in the regulations and acknowledged by the Environmental Appeals Board and this Tribunal, "[t]he purpose of an SPCC Plan is to form a *comprehensive... spill prevention*

⁹² CX 02 (SPCC Inspection Report Transmittal Letter).

⁹³ CX 22 (Stormwater Pollution Control Plan) at 6, 12.

⁹⁴ CX 21 (GM-22) at 27.

⁹⁵ Second Amended Complaint, ¶¶ 3.15-3.18.

⁹⁶ 33 U.S.C. § 1321(b)(1).

⁹⁷ See *In re Indus. Chems. Corp.*, 10 E.A.D. 241 at 259 (finding that SPCC Plan shortcomings warrant a substantial penalty "in view of the importance that the SPCC regulatory guidelines place on the preparation of complete and detailed SPCC Plans."); see also *In re Brewer Chem. Corp.*, 1 E.A.D. 247, 251 (Adm'r 1976).

program that minimizes the potential for discharges.”⁹⁸ “The SPCC guidelines place great emphasis upon the need to prepare ‘carefully thought-out’ and complete SPCC Plans that detail procedures, methods, and equipment necessary to prevent and contain oil spills”⁹⁹ including all relevant countermeasures necessary at the specific facility.¹⁰⁰ Preparation of an SPCC Plan is not an arbitrary paperwork exercise but rather a requirement to carefully tailor spill prevention protocols specifically to a facility’s features.

Courts reflect the importance of SPCC Plans through how they categorize the severity of the violation. Even where facilities have SPCC Plans but they are deficient, Courts have characterized the violation as “moderate.” In *Industrial Chemicals Corp.*, the Environmental Appeals Board upheld a penalty that reflects moderate noncompliance where the respondent had an SPCC Plan that, nonetheless, demonstrated significant shortcomings.¹⁰¹ Here, unlike the respondent in *Industrial Chemicals*, Respondent had no plan and operated for decades without one. Accordingly, and as noted by this Tribunal in *Pepperell*, the complete failure to prepare an SPCC Plan is “one of the most egregious violations of the SPCC regulations.”¹⁰² In light of the egregious nature of the violation, the Environmental Appeals Board has affirmed “a substantial gravity penalty” where a respondent has failed to prepare and implement an SPCC Plan.¹⁰³

Respondent did not prepare an SPCC Plan until December of 2024 despite operating for decades prior.¹⁰⁴ Absence of an SPCC Plan “completely thwarts the stated purpose of Section

⁹⁸ 40 C.F.R. § 112.1(e) (emphasis added); see also *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20 at 126.

⁹⁹ *In re Indus. Chems. Corps.*, 10 E.A.D. 241 at 259.

¹⁰⁰ 40 C.F.R. § 112.1(e).

¹⁰¹ *In re Indus. Chems. Corp.*, 10 E.A.D. 241, 259-60 (EAB 2002) (noting that even where a facility had a plan, the plan’s shortcomings were significant and warranted a substantial penalty).

¹⁰² *In re Pepperell Assocs.*, 1999 EPA ALJ LEXIS 16, *75-76 (Feb. 26, 1999).

¹⁰³ *In re Indus. Chems. Corp.*, 10 E.A.D. 241 at 259-60 (affirming a substantial gravity penalty where a facility had a partial but incomplete SPCC Plan).

¹⁰⁴ CX 01 (SPCC Inspection) at 3-4 (identifying the failure to have a plan and noting date facility began operations in 1984); CX 23 (December 2024 SPCC Plan) at 29-32.

311 of the Clean Water Act.”¹⁰⁵ Accordingly, Complainant asserts that the gravity amount assessed in this matter should reflect major noncompliance because Respondent completely thwarted the purpose of CWA Section 311 in failing to prepare and implement a plan.

Beyond failing to have a plan, the Inspection Report for the Facility indicates that Respondent was not conducting “its operations in substantial compliance with SPCC plan regulations” as it claims in its Answer¹⁰⁶ but, in fact, failed to consider other critical elements relevant to preparation and implementation of an SPCC Plan. As discussed in Complainant’s Initial Prehearing Exchange, Respondent completely lacked secondary containment for two 10,000-gallon tanks.¹⁰⁷ Secondary containment is central to the SPCC Program and one of the primary ways the regulations set out to prevent discharges of oil into waters of the United States.¹⁰⁸ This lack of secondary containment accordingly further thwarted the preventative purpose of the 40 C.F.R. Part 112 regulations.

Respondent further undermined the goal of the CWA Section 311 regulatory scheme by failing to develop procedures for tank integrity testing. EPA identified in 2021 that the Facility “had no documentation of integrity testing and had not identified an integrity testing standard.”¹⁰⁹ Similarly, the April 2023 Powers Engineering Tank Integrity Testing Reports indicate that Respondent had never conducted integrity testing prior to 2023, while also identifying that the Facility should conduct annual and monthly inspections.¹¹⁰ Without tank

¹⁰⁵ *In re Pepperell Assocs.*, 1999 EPA ALJ LEXIS 16, *75-76 (Feb. 26, 1999).

