



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

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ENV. APPEALS BOARD  
ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Consent Agreement and Proposed Final Order: *In the Matter of New Cingular Wireless PCS, LLC*, Docket No. EPCRA-HQ-2009-8001; CWA-HQ-2009-8001; and CAA-HQ-2009-8001

**FROM:** Cynthia Giles, Assistant Administrator  
Office of Enforcement and Compliance Assurance

**TO:** Environmental Appeals Board

Attached for your approval is a Consent Agreement and Proposed Final Order to settle the above-referenced multimedia enforcement action.<sup>1</sup> The attached Consent Agreement is consistent with the Emergency Planning and Community Right-to-Know Act (EPCRA), the Clean Water Act (CWA), the Clean Air Act (CAA), and the U.S. Environmental Protection Agency's (EPA) policies.

Because EPA and Respondent, New Cingular Wireless PCS, LLC (New Cingular or Respondent), have agreed to settle all causes of action before the filing of a complaint, this proceeding will be simultaneously commenced and concluded by the issuance of this Consent Agreement and Final Order (CAFO), as provided by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. § 22.13 and § 22.18. The parties have reduced the terms of the Consent Agreement to writing, which has been signed by a representative of New Cingular, and for EPA by Cynthia Giles, Assistant Administrator of OECA.

As discussed below, the total calculated gravity penalty and economic benefit penalty amount proposed in this matter is \$1,250,000. This penalty will be satisfied through a civil penalty payment of \$750,000 and the implementation of \$625,000 in Supplemental Environmental Projects (SEPs). In addition, New Cingular Wireless (NCW) is required in the CAFO to undertake comprehensive CWA and CAA compliance audits estimated to cost up to \$2.5 million.

The CWA provides that no complaint or order shall become final until an opportunity for public notice and comment has been provided. On September 19, 2012, the CAFO was published in the Federal Register for comment, as required by the Clean Water Act Section 311(b)(6), 33 U.S.C. § 1321(b)(6). The comment period has closed, and no comments were received.

<sup>1</sup> See Attachment 1 to this Memorandum.

## **A. Statement of Facts**

### **1. Facts Relating to the Investigation of AT&T Wireless (AWS) Facilities and the Purchase of AWS by Cingular Wireless (CW) PCS, LLC**

Based on information received by EPA headquarters in 2002 from EPA Region 5, EPA's Special Litigation and Projects Division (SLPD) conducted an investigation of AT&T Wireless (AWS) for potential EPCRA Section 311 and 312 reporting violations, CWA violations related to Spill Prevention, Control, and Countermeasure (SPCC) Plans, and CAA violations related to permitting and operation of backup generators under State Implementation Plan (SIP) rules. On December 2, 2002, EPA sent AWS a detailed information request. AWS submitted its responses to EPA in June 2003. The violations in the attached CAFO and cited herein were discovered during EPA's investigation of AWS's compliance with the above programs under EPCRA, CWA/SPCC and the CAA.

On October 26, 2004, AWS was purchased by Cingular Wireless PCS, LLC (CW). After the transaction, CW was renamed New Cingular Wireless PCS, LLC. The scope of this Consent Agreement is limited to legacy AWS facilities that were subject to the SLPD investigation.

In a separate matter, NCW approached EPA to self-disclose EPCRA violations at legacy CW and NCW facilities after acquiring AWS. NCW made two sets of disclosures to EPA, one in 2005 and a second in 2007 involving both legacy CW and NCW sites. No AWS sites were part of those disclosures. SLPD and NCW settled those violations, disclosed pursuant to EPA's *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Final Policy Statement* (Audit Policy), 65 Fed. Reg. 19,618 (Apr. 11, 2000), in a separate CAFO that was approved by the EAB on February 9, 2012.

### **2. Legacy AWS Violations and CAFO Requirements**

#### **EPCRA Violations Resolved in the CAFO**

AWS operated 25,000 facilities nationwide at the time of the investigation in 2002. These facilities consisted of cell sites, transmitter sites, switching stations, and warehouses. The enclosed CAFO resolves 476 violations of EPCRA, CWA, and CAA, which occurred at 332 legacy AWS facilities located in 43 states during EPCRA reporting years 2001 to 2003.

