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REGIONAL HEARING CLERK
EPA REGION VI

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

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

MOTION FOR ASSESSMENT OF CIVIL PENALTY

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

I. PROCEDURAL BACKGROUND

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

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

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

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

II. STATUTORY REQUIREMENTS

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

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

III. PENALTY ASSESSMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

7-28-10

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

Date

CERTIFICATE OF SERVICE

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

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

Edwin Quinones

7-28-10
Date

EXHIBIT 1

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY – REGION 6

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

SPCC Case #: FY-INSP- 080085
SPCC Inspection Date: 2/6/2008

FRP ID: FRP-06-
FRP Inspection Date:

Name of Facility: Wooten Tank Battery
Latitude: 34.92 826 (2) Longitude: -96.757 37 (3) Source: Garmin GPS III Plus
Facility Address/Location: EW 1440 Rd & NS 3510 Rd

City: Konawa County/Parish: Seminole State: OK Zip: 74849
Facility Contact: Richard Bertschinger Title: owner | operator
Telephone Number: 405-842-4527 Email:

Name of Owner/Operator: Bertschinger Oil company
Corporate Address: 6417 Grandmark Drive
City: Oklahoma City State: OK Zip: 73116
Corporate Contact: Richard Bertschinger Title: owner | operator
Telephone Number: 405-842-4527 Email:

405-848-494

Synopsis of Business: oil production

How many employees work at this facility? 4
If unmanned, how many employees maintain this facility?

NAICS #: 21111

Route of Entry to Waterway: South to Negro Creek → East to Canadian River
Distance to Navigable Waterway (in feet): South 500'
Relative direction to water body: 500' Elevation above water body (ft):

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

FRP inspector name:
Team members:
FRP review by:
Date of review:

Acknowledgement of Inspection

Company Contact: [signature] Title: Pres.
Inspector: Tom McKay Title: Inspector GPN | SEC

Phone: (214) 665-2180

Memorandum Of Understanding
(check all applicable descriptions)

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

Facility Type

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

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

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

Applicable Storage Containers
(check all applicable descriptions)

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

Storage Function
(check all applicable descriptions)

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

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

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

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

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

Name of Professional Engineer: No Plan

License Number: State:

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

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

Mgmt Personnel Name:

Mgmt Personnel Title:

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

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

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

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

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

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

Spill may have also reached creek per operator

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

Certification #:

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

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

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

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

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

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

GENERAL REQUIREMENTS FOR SPCC PLANS 112.7(a-d)	Adequately Addressed in Plan	
Does the Plan format follow the sequence in the rule? *112.7*	☐ YES ☑ NO ☐ N/A	see p 19?
If no, is a cross-reference provided?	☐ YES ☐ NO ☑ N/A	
Does the Plan call for additional facilities or procedures, methods, or equipment not yet fully operational?	☐ YES ☐ NO ☑ N/A	
If yes, are these items discussed in the Plan? *112.7*	☐ YES ☐ NO ☑ N/A	
Does the Plan include a discussion of conformance with SPCC requirements? *112.7(a)(1)*	☐ YES ☑ NO ☐ N/A	
Does the Plan deviate from SPCC requirements? *112.7(a)(2)*	☐ YES ☐ NO ☑ N/A	
If yes, does the plan describe detailed alternative methods to achieve equivalent environmental protection?	☐ YES ☐ NO ☑ N/A	
Does the Plan contain a facility diagram? *112.7(a)(3)*	☐ YES ☑ NO ☐ N/A	
Does the diagram include:	☐ YES ☐ NO ☑ N/A	
- The location and contents of each container?	☐ YES ☐ NO ☑ N/A	
- Completely buried storage tanks?	☐ YES ☐ NO ☑ N/A	
- Transfer stations?	☐ YES ☐ NO ☑ N/A	
- Connecting pipes?	☐ YES ☐ NO ☐ N/A	
Is there a description in the Plan of the physical layout of the facility and include: *112.7(a)(3)*	☐ YES ☑ NO ☐ N/A	
- The type of oil in each container and its storage capacity? *112.7(a)(3)(i)*	☐ YES ☑ NO ☐ N/A	
- Discharge prevention measures including procedures for routine handling of products? *112.7(a)(3)(ii)*	☐ YES ☑ NO ☐ N/A	
- Discharge or drainage controls? *112.7(a)(3)(iii)*	☐ YES ☑ NO ☐ N/A	
- Countermeasures for discharge discovery, response, and cleanup? *112.7(a)(3)(iv)*	☐ YES ☐ NO ☑ N/A	
- Methods for disposal of recovered materials in accordance with applicable legal requirements? *112.7(a)(3)(v)*	☐ YES ☐ NO ☑ N/A	
- Contact list and phone numbers for the facility response coordinator, NRC, cleanup contractors, and federal, state, and local agencies? *112.7(a)(3)(vi)*	☐ YES ☐ NO ☑ N/A	
Does the Plan include information and procedures for reporting a discharge? *112.7(a)(4)*	☐ YES ☑ NO ☐ N/A	
Does the Plan include procedures to use when a discharge may occur? *112.7(a)(5)*	☐ YES ☑ NO ☐ N/A	
Does the Plan include a prediction of equipment failure(s) that could result in a discharge from the facility per *40 CFR 112.7(b)*?	☐ YES ☑ NO ☐ N/A	
Does the Plan discuss appropriate containment and/or diversionary structures/ equipment (including transfer areas) per *40 CFR 112.7(c)*?	☐ YES ☑ NO ☐ N/A	

no containment for load line taken care of by berm.