¹⁰⁶ Respondent’s Answer to the Second Amended Complaint at 10.

¹⁰⁷ CX 01 (SPCC Inspection) at 23; Complainant’s Initial Prehearing Exchange at 16. As described in Complainant’s initial prehearing exchange, Mr. Franklin will testify that the aboveground storage tanks inspected by Powers Engineering were the same tanks present at the Facility at the time of the Inspection and, that at the time of the Inspection, the two 10,000-gallon diesel tanks identified by the Powers Engineering Inspection reports completely lacked secondary containment

¹⁰⁸ *In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1, 158-59 (Jan. 8, 2002).

¹⁰⁹ CX 01 (SPCC Inspection) at 12.

¹¹⁰ CX 04-10 (Integrity Testing Reports) (Each report notes that the prior inspection date for the respective tank is “unknown” or “N/A”.); *see also* Complainant’s Initial Prehearing Exchange at 35.

integrity testing, Respondent ignored critical preventative measures designed to mitigate the risk that a harmful spill would occur.¹¹¹ Respondent's shortcomings do not stop there; as described in Complainant's Initial Prehearing exchange, Respondent also failed to provide adequate secondary containment for the tank truck loading/unloading rack and failed to provide a warning lights or a barrier system to prevent premature vehicle departure at the loading and unloading rack.¹¹² Each of these deficiencies further hindered the purpose of CWA Section 311 and the 40 C.F.R. Part 112 regulations. And even if Respondent had been taking all necessary actions pursuant to 40 C.F.R. Part 112, which it was not, the lack of a plan on its own is a serious violation.¹¹³ As stated by the Environmental Appeals Board in *Brewer*, "even if all necessary actions had already been taken to implement what would be required in an adequate SPCC Plan, the lack of the plan is a *substantial* violation."¹¹⁴ And here, Respondent's violation is far more egregious than the violation in *Brewer* because, unlike in *Brewer*, Respondent did not take actions to implement an SPCC Plan, such as secondary containment, integrity testing, and truck loading/unloading rack spill prevention measures.¹¹⁵

Beyond jeopardizing the ability to prevent oil spills at a particular facility, failure to prepare and implement an SPCC Plan jeopardizes the broader integrity of the Oil Prevention program. Mr. Franklin will offer testimony describing the ways in which failure to prepare and implement an SPCC Plan at a specific facility impacts program integrity. Respondent's failure to prepare and implement an SPCC Plan harms the entire regulatory program because, for example,

¹¹¹ *In re VSS Int'l Inc.*, 2020 EPA LEXIS ALJ 20 at *129.

¹¹² CX 01 (SPCC Inspection) at 13.

¹¹³ See *In re Indus. Chems. Corp.*, 10 E.A.D. at 259; *In re Brewer*, 1 E.A.D. at 251; see also *In re Marathon Oil Co.*, 1 E.A.D. 150, 152 (Adm'r 1975).

¹¹⁴ *In re Brewer*, 1 E.A.D. at 251 (emphasis added); see also *In re Indus. Chems. Corp.*, 10 E.A.D. at 259.

¹¹⁵ *In re Brewer*, 1 E.A.D. at 251; (noting the existence of a spill retention system as relevant to the gravity assessment for penalty); see also *In re Indus. Chems. Corp.*, 10 E.A.D. at 259-60.

such failure may influence others to forego compliance – meaning that these facilities will not have spill prevention programs and all of the benefits they bring as well.

It is difficult to overstate the importance of preparation and implementation of an SPCC Plan to the overarching goals of the CWA Section 311 program. Failure to prepare and implement an SPCC Plan resulted in Respondent ignoring “important preventative measures designed to mitigate the potential that a harmful spill would occur.”¹¹⁶ Accordingly, Complainant asserts that that the violation was serious reflective of major noncompliance because of the impact to the overall regulatory scheme, which is well supported by case law.¹¹⁷

c. *Size of the Violator*

Finally, Complainant considers the size of the violator as relevant to its assessment of the overall seriousness of the violation.¹¹⁸ Respondent is a petroleum wholesale and distribution business.¹¹⁹ The Oregon Secretary of State identifies Respondent’s principal place of business as 84721 Happel Lane in Seaside, Oregon (the location of the Facility at issue in this case) and indicates filings associated with Clatsop and Tillamook counties.¹²⁰ As Mr. Franklin will testify, based on his Inspection and his over 30 years of experience conducting SPCC inspections, Respondent’s presence is largely local and its business operations are on a smaller-scale within the petroleum distribution industry. Accordingly, Complainant acknowledges there are mitigating factors with respect to Respondent’s size and has considered this in its initial gravity amount.