At 325 of the sites covered by this action, AWS owned and operated batteries containing sulfuric acid and/or storage tanks containing diesel fuel in excess of the EPCRA threshold reporting amounts. At 314 facilities, AWS failed to submit an Emergency and Hazardous Chemical Inventory form to the Local Emergency Planning Committees (LEPC), the State Emergency Response Commissions (SERC), and/or the fire departments with jurisdiction over the facilities, in violation of EPCRA Section 312(a), 42 U.S.C. § 11022(a). In addition, at 51

facilities, AWS did not submit Material Safety Data Sheets to the LEPC, SERC, and/or the fire department with jurisdiction over the facilities in violation of EPCRA Section 311(a), 42 U.S.C. § 11021(a).<sup>2</sup>

This CAFO contains a certification by NCW that it is now in compliance with these EPCRA requirements not only at the legacy AWS facilities that were the subject of the investigation, but also at all facilities now owned by NCW as of EPCRA Reporting Year 2009.<sup>3</sup> In order to make such a global certification, NCW performed a comprehensive data validation review of its approximately 60,000 facilities in early 2007 and verified the global NCW battery inventory subject to EPCRA reporting requirements in August and September 2007. NCW subsequently submitted timely EPCRA reports for EPCRA Reporting Years 2007, 2008, and 2009. EPA determined that the above efforts and the global certification of EPCRA compliance for Reporting Year 2009 were sufficient to document compliance with EPCRA. Moreover, after the 2009 EPCRA compliance certification, the parties engaged in extensive discussions to identify appropriate Supplemental Environmental Projects, which are included in the proposed CAFO.

#### SPCC Violations Resolved in the CAFO

AWS owned fourteen sites with storage tanks used to store diesel fuel to run back-up generators in the case of a power outage at the site. These fourteen sites were subject to SPCC regulations and had inadequate and/or no SPCC plans. Specifically, the regulations at 40 C.F.R. Part 112, promulgated under the CWA, required AWS to develop and implement SPCC plans to prevent the discharge of oil into the navigable waters of the United States or adjoining shorelines for its subject sites. Seven sites lacked a certification from a professional engineer. Five sites had draft plans in place, but the plans lacked management approval and an engineer certification. The two remaining sites had no SPCC plan in place.<sup>4</sup>

#### SPCC Audit to be Conducted under the CAFO

The CAFO does not include a certification of current compliance with CWA/SPCC requirements at all legacy AWS facilities. Because a certification is not included, NCW will be required, under the CAFO, to conduct comprehensive compliance audits of CWA/SPCC requirements at 41 legacy AWS sites still owned by NCW. The CWA/SPCC audit is scheduled to take nine months.<sup>5</sup>

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<sup>2</sup>See Attachment A of the CAFO for a comprehensive list of sites with EPCRA violations.

<sup>3</sup>See Paragraph 46 of the CAFO and Attachment D of the CAFO for a list of these sites.

<sup>4</sup>See Attachment B of the CAFO for a list of these sites.

<sup>5</sup>See Attachment E of the CAFO for the CWA/SPCC audit protocols and a list of sites to be audited.

The CAFO requires NCW to report to EPA any violations of CWA/SPCC requirements found during the above-described audit, to correct all disclosed violations, and to pay negotiated penalties for all violations found at the 41 audited legacy AWS facilities, as described in Section E below.