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

Comment:

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

Comment:

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

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

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

FACILITY TANK CAR AND TANK TRUCK LOADING/UNLOADING RACK (Continued) (excluding offshore facilities) 112.7(h-j)		
Comment:		

OIL PRODUCTION FACILITY DRAINAGE 112.9 (b) Note: See Tank and Secondary Containment Forms	Adequately Addressed in Plan	Adequately Addressed in Field
Are drains of dikes or drains described in *112.7(1)* at tank batteries and separation and treating areas closed and sealed at all times except when uncontaminated rainwater is being drained? *112.9(b)(1)* If YES. No valves, evaporation; but siphons out in emergency	☐ YES ☒ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Prior to drainage of the diked area(s), is the rainwater inspected, valves opened and resealed under responsible supervision, and records kept of such events? *112.8(c)(3)(ii)(iii)&(iv)*	☐ YES ☒ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Is accumulated oil on the rainwater removed and returned to storage or dispose of in accordance with legally approved methods? *112.9(b)(1)*	☐ YES ☐ NO ☐ N/A	☒ YES ☐ NO ☐ N/A
Are field drainage systems (ditches, oil traps, sumps, or skimmers) inspected for accumulation of oil? *112.9(b)(2)* If Yes,	☐ YES ☒ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
- Is accumulated oil promptly removed?	☐ YES ☒ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Comment:		

OIL PRODUCTION FACILITY BULK STORAGE CONTAINERS 112.9 (c)	Adequately Addressed in Plan	Adequately Addressed in Field
Are the materials and construction of the containers compatible with the oil stored and the conditions of storage? *112.9(c)(1)*	☐ YES ☒ NO ☐ N/A	☒ YES ☐ NO ☐ N/A
Do all tank battery, separation, and treating facility installations have adequate secondary means of containment for the capacity of the largest single container plus sufficient freeboard for precipitation? *112.9(c)(2)*	☐ YES ☒ NO ☐ N/A	☐ YES ☐ NO ☐ N/A
Is drainage from undiked areas confined in a catchment basin or holding pond? *112.9(c)(2)*	☐ Adeq ☒ Inad ☐ N/A	☐ YES ☐ NO ☐ N/A

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

Comment: house oil at base as oil tanks

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

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

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

Container Inspection Form

Container ID: Stock Tank

Maximum capacity (gal): 210,000 Container height (ft): 12'

Nominal capacity (gal): 210,000 Container diameter (ft): 16' Year Built: 1958

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

Material(s) Stored in Container:

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

Other: _____

Container Type:

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

Container Material:

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

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

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

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

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

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

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

Comment on container inspection: Loose oil on bed of ST

Container Foundation Material:

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

☐ Steel ☐ Unknown Other: _____

Inspect container foundation, specifically looking for:

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

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

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

Container Inspection Form

Comment on foundation inspection: _____

_____

_____

Container Piping Construction:

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

☐ Double walled ☐ Copper ☐ Fiberglass reinforced plastic ☐ Unknown

Other: _____

Inspect pipes/valves, specifically looking for:

Leaks at joints, seams, valves:

☒ Check if present and if:

Acceptable ☐

Or, if Unacceptable ☒,

☐ Adequate

Discoloration:

☒ Check if present and if:

Acceptable ☐

Or, if Unacceptable ☒,

☐ Adequate

Corrosion:

☒ Check if present and if:

Acceptable ☐

Or, if Unacceptable ☐,

☒ Adequate

Bowing of pipe:

☐ Check if present and if:

Acceptable ☐

Or, if Unacceptable ☐,

☒ Adequate

Pooling of stored material:

☐ Check if present and if:

Acceptable ☐

Or, if Unacceptable ☐,

☐ Adequate

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

Secondary Containment Types:

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

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

Other – Loc.: _____

Secondary Containment Checklist:

☐ Capacity does not appear to be adequate?

☐ Not sufficiently impervious to stored material?

☐ Standing water within dike or berm?

☐ Erosion or corrosion of dike or berm?

Location: _____

☐ Drainage mechanism manually operated?

☒ Presence of stored material within dike or berm?

☐ Debris/vegetation within or on the dike or berm area?

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

EXHIBIT 2

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

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

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

Company Name: Wooten Tank Battery

Docket Number: CWA6-[ ][ ]-[ ][ ][ ][ ]

Facility Name: Bertschinger Oil Company

Date: 2/6/2008

Address: 6417 Grandmark Drive

Inspection Number: FY-INSP-08008S

City: Oklahoma city

Inspectors Name: Tom mckay

State: OK **Zip Code:** 73116

EPA Approving Official:

Contact: Richard Bertschinger

Enforcement Contacts:

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

Summary of Findings

(Onshore Oil Production Facilities)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

☐ No contingency plan- *112.7(d)(1)*

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

WRITTEN PROCEDURES AND INSPECTION RECORDS 112.7(e)

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

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

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

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

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

PERSONNEL TRAINING AND DISCHARGE PREVENTION PROCEDURES 112.7(f)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OIL PRODUCTION FACILITY DRAINAGE 112.9(b)

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

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

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

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

OIL PRODUCTION FACILITY BULK STORAGE CONTAINERS 112.9(c)

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

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

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

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

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

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

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

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

FACILITY TRANSFER OPERATIONS, OIL PRODUCTION FACILITY 112.9(D)

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

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

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

☐ Plan has inadequate or no discussion of oil production facilities

EXHIBIT 3

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

Office of Enforcement and Compliance Assurance
August 1998

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND

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

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

A. Purpose and Scope

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

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

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

B. Statutory Authorities

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Choice of Forum

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

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

II. ADMINISTRATIVE PENALTY PLEADING GUIDANCE

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

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

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

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

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

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

III. MINIMUM SETTLEMENT PENALTY CALCULATION

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

[7] *See* 13 C.F.R. §121.

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