¹¹⁶ *In re VSS Int’l*, 2020 EPA ALJ LEXIS 20 at 129 (noting that the age of respondent’s tanks made the maintenance of a robust and accurate inspection program imperative).

¹¹⁷ *See, e.g., In re Pepperell Assocs.*, 1999 EPA ALJ LEXIS 16, *75-76 (Feb. 26, 1999).

¹¹⁸ CX 21 (GM-22) at 27.

¹¹⁹ CX 18 (Oregon Secretary of State Filings) at 7, 32.

¹²⁰ *Id.* at 1, 27.

d. *Complainant's Proposed Initial Gravity Amount*

The calculation of discretionary penalties is not an exact science¹²¹ and is to a certain degree a subjective process.¹²² Accordingly, Complainant believes that this Tribunal's approach in *Urban Drainage* is appropriate to use as guidance with respect to an initial gravity amount in addition to the EPA's GM-21 and GM-22 and Section 311 Penalty policies.¹²³ In *Urban Drainage*, the Presiding Officer categorized the gravity of violations into minor, moderate, or major and then reduced the maximum statutory penalty based on the respective ranges, resulting in an initial gravity amount.¹²⁴

As described in Paragraph 4.1 of the Second Amended Complaint, Complainant alleges that Respondent violated the requirements of CWA Section 311(j) and 40 C.F.R. Part 112 for 1,182 days.¹²⁵ Accordingly, if Complainant alleged the maximum allowable penalty of \$23,647 per day, the total calculated penalty would far exceed the allowable statutory maximum of \$295,564.¹²⁶ Consistent with this Tribunal's authority pursuant to CWA Section 311,¹²⁷ Complainant asserts that it is appropriate to start at the administrative maximum penalty of

¹²¹ *U.S. v. Marine Shale Processors, Inc.*, 81 F.3d 1329, 1338 (5th Cir. 1996) (citing *Tull v. United States*, 481 U.S. 412, 497 (1987)).

¹²² CX 21 (GM-22) at 13.

¹²³ *In re Urban Drainage and Flock Control Dist.*, 1998 EPA ALJ LEXIS 42, *65-66 (Jun. 24, 1998). Complainant acknowledges that the violations at issue in *Urban Drainage* involved the CWA Section 404 program. However, ranking of the seriousness of violations into dollar ranges provides a reasonable approach to the inherently subjective process of categorizing the gravity of violations under CWA Section 311. For example, the CWA Section 311 Settlement Penalty Policy uses a matrix to categorize violations into major, moderate, or minor when developing a gravity component. CX 20 (CWA Section 311 Penalty Policy) at 9-10. While this policy is not approved for use in litigation, the major, moderate, minor distinction in *Urban Drainage* is consistent with the Section 311 Penalty Policy and Complainant accordingly asserts that is appropriate to apply *Urban Drainage* approach to the instant case.

¹²⁴ *Id.* at *61, 65 – 66; (assessing the gravity of the violation “in the context of the statutory maximum” and classifying the gravity of the alleged violations as major, moderate, or minor and assigning a dollar range to reflect level of gravity).

¹²⁵ Complainant asserts that Respondent failed to have an SPCC Plan from the time of the Inspection on September 21, 2021, through December 16, 2024. *See* CX 01 (SPCC Inspection) at 3.

¹²⁶ The maximum allowable penalty calculated based on per day violations exceeds \$27 million.

¹²⁷ 33 U.S.C. §1321(b)(6); 90 Fed. Reg. 1375 (Jan. 8, 2025).

\$295,564 and apply the methodology in *Urban Drainage* to divide the maximum penalty into three ranges reflecting the seriousness of the violations—major, moderate, and minor.¹²⁸

Considering the factors discussed above, Complainant avers that Respondent’s noncompliance falls into the major category. The failure to prepare and implement an SPCC Plan created a high risk of potential harm to a sensitive ecosystem and nearby businesses and “[e]vidence of potential harm alone can justify a significant penalty.”¹²⁹ Preparation and implementation of an SPCC Plan is integral to the CWA Section 311 regulatory scheme and purpose of preventing oil spills; Respondent’s failure to do so undermined the entire preventative purpose of the CWA Section 311 Program and introduced a serious risk of discharging oil into Circle Creek.¹³⁰ Furthermore, the violations continued for a considerable length of time and Respondent stored an amount of oil well in excess of the threshold to be subject to the 40 C.F.R. Part 112 regulations. Considering the major violation in this case, the initial gravity assessment should fall in the upper third of the maximum penalty—between \$197,043 and \$295,564.

Complainant, however, acknowledges that no spill or release from the Facility was recorded and thus, there was no actual harm to the environment. Further, Complainant acknowledges that Respondent is a local operator and a relatively small business. Considering these mitigating factors, Complainant proposes an initial gravity amount of \$197,043—the lowest end of the range assigned to major violations when applying the method used in *Urban Drainage*.¹³¹

¹²⁸ *In re Urban Drainage*, 1998 EPA ALJ LEXIS 42 at 65.