#### CAA Violations Resolved in the CAFO

At two sites, AWS violated applicable, federally-enforceable provisions of the California State Implementation Plan (SIP), thereby violating CAA Section 110(a), 42 U.S.C. § 7410(a). At these two sites, AWS failed to obtain CAA Section 110/SIP permits for three back-up diesel electric generators between July 1999 and 2007. The facilities returned to compliance in 2005 and 2007, respectively.<sup>6</sup>

Pursuant to Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), the administrative settlement of cases in which the first alleged date of violation occurred more than 12 months prior to the initiation of the action requires a joint determination by the Attorney General of the United States and the Administrator that such settlement is appropriate. On February 28, 2008 the Administrator and the Attorney General, through their duly authorized representatives, jointly determined that, pursuant to Section 113(d)(1), the CAA violations, which preexisted commencement of this action by more than 12 months, are appropriately settled administratively.<sup>7</sup>

#### CAA Audit to be Conducted under the CAFO

The CAFO does not include a certification of current compliance with backup generator CAA 110/SIP permitting requirements at all legacy AWS facilities. Under the CAFO, NCW will be required to conduct comprehensive compliance audits at 1,356 legacy AWS sites for CAA 110/SIP, as well as applicable New Source Performance Standard (NSPS), requirements. The CAA audit is scheduled to take eighteen (18) months and estimated to cost up to \$2.5 million.<sup>8</sup> OCE believes this is the most detailed and comprehensive CAA audit protocol developed specifically for telecom sites. The protocol will help other telecom companies, EPA regions, and states evaluate compliance at telecom sites.

The CAFO requires NCW to report to EPA any violations of CAA/SIP or NSPS requirements found during the above-described audit and correct all disclosed violations at the 1,356 audited legacy AWS sites still owned by NCW. NCW has agreed to pay negotiated penalties for all CAA noncompliance discovered and disclosed to EPA pursuant to the compliance audit. With respect to CAA noncompliance, the parties have agreed to classify

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<sup>6</sup>See Paragraphs 32 and 33 of the CAFO for the locations of these 2 facilities.

<sup>7</sup>See Attachment 2 to this Memorandum.

<sup>8</sup>See Attachment E of the CAFO for the CAA audit protocol and list of sites to be audited.

potential violations according to two tiers and assign penalties as described in Section E below.

## **B. Penalty Determinations**

### **1. EPCRA Economic Benefit and Gravity Penalty Components (\$1,048,646)**

As explained below, EPA has calculated a gravity-based penalty of \$1,035,146 for these violations. The addition of economic benefit brings the total EPCRA component of the penalty to \$1,048,646.

#### **Economic Benefit (\$13,500)**

EPA has calculated an estimated economic benefit of \$13,500 for all EPCRA violations. The figure represents the adjusted benefit gained by the delayed expenditures related to the failure to file the appropriate EPCRA forms with the appropriate entities for the 325 legacy AWS facilities.

#### **Gravity (\$1,035,146)**

Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), requires the Administrator to take into account the nature, circumstances, extent, and gravity of Section 311 and 312 violations, and with respect to the violator: ability to pay; any prior history of such violations; the degree of culpability; economic benefit or savings (if any) resulting from the violations; and such other matters as justice may require. These penalty factors are incorporated into the *Final Enforcement Response Policy for Sections 304, 311 and 312 of the EPCRA, and Section 103 of CERCLA (September 30, 1999)* (EPCRA ERP), which EPA used to develop the penalty in this case.

EPA's EPCRA penalty reduction comports with the EPCRA ERP. EPA's base gravity penalty calculation, derived from application of the EPCRA ERP two matrices, for all of the EPCRA violations being resolved in the CAFO is \$4,140,583. The EPCRA ERP allows reductions of a base gravity penalty based on: culpability (25% maximum); attitude-cooperation (25% maximum); attitude-willingness to settle (10% maximum); and other matters as justice may require (10% or more if warranted). Here, over the course of a complicated and lengthy negotiation, the settlement team adjusted the EPCRA gravity component according to each of these factors. EPA believes that a number of mitigating factors justify these penalty reductions. In addition, EPA factored in the Debt Collection Improvement Act adjustment to the initial gravity components for the EPCRA violations cited herein. See Amendments to Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule, issued on December 29, 2008.<sup>9</sup>

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<sup>9</sup> <http://www.epa.gov/compliance/resources/policies/civil/penalty/amendmentstopenaltypolicies-implementpenaltyinflationrule08.pdf>.