¹²⁹ *HVI Cat Canyon Inc.*, 2023 U.S. Dist. LEXIS 31516 at 99.

¹³⁰ *See In re Indus. Chems. Corp.*, 10 E.A.D. 241 at 259.

¹³¹ *In re Urban Drainage*, 1998 EPA ALJ LEXIS 42 at 65.

2. Respondent's Economic Benefit

The CWA Section 311(b)(8) factors direct courts to consider “the economic benefit to the violator, if any, resulting from the violation.”¹³² Economic benefit is “assessed to keep violators from gaining an unfair competitive advantage by violating the law” and includes an approximation of how much money the violator saved by failing to comply.¹³³ Recapture of economic benefit enjoyed by a violator is “vital to an effective enforcement program” because it incentivizes compliance with the law by removing any economic incentive associated with noncompliance.¹³⁴ Federal courts, the Environmental Appeals Board, and this Tribunal have noted the importance of economic benefit, even if the exact amount cannot be assessed; accordingly reasonable estimates of economic benefit are appropriate for the purposes of penalty assessment.¹³⁵

In its Initial Prehearing Exchange, Respondent indicates that Mr. Casey Jackson will testify regarding the “lack of any economic benefit regarding failure to prepare an SPCC Plan as alleged by EPA.”¹³⁶ Other than this allusion to future testimony, Respondent has not offered any specific information or estimates related to economic benefit.¹³⁷ Furthermore, even if there is little to no economic benefit, that does not mean that no penalty is warranted; when the violation is serious, a significant penalty is appropriate regardless of economic benefit.¹³⁸

¹³² 33 U.S.C. §1321(b)(8).

¹³³ *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999); *see also HVI Cat Canyon Inc.*, 2023 U.S. Dist. LEXIS 31516 at 100-101 (noting that courts must make a reasonable approximation of economic benefit in determining penalty and resolve uncertainties in favor of the higher estimate).

¹³⁴ *In re B.J Carney Indus.*, 7 E.A.D. 171, *207-08 (E.A.B. 1997) (appeal dismissed as moot, 200 F.3d 1222 (9th Cir. 2000)); *see also In re San Pedro Forklift*, 15 E.A.D. 838 at 879 (noting recovery of economic benefit as “critical”).

¹³⁵ *See Smithfield Foods*, 191 F.3d at 529; *In re VSS Int'l Inc.*, 2020 EPA. ALJ LEXIS 20 at 117 (citing *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 575-76 (5th Cir. 1996); *Pub. Interest Research Grp. N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990)).

¹³⁶ Respondent's Initial Prehearing Exchange at 2.

¹³⁷ Complainant reserves the right to seek additional discovery from Respondent with respect to economic benefit.

¹³⁸ *HVI Cat Canyon, Inc.*, 2023 U.S. Dist. LEXIS 31516 at 100.

In light of the cited importance of economic benefit to the overall penalty assessment, Complainant provides a reasonable estimate of the economic benefit that Respondent obtained through failure to prepare and implement an SPCC Plan. As Ms. Spaulding will testify, the EPA first developed a reasonable estimate of the cost of preparing and implementing an SPCC Plan. As Mr. David Smith-Watts will testify, EPA then converted that cost estimate into an economic benefit.

With respect to the cost estimate, Ms. Spaulding will testify that she obtained the approximate cost of preparing and implementing an SPCC Plan for Respondent's Facility through the EPA SPCC Plan Renewal Information Collection Request ("ICR").¹³⁹ The ICR surveyed professional engineers who provide services to SPCC-regulated facilities.¹⁴⁰ Based on the information obtained through the survey, the EPA developed cost estimates associated with preparation and implementation of an SPCC Plan.¹⁴¹ As part of the estimate process, the EPA divided regulated entities into four size categories: I – IV.¹⁴² To estimate per-facility cost of developing an SPCC Plan, the EPA "multiplied unit labor estimates for management, technical, and clerical personnel by the fully loaded hourly wage rate for each labor category."¹⁴³

Based on the ICR, Ms. Spaulding will testify that she assigned Respondent's Facility a Category III size designation, consistent with all facilities that have an aggregate capacity between 42,001 and 1 million U.S. gallons.¹⁴⁴ Next, Ms. Spaulding referred to the annual burden and unit costs for an average Category III facility and noted an estimated cost of preparing and

¹³⁹ CX 39 (SPCC ICR).

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.*

¹⁴² *Id.* at 12-13.

¹⁴³ *Id.* at 16.

¹⁴⁴ *Id.* at 13.

PE certifying a new SPCC Plan of \$16,370 in 2018 dollars.¹⁴⁵ In addition to the one-time cost of preparing and obtaining PE certification for a new SPCC Plan, Ms. Spaulding will testify that the ICR also provides an estimated annual cost to maintain an SPCC Plan and implement any necessary updates. Ms. Spaulding will testify that, based on the ICR, she determined Respondent likely avoided \$157 for both failure to maintain the SPCC Plan and failure to keep records in the first year of the Plan.¹⁴⁶ After this initial year of avoided costs, Ms. Spaulding estimated an annual avoided cost of \$2,747 based on the average cost of reviewing and maintaining a previously developed SPCC Plan.¹⁴⁷

Ms. Spaulding will further testify to the dates that are relevant for estimating economic benefit. Ms. Spaulding will testify that while Respondent has been operating a petroleum distribution business since 1984, she conservatively estimated that non-compliance started on July 1, 2015,¹⁴⁸ after EPA provided notice to the Respondent about the SPCC Program.¹⁴⁹ Non-compliance ends on December 16, 2024, the date that Respondent signed its SPCC Plan.¹⁵⁰

Based on the dates that Ms. Spaulding provided, and the ICR estimate of \$16,370 to create an SPCC Plan for the Facility and the above-described avoided annual costs associated with the Plan's maintenance, Mr. Smith-Watts¹⁵¹ used the BEN model's methodology to conduct

¹⁴⁵ *Id.* at 23. The annual burden and unit costs for Category III facilities in SPCC ICR Exhibit 7 note an annual cost of \$16,370 for new facilities to prepare an SPCC Plan. New facilities are defined as those that will begin operations during the ICR period while existing facilities are those that have been in operations for over a year and have burdens that include activities occurring continuously, such as recordkeeping and SPCC Plan review. *See* CX 39 (SPCC ICR) at 14. While Respondent has been operating at its Facility since 1984, Respondent has not provided Complainant evidence indicating it prepared an SPCC Plan prior to December 16, 2024. Thus, the cost to prepare an SPCC Plan for a new facility is applicable to Respondent.

¹⁴⁶ *Id.* at 23.

¹⁴⁷ *Id.* at 19 n. 14 (“The cost estimates in the Exhibits present average annual costs for each facility, e.g., the annual cost estimate for Plan review represents the total cost for Plan review divided by five.”), 23, n.2. *See also* 40 C.F.R. §112.5 (requires review and evaluation of the SPCC Plan at least once every five years).

¹⁴⁸ CX 41 (Smith-Watts Report) at 7

¹⁴⁹ CX 03 (Franklin Email).

¹⁵⁰ CX 23 (December 2024 SPCC Plan).

¹⁵¹ Mr. Smith-Watts' resume is available as CX 40.

a cash flow analysis resulting in an estimated economic benefit.¹⁵² Mr. Smith-Watts serves as the EPA's National Coordinator for Civil Penalties and Financial Analysis and prepared a report submitted as CX 41 describing the economic benefit calculations. Mr. Smith-Watts will testify to the contents of his report.

Mr. Smith-Watts arrived at an economic benefit of \$4,401.58 for delayed costs and \$32,617.60 for avoided costs.¹⁵³ Accordingly, the total economic benefit obtained by the Respondent as a result of failure to prepare and implement an SPCC Plan is \$37,019.18.

The estimated economic benefit of \$37,019.18 is an overly-conservative estimate based on the costs associated with plan preparation and maintenance; it does not include additional delayed expenditures resulting from Respondent's complete failure to implement an SPCC Plan at the Facility such as secondary containment, tank integrity testing, and spill prevention mechanisms at the truck loading/unloading rack, among others.¹⁵⁴

3. Respondent's Degree of Culpability Involved

The third statutory factor to consider is the degree of culpability involved in Respondent's violation¹⁵⁵ or Respondent's general "blameworthiness."¹⁵⁶ The culpability involved in a violation can be understood as "respondent's degree of willfulness or negligence."¹⁵⁷ GM-22 articulates the following factors relevant to determining the degree of culpability involved: how much control the violator had over the events constituting the violation; the foreseeability of the events constituting the violation; whether the violator took

¹⁵² Mr. Smith-Watts' estimated economic benefit is calculated using a conservative penalty payment date of June 1, 2026. CX 41 (Smith-Watts Report) at 7.

¹⁵³ CX 41 (Smith-Watts Report) at 17.

¹⁵⁴ CX 01 (SPCC Inspection Report).

¹⁵⁵ 33 U.S.C. § 1321(b)(8).

¹⁵⁶ *In re Phoenix Const. Services*, 11 E.A.D. 379, 418, n. 87 (EAB 2004).