As discussed in Section D below, EPA has sought to achieve parity between the penalty assessed here and that assessed in other major telecommunications settlements involving MCI and ALLTEL, while also providing appropriate deterrence. To meet those objectives and in accordance with the ERP, EPA reduced the base EPCRA penalty (Section 311 and 312 violations combined) of \$4,140,583 by 75%,<sup>10</sup> resulting in an EPCRA penalty allotment of \$1,035,146, excluding economic benefit.

## 2. SPCC Economic Benefit and Gravity Penalty Components (\$68,297)

### Economic Benefit (\$2,500)

EPA calculated an estimated economic benefit of \$2,500 for the 14 SPCC violations. The economic benefit for the 12 facilities that had prepared SPCC plans and only lacked management approval and/or certification by a professional engineer is considered small. The economic benefit for the remaining two facilities without SPCC plans was estimated to be \$2,000. The figure was obtained by inputting Office of Management and Budget Information Collection Request (OMB/ICR) costs (not including any potential secondary containment costs) into the BEN computer model. The BEN computer model generated a 5-year economic benefit figure of \$1,312 for a site with no SPCC plan. In this case, EPA chose a \$1,000 figure to represent the 5-year economic benefit at legacy AWS facilities lacking an SPCC plan.

### Gravity (\$65,797)

Using the matrix found on page 7 of the *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act* (Aug. 1, 1998), EPA has calculated a gravity-based penalty of \$65,797. The addition of the \$2,500 economic benefit figure brings the total SPCC component of the penalty to \$68,297. NCW has corrected these violations by preparing, finalizing, and certifying the SPCC plans.

As set forth above, EPA identified 14 instances in which a facility's SPCC plan was finalized after the regulatory deadline in violation of Section 311(j) of the CWA. Seven sites had plans lacking an engineer certification; five sites had draft plans lacking management approval and an engineer certification; and two sites had no plan in place.<sup>11</sup>

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<sup>10</sup> In accordance with the ERP, EPA reduced the base EPCRA penalty by 25% for culpability, by 25% for cooperation, and by 10% for attitude/willingness to settle. EPA also made a 15% reduction, rather than the 10% reduction provided as a suggested maximum in the ERP, based on other matters as justice may require. OECA believes that the facts and circumstances of this matter warrant a 15% reduction. In any event, the EPCRA ERP specifically allows for deviations from its terms based on the particulars of the case at hand (EPCRA ERP, p. 3):

*Although the application of this Policy is intended for typical cases, there may be circumstances that warrant deviation from this Policy. The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. \* \* \* The Agency reserves the right to act at variance with this Policy.*

<sup>11</sup> See Attachment B to the CAFO for a detailed breakdown of the violations.

EPA assessed a \$3,000 penalty for 11 plans lacking management approval and an engineer certification, a \$6,000 penalty for the site with the large underground tanks, and an \$8,000 penalty for two sites with no plan. As provided by the penalty policy, EPA adjusted the base penalty amount for each violation based on the temporal length of the violation or the statute-of-limitations bar date. The above factors generate a base penalty of \$63,667 for these 14 sites.

EPA also made the required Debt Collection Improvement Act adjustment to the initial gravity components for five violations cited in the above table which raised the total gravity penalty component to \$65,797. See Amendments to Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment, issued on December 29, 2008 and previously cited at footnote 9. As indicated above, the addition of economic benefit brings the total SPCC component of the penalty to \$68,297.

### 3. CAA Economic Benefit and Gravity Penalty Components (\$131,208)

EPA's investigation uncovered two AWS facilities located in Suisun and Stockton, California that did not acquire CAA permits for three emergency generators/engines. In determining an appropriate penalty, Section 113(e)(1) of CAA, 42 U.S.C. § 7413(e)(1), requires the Administrator to take into account (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, the economic benefit of noncompliance, and the seriousness of the violation.

Under the *Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991)* (CAA Penalty Policy), a penalty is determined in two stages: (1) determination of the preliminary deterrence amount (PDA) and (2) adjustments to the PDA. The PDA is defined as the economic benefit component plus the gravity component. Page 4 of the CAA Penalty Policy states that: "The procedures set out in this document are intended solely for the guidance of government personnel. . . . The Agency reserves the right to act at variance with this policy and to change it at anytime without public notice."