¹⁵⁷ *In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS 20 at 140-41; (citing *In re Henry Stevenson & Parkwood Land Co.*, 16 E.A.D. 151, 176 (EAB 2013); see also *Polo Dept.* 2015 ALJ LEXIS at 46 ("Culpability is analogous to GM-22's factor or the degree of willfulness or negligence of the violator...").

reasonable precautions against the events constituting the violation; whether the violator knew or should have known of the hazards associated with the conduct; the level of sophistication within the industry in dealing with compliance issues...; and whether the violator in fact knew of the legal requirement which was violated.¹⁵⁸ In addition, “[t]he amount of control which the violator had over how quickly the violation was remedied is also relevant in certain circumstances.”¹⁵⁹

Considering the factors provided above, Complainant asserts that Respondent’s violation displays a high degree of culpability. The alleged violation—failure to prepare and implement an SPCC Plan—falls on the owner or operator of the Facility.¹⁶⁰ As the owner and operator of the Facility, the failure to prepare and implement an SPCC Plan and correction of that violation were both entirely within Respondent’s control.¹⁶¹

Respondent further displayed a high degree of culpability because it knew or should have known of the legal requirement that it violated.¹⁶² This Tribunal and the Environmental Appeals Board have acknowledged that a respondent’s knowledge that its activities are subject to environmental regulation should alert it to make further inquiries into what other regulations may apply.¹⁶³ As previously discussed, Mr. Franklin sent Respondent an email in 2015 introducing the SPCC Program and noting that the regulations “commonly apply to oil storage and handling facilities such as yours, and are found... at 40 C.F.R. Part 112.”¹⁶⁴ This email should have, at a minimum, prompted Respondent to further investigate whether or not it was in fact subject to the

¹⁵⁸ CX 21 (GM-22) at 30.

¹⁵⁹ *Id.*

¹⁶⁰ 40 C.F.R. § 122.3 (“The owner or operator...must prepare in writing and implement a Spill Prevention Control and Countermeasure Plan...); CX 26 (SPCC Regional Inspector Guidance) at 50 (“The facility owner/operator is responsible for determining whether the facility is subject to the SPCC rule...).

¹⁶¹ CX 21 (GM-22) at 30 (“The amount of control which the violator had over how quickly the violation was remedied is also relevant in certain circumstances”).

¹⁶² CX 21 (GM-22) at 30.

¹⁶³ *In re Pepperell Assocs.*, 9 E.A.D at 109-10; *In re VSS Int’l Inc.* 2020 EPA LEXIS ALJ at 145.

¹⁶⁴ CX 03 (Franklin Email).

SPCC regulations.¹⁶⁵ A Respondent’s knowledge that its activities are subject to environmental regulations should prompt it to make “further inquiries into what other regulations, such as EPA’s SPCC regulations, might also apply to the Facility.”¹⁶⁶ Despite this, at the time of the 2021 Inspection, Respondent was still unable to present any substantive information indicating that the Facility was not subject to the Part 112 requirements¹⁶⁷ and they still lacked an SPCC Plan.¹⁶⁸ Thus, consistent with the Environmental Appeals Board’s approach in *Pepperell*, “incomplete efforts to become better versed in environmental regulation affecting the Facility...” do not support adjustments based on low culpability.¹⁶⁹

Lastly, Respondent is not an unsophisticated operator. Respondent has been operating as a wholesale petroleum distributor at the Facility since 1984 and thus, has experience and knowledge relevant to the alleged violation.¹⁷⁰ Respondent is the very type of industry contemplated by the SPCC Plan requirement. However, Complainant also acknowledges that Respondent is a relatively small local business with limited staff.¹⁷¹ Complainant will solicit testimony from Mr. Franklin, who has over 30 years of experience in CWA Section 311 inspections, regarding his impressions from the Inspection of the size of Respondent’s business as compared to other petroleum distribution companies. Complainant has considered Respondent’s overall size and availability of regulatory staff as a mitigating factor with respect to Respondent’s culpability.¹⁷²

¹⁶⁵ *In re Pepperell Assocs.*, 9 E.A.D at 109-10; *In re VSS Int’l Inc.*, 2020 EPA LEXIS ALJ at 145.

¹⁶⁶ *In re Pepperell Assocs.*, 9 E.A.D. at 109-10.

¹⁶⁷ CX 01 (SPCC Inspection) at 23.

¹⁶⁸ CX 01 (SPCC Inspection) at 3.

¹⁶⁹ *In re Pepperell Assocs.*, 9 E.A.D. at 110.

¹⁷⁰ CX 01 (SPCC Inspection) at 2-3; *see also In re VSS Int’l Inc.*, 2020 EPA LEXIS ALJ at 144 (noting respondent’s three decades in business with relevant to discussion of culpability).

¹⁷¹ CX 18 (Oregon Secretary of State Filings) at 7, 32.

¹⁷² *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS at 144 (considering resources available to hire specialized contractors and in-house corporate environmental staff as relevant to the sophistication of the operator and overall culpability).