As explained below, EPA has calculated a CAA gravity-based penalty of \$130,758. The addition of economic benefit brings the total CAA component of the penalty to \$131,208.

#### Economic Benefit (\$450)

To determine an economic benefit penalty component in this case, the case team evaluated the costs associated with CAA compliance from the prior telecom cases. NCW indicated that its review showed that the nationwide average of costs associated with having an outside consultant research the regulations and complete the necessary permit applications was \$1,000. EPA found this figure to be reasonable and used \$1,000 as the initial average cost for

AWS sites. Using the \$1,000 estimated delayed cost and no annual recurring costs, the BEN computer model returned a 5-year economic benefit figure of \$150 for a single site. We applied this \$150 figure to each of the three unpermitted generators to obtain a BEN of \$450.

#### Gravity (\$130,758)

- *Applicable Facts*

NCW has applied for and received the appropriate CAA permits for two of the violative generators, with the remaining generator being removed from service. The Suisun/Bay Area location operated an unpermitted 82 kilowatts (kW) or 109 horsepower (hp) engine from April 2002 to February 2007. The Stockton/San Joaquin Valley location operated two unpermitted engines: a 600 kW (850 hp) unit from March 2000 to April 2005 and a 679 kW (910 hp) unit from July 1999 to March 2005. The two engines at the Stockton location were redundant units as only one engine was used at any given time. These three generators only operated in emergency situations. Both locations are in extreme non-attainment areas. The primary pollutants from internal combustion (IC) engines are nitrogen oxides, hydrocarbons and other organic compounds, carbon monoxide, and particulates. Sulfur oxides also appear in the exhaust from IC engines, mainly related to the fuel's sulfur content.

- *Method of Calculation*

Pages 9 and 10 of the CAA Penalty Policy list three main gravity-calculation criteria to measure the seriousness of a violation: (1) actual or possible harm; (2) importance to the regulatory scheme; and (3) size of violator in determining the gravity penalty component. The amount and toxicity of the pollutants, the sensitivity of the environment, and the length of time the violation continues are also factors to consider in calculating the gravity penalty component. The case team developed the CAA gravity penalty component in accordance with all three gravity-calculation criteria and followed the CAA Penalty Policy's "Calculating Size of Violator Factor for Sources With Very Large Net Worth" on pages 174-178, to arrive at a size of violator component of \$226,450 and a PDA of \$452,450.

EPA made the required Debt Collection Improvement Act adjustment to the initial PDA figure, resulting in an adjusted total PDA penalty component of \$533,705. Then, as permitted by the CAA Penalty Policy, EPA reduced the PDA to reflect NCW's cooperation (30%) and litigation risk (65%) associated with the CAA violations to arrive at a final gravity penalty figure of \$130,758. Adding the economic benefit of \$450 for the three generators to the final adjusted gravity-based penalty results in a final CAA penalty of \$131,208.

#### **C. Summary of Gravity and Economic Benefit Based Penalties**

As described above, the case team calculated gravity-based penalties and economic benefit for the EPCRA, CWA and CAA violations resolved in this agreement. For economic benefit, the case team utilized the delayed and annual avoided costs provided by NCW, certain

OMB/ICR costs, costs associated with previous telecom cases, and compliance dates in the economic benefit calculations.

<u>Statute</u>	<u>GBP</u>	<u>BEN</u>	<u>Total</u>
EPCRA	\$1,035,146	\$13,500	\$1,048,646
CWA/SPCC	\$ 65,797	\$ 2,500	\$ 68,297
CAA	\$ 130,758	\$ 450	\$ 131,208
<b>Totals</b>	<b>\$1,231,701</b>	<b>\$16,450</b>	<b>\$1,248,151 (rounded-up to \$1,250,000)</b>

**D. Total Penalty and Historical Context Concerning EPA Telecom Actions**

The total gravity penalty and economic benefit penalty amount proposed in this matter is \$1,250,000. This penalty will be satisfied through a civil penalty payment of \$750,000 and a \$625,000 expenditure on approved Supplemental Environmental Projects under the proposed CAFO.

Since 1998, SLPD has entered into settlements with a total of 36 telecommunications companies for violations of EPCRA, CWA/SPCC, and CAA requirements. Of that total, SLPD settled two cases with companies of similar size and levels of violation to AWS: (1) MCI (*In the Matter of MCI WorldCom, Inc.*, Docket No. EPCRA-HQ-99-007; CWA-HQ-99-005; CAA-HQ-99-001/S); and (2) ALLTEL (*United States v. ALLTEL Corporation*, Civil Action No. 4:03CV-0792 WRW (E.D. Ark.)).

NCW has argued that, in this case, it should be penalized to a lesser extent than MCI and ALLTEL because the violations at issue in this action were committed by its corporate predecessor, AWS, and not by NCW. The case team evaluated this issue and sought to reinforce the message that appropriate penalties must be collected from purchasers of environmental liabilities to level the playing field for companies that are in compliance.

Taking into account both the prior telecom settlements and all the factors in this matter, EPA concluded that a rough parity between the MCI, ALLTEL, and NCW settlements is appropriate under the circumstances. MCI and ALLTEL are similar telecom settlements that resulted in per site penalties of approximately \$3,981 and \$5,136, respectively. Under this CAFO, NCW will pay a penalty of approximately \$3,765 per site and will certify to compliance with EPCRA through reporting year 2009. In addition, NCW will perform CAA/SIP, CAA/NSPS, and CWA/SPCC compliance audits which go beyond the compliance audits undertaken by MCI and Alltel in the prior settlements with EPA. These audits are estimated to cost the company 2.5 million dollars. NCW will correct all disclosed violations, pay negotiated penalties for all disclosed violations, and certify its compliance with those requirements at the conclusion of the audits. In sum, EPA believes the penalty is fair, yet substantial enough to provide a strong compliance incentive for regulated entities.

**E. Proposed Negotiated Penalties for Violations Discovered from the Prospective CWA/SPCC and CAA Audits**

**1. CWA/SPCC Negotiated Penalties**

NCW has agreed to pay negotiated penalties of \$1,500 per facility for all CWA/SPCC violations discovered at a facility in the proposed CAFO through the audit NCW has agreed to conduct. A single violation will trigger payment of the \$1,500 penalty. This proposed \$1,500 negotiated penalty was developed based on a \$500 gravity component and \$1,000 five-year economic benefit component based on OMB/ICR costs for small oil facilities, not including secondary containment.

Because the typical legacy AWS site is quite small and presents a very low risk of harm to the environment, the \$500 gravity component was chosen from the CWA/SPCC Penalty Policy minor noncompliance matrix. In this case, EPA chose a \$1,000 figure to represent the 5-year economic benefit at legacy AWS facilities lacking an SPCC plan, consistent with our approach on page 10. This figure also aligns the total negotiated penalty with other settlements, as noted below. The proposed CAFO provides that EPA will also collect additional economic benefit for any audited site whose corrective action requires a capital expenditure, such as provision of secondary containment.

The AWS negotiated penalty for these CWA/SPCC violations is consistent with prior telecom settlements with ALLTEL Corporation, Adelphia Communications Corporation and Verizon Wireless Corporation, which are summarized below.

Company	SPCC Violations
ALLTEL	\$1,250/facility for no SPCC Plan
Adelphia	\$1,500/facility for no SPCC Plan
Verizon	\$800/facility for no SPCC Plan

**2. CAA Negotiated Penalties**

NCW has agreed to pay a negotiated penalty of \$1,150 for Tier 1 violations (failure to obtain a federally-required permit for a facility) and \$700 penalty for Tier 2 violations (noncompliance with federally approved requirements such as failure to provide required notice, maintain records and/or conduct monitoring for a facility). The Tier 1 proposed penalty is composed of a \$1,000 gravity component and \$150 five-year economic benefit component based on OMB/ICR costs with minor source permitting requirements. The Tier 2 proposed penalty is primarily a gravity component, as the economic benefit would be very limited for such violations.