The GM-22 Policy notes that, after weighing the considerations above, case teams have the discretion to adjust the penalty up or down by 20 percent of the gravity component.¹⁷³ Accordingly, Complainant proposes an upwards adjustment of the initial gravity amount of five percent or \$9,852. A five percent adjustment accounts for Respondent's high degree of culpability while acknowledging the deterrent effect of Complainant's initial gravity amount and Respondent's size and availability of regulatory staff. This brings Complainant's adjusted gravity-based penalty to \$206,895.

4. Any Other Penalty for the Same Incident and History of Prior Violations

The statutory factors next require consideration of any other penalty for the same incident and any history of prior violations.¹⁷⁴ Complainant is unaware of any previously assessed penalty for the same alleged violations. Similarly, Complainant is unaware of any history of prior violations that would be relevant to any penalty adjustment. Accordingly, Complainant does not propose additional upward or downward adjustments based on these factors.

5. The Nature, Extent, and Degree of Success of Respondent's Efforts to Mitigate

The CWA Section 311 statutory factors next examine a Respondent's efforts to mitigate and the nature, extent, and degree to which those efforts are successful.¹⁷⁵ GM-22 elaborates on this factor and notes that the penalty may be further adjusted to account for Respondent's degree of cooperation or noncooperation.¹⁷⁶ GM-22 specifically identifies three areas in which consideration of cooperation or noncooperation is appropriate: 1) prompt reporting of noncompliance; 2) prompt correction of environmental problems; and 3) delaying compliance.¹⁷⁷

¹⁷³ CX 21 (GM-22) at 30.

¹⁷⁴ 33 U.S.C. § 1321(b)(8).

¹⁷⁵ *Id.*

¹⁷⁶ CX 21 (GM-22) at 31.

¹⁷⁷ CX 21 (GM-22) at 31-32.

In addition to the areas identified in GM-22, the CWA Section 311 Penalty Policy is also instructive with respect to this specific factor. The CWA Section 311 Penalty Policy provides that where a violation of Section 311(j) occurs without an accompanying discharge, efforts to mitigate noncompliance may include consideration of how quickly the violator comes into compliance with the 40 C.F.R. Part 112 regulations.¹⁷⁸

Complainant does not believe that any downward adjustment for mitigation is supported by the facts in this case. Respondent asserts in its Initial Prehearing Exchange that it “has fully cooperated with EPA since issuance of the November 15, 2023 Notice of Intent, and voluntarily performed each and every action identified.”¹⁷⁹ First, Complainant transmitted its Notice of Intent on November 15, 2022, not in November of 2023.¹⁸⁰ Thus, Respondent’s mitigation – finalization of an SPCC Plan in December of 2024¹⁸¹ – is not as timely as Respondent suggested in its Initial Prehearing Exchange. Respondent’s efforts are certainly not timely when one also considers that the EPA first notified Respondent of SPCC regulations in 2015.¹⁸² Respondent’s Facility was then inspected by EPA representatives in 2021.¹⁸³ As Mr. Franklin will testify, following the Inspection, EPA representatives conducted a closing conference during which they described inspection observations and areas that appeared to be deficient, problematic, or inconsistent with the requirements at 40 C.F.R Part 112, including the failure to prepare and implement an SPCC Plan. The EPA also transmitted a report summarizing the findings from the Inspection, including the failure to prepare and implement an SPCC Plan.¹⁸⁴ In sum, Respondent

¹⁷⁸ CX 20 (CWA Section 311 Penalty Policy) at 12.

¹⁷⁹ Respondent’s Initial Prehearing Exchange at 6.

¹⁸⁰ See RX 01 (Notice of Intent) at 1, which displays a date of “Tuesday, November 15, 2022 at 9:27 AM PST”; see also Respondent’s Initial Prehearing Exchange at 6.

¹⁸¹ CX 23 (December 2024 SPCC Plan).

¹⁸² CX 03 (Franklin Email).

¹⁸³ CX 01 (SPCC Inspection) at 2.

¹⁸⁴ CX 02 (SPCC Inspection Report Transmittal Letter).

failed to prepare and implement an SPCC Plan for years after notice from the EPA about the requirements of the SPCC Program. Respondent's efforts to return to compliance were neither prompt nor the result of self-reporting. Accordingly, Complainant does not propose any additional adjustments for efforts to mitigate.

6. Economic Impact of the Penalty

An adjustment for economic impact of the penalty on the Respondent is warranted when the Respondent has demonstrated an ability to pay concern.¹⁸⁵ “[A] respondent’s ability to pay may be presumed until it is put at issue by respondent.”¹⁸⁶ As stated in Complainant’s Prehearing Exchange, Complainant has discussed the EPA’s process for evaluating ability to pay with Respondent.¹⁸⁷ Respondent has not provided any information with respect to ability to pay, nor has it cited this factor as specific grounds for reducing penalty.¹⁸⁸ Accordingly, Complainant asserts that no reduction in penalty for ability to pay concerns is warranted.