The Tier 1 \$1,000 gravity component ultimately selected represents 6.6% of the \$15,000 gravity figure for importance to the regulatory scheme under the CAA Penalty Policy. This gravity component is an appropriate per site penalty to be obtained for violations disclosed and

corrected under NCW's comprehensive, precedential CAA audit. Because EPA does not have the resources to inspect all 1,356 sites subject to this audit, it is appropriate to significantly reduce the gravity penalty associated with disclosed and corrected noncompliance.

The Tier 1 penalty will serve as a cap for the facility, with no additional penalties imposed even where Tier 2 violations have occurred. Similarly, where Tier 2 violations have occurred in the absence of Tier 1 violations, penalties per facility are capped at \$700. In addition, EPA will collect additional economic benefit for delayed and avoided costs, including capital expenditures associated with failure to install air pollution controls or make equipment changes to meet emission limits at any site, beyond the previous penalty figures.

To determine a BEN component for the Tier 1 penalty, the costs associated with CAA compliance from the prior Qwest, Nextlink, Broadwing, and AirTouch Communications settlements were evaluated. The average cost per facility for minor source permit development and submission was approximately \$1,231, with costs ranging between \$300 and \$2,840. NCW indicated that its review showed that the nationwide average of costs associated with having an outside consultant research the regulations and complete the necessary permit applications was \$1,000. EPA found this figure to be reasonable and used \$1,000 as the initial average cost for AWS sites. Using the \$1,000 estimated delayed cost and no annual recurring costs, the BEN computer model returned a 5-year economic benefit figure of \$150 for a single site.

The AWS negotiated penalties of \$1,150 and \$700 for these CAA violations are consistent with prior telecom settlements with ALLTEL Corporation, Adelphia Communications Corporation and Verizon Wireless Corporation, which are summarized below.

Company	CAA Violations
ALLTEL	\$500/year/facility
Adelphia	\$800/facility
Verizon	\$500/facility

**F. Supplemental Environmental Projects and Environmental Justice (EJ)**

Under this agreement, NCW will provide equipment and/or hazardous materials training to enhance the capabilities of seven emergency responders across the country, each located in states in which a significant number of potential EPCRA violations occurred. NCW will spend a total of \$625,000 on emergency response equipment, such as unknown gas and biological agent identifier technology, thermal imaging cameras, multi-gas meters, fire trucks, satellite communications devices and other communications equipment.<sup>12</sup> The proposed \$625,000 SEP package is consistent with Section E of EPA's Final SEP Policy, which sets forth the process by which EPA determines the appropriate mitigation percentage and mitigation amount in settlements that include SEPs. NCW's proposal to donate \$625,000 in emergency response

<sup>12</sup>See Attachment C of the CAFO.

equipment, which involved significant input from affected communities, qualifies for an 80% mitigation percentage and a \$500,000 reduction in the amount paid in penalties.

A description of the Environmental Justice status of the populations affected by the seven emergency responders is included below.

**Bodega Bay, California** is a large rural area in western coastal Sonoma County. Sonoma County has a population of 472,102 with 10% below the poverty level. In addition, 32% are minorities; 22% are 18 years old or less; 14% are 65 and older; and the median household income in 2008 was \$62,314. Within a 10 mile radius of Bodega Bay, the population is 12,712; 10% of the population is below the poverty level (Sonoma County level is 10.4%); 15% are minorities; 20% of the population is 17 years or younger (5% are 5 years or less) and 47% of households make \$50,000 or less.

**Palm Beach County, Florida** is a large and diverse county that has 1.3 million people in 37 municipalities and includes western rural areas near Lake Okeechobee and urban coastal areas between Jupiter and Boca Raton, with 12% of the county population below the poverty level.