7. Other Matters as Justice May Require

The last statutory factor under CWA Section 311 accounts for other matters as justice may require. Adjustments under this factor are rare and the Environmental Appeals Board has noted that “the standard for invoking this factor is high, such that ‘the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.’”¹⁸⁹ Complainant does not believe that any additional adjustment under this factor is supported.

¹⁸⁵ *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20 at 146, n. 53 (citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994)).

¹⁸⁶ *In re New Waterbury Ltd.*, 5 E.A.D.529 at 541.

¹⁸⁷ Complainant’s Initial Prehearing Exchange at 42.

¹⁸⁸ While Respondent includes a penalty reduction section in its Initial Prehearing Exchange, this section does not raise a specific ability to pay concern. See Respondent’s Initial Prehearing Exchange at 6.

¹⁸⁹ *In re Phoenix Constr. Servs.*, 11 E.A.D. 379, 415 (EAB 2004) (quoting *In re Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995); see also *In re Pepperell Assocs.*, 9 E.A.D. 83 at 113 (noting that application of the other matters as justice may require factor should be far from routine).

Respondent asserts in its Prehearing Exchange that no penalty is necessary here, in part, because Respondent “has fully cooperated with EPA since issuance of the... Notice of Intent, and voluntarily performed each and every action identified by EPA as set forth in the compliance plan.”¹⁹⁰ This Tribunal has previously discussed similar arguments in the context of this factor and so, Complainant will address this argument here.¹⁹¹ To the extent that Respondent’s assertion is an attempt to argue for application of the other matters as justice may require factor, it falls short of the high standard required.¹⁹² Actions taken to come into compliance after discovery of an SPCC Plan violation “[are] not significant because they were tardy...”.¹⁹³

As Respondent indicated through the prehearing exchange process, Complainant sent its initial Notice of Intent on November 15, 2022.¹⁹⁴ This initial Notice of Intent listed failure to prepare an SPCC Plan as a violation observed during the 2021 Inspection.¹⁹⁵ All enforcement-related correspondence that Respondent includes in its prehearing exchange occurred after EPA’s November 2022 Notice of Intent.¹⁹⁶ None of it includes the actual development of an SPCC Plan, which was not finalized until December of 2024.¹⁹⁷ Respondent’s efforts to comply and its communications with Complainant occurred well after the Inspection and after transmittal of the Notice of Intent and thus, are not timely for the purposes of any penalty reduction under this factor, demonstrative of environmental good deeds, or significant good faith efforts to return

¹⁹⁰ Respondent’s Initial Prehearing Exchange at 6.

¹⁹¹ See *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20 at 146-47 (finding that, to the extent that respondent’s general assertion that its penalty should be minimized because it worked in good faith to return to compliance “could be construed as an argument for a penalty reduction based on other matters justice may require, I reject the argument”).

¹⁹² *Id.*

¹⁹³ *In re Pepperell Assocs.*, 9 E.A.D. 83 at 110 (“For example, the company sought the Region’s consultation and guidance on compliance only after being informed by the Region that it was in violation of the SPCC requirements.”).

¹⁹⁴ RX 01 (Notice of Intent) at 1.

¹⁹⁵ *Id.* at 3.

¹⁹⁶ RX 02 - RX 07.

¹⁹⁷ CX 23 (December 2024 SPCC Plan) at 5.

to compliance. Furthermore, Respondent has not demonstrated any manifest injustice resulting from a failure to apply this factor. Accordingly, Complainant believes that no adjustment is warranted pursuant to this factor.

D. Complainant’s Total Proposed Penalty Amount

Based on the statutory factors, as informed by relevant case law and EPA policy and guidance, Complainant asserts that a gravity amount of \$206,895 is appropriate in this case. Additionally, given that Respondent has not disclosed information related to economic benefit, Complainant has provided a reasoned estimate of Respondent’s economic benefit amounting to \$37,019. Accordingly, Complainant asserts that a penalty of \$243,914 is appropriate considering the facts and circumstances of this case.

IV. CONCLUSION

After considering the statutory factors enumerated under CWA Section 311(b)(8), applicable case law, and relevant EPA guidance and policies, Complainant proposes a penalty of \$243,914. Complainant’s proposed penalty is supported and appropriate given (1) that the failure to prepare and implement an SPCC Plan as required by 40 C.F.R. § 112.3 thwarts the purpose of the SPCC Program, (2) the economic benefit to the Respondent, (3) the high risk of harm in this case, and (4) the high degree of Respondent’s culpability.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION 10:

DATE

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In the Matter of *Jackson & Son Distributors, Inc., d/b/a Jackson and Son Oil*, Respondent.
Docket No. CWA-10-2025-0023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Complainant's Corrected Rebuttal Prehearing Exchange & Supplemental Prehearing Exchange**, dated March 5, 2026, was sent this day to the following parties in the manner indicated below.

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