**Georges Lake-Putnam County, Florida** is a large rural county in northeastern Florida, approximately 45 miles west of Daytona Beach with a population of 73,000. With regard to the Putnam County population, 27% are minorities; 23% are below the poverty level; 23% are 18 years old or less; 19% are 65 and older; and the median household income in 2008 was \$35,168. Within a 10 mile radius of Georges Lake: the population is 21,000; 9% of the population is below the poverty level; 6% are minorities; 26% of the population is 17 years old or younger (7% are 5 years or less); and 35% of households make \$25,000 or less.

**Yancey, Texas-Medina County, Texas** is a large rural area approximately 40 miles southwest of San Antonio, TX with a population of 45,000. With regard to Medina County population, 53% are minorities; 17% are below the poverty level; 26% are 18 years old or less; 13% are 65 and older; and the median household income in 2008 was \$44,632. Within a 10 mile radius of Yancey, the population is 8,081; 9% of the population is below the poverty level; 55% are minorities; 29% of the population is 17 years or younger (9% are 5 years or less); 14% of the population is 65 years or older; and 41% of households make \$25,000 or less.

**San Diego County, California** is a large diverse county, with extensive urban and rural coastal areas and remote rural canyon areas in the eastern part of the county. The county population is 3 million, with 13% below the poverty level.

Lastly, **Los Angeles, California and New York City, New York** (five boroughs of New York City) are two of the largest and most diverse cities in the United States.

### **G. Human Health and Environmental Concerns**

While EPA has human health and environmental concerns regarding chemicals which have hazardous properties and the potential for exposure of these chemicals to humans and the environment, there is no evidence of any actual harm caused by AWS's failure to comply with EPCRA, the CAA, and the CWA.

### **H. Disposition of the Chemicals**

There are no chemicals to be disposed of in this action. AWS has submitted EPCRA filings, CAA permits, and prepared SPCC plans for all of the sites identified in the Consent Agreement as having violated EPCRA, the CAA, and the CWA. Based on its certification in the Consent Agreement, EPA has determined that the violations which are the subject of this Agreement have been corrected.

### **I. Past or Pending Actions**

As set forth above, after purchasing AWS, NCW approached EPA to self-disclose EPCRA violations at legacy Cingular and NCW facilities in a separate matter from this settlement. NCW made two sets of disclosures to EPA, one in 2005 and a second in 2007. EPA and NCW settled those violations, disclosed pursuant to EPA's Audit Policy, in a separate agreement (EPCRA-HQ-2007-6000). The Audit Policy disclosures made to EPA in 2005 and 2007 do not include disclosures at the legacy AWS sites involved in this action.

### **J. CAA Notice to California**

The Consent Agreement serves as the Notice of Violation to Respondent as required by Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1). On November 16, 2009, EPA notified the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) that EPA proposed to resolve potential violations of CAA Section 110 and the California SIP in a settlement with NCW. On April 2, 2010, EPA notified the Bay Area Air Quality Management District (BAAQMD) that EPA proposed to resolve potential violations of CAA Section 110 and the California SIP in a settlement with NCW. Such notice was given pursuant to CAA Section 113(a)(1), 42 U.S.C. § 7413(a)(1), which requires EPA to notify the person found to be in violation of any requirement of a SIP and the state in which the plan applies of such finding no less than 30 days prior to taking action.

### **K. The Public Interest is Served by the Agreement**

The public interest is served by this CAFO because it will deter future violations, and because NCW will ultimately be certifying to compliance with EPCRA, CAA Section 110/SIP and CWA/SPCC requirements.

**RECOMMENDATION:** OECA recommends that the EAB approve the proposed settlement in this matter on the conditions and for the reasons presented herein, and issue a Final Order.

Please address any questions concerning this memorandum or the attached documents to Andrew Stewart at 202-564-1463, Michael Calhoun at 202-564-6031, or Jeanne Duross at 202-564-6595.

cc: Philip Moffat, Outside Counsel for New Cingular Wireless

**Attachments:**

1 - Consent Agreement and Proposed Final Order with Attachments

2 - Department of Justice Approval of CAA Waiver Under Section 113(d) of the Act