IN RE INDUSTRIAL CHEMICALS CORP.

CWA Appeal No. 00-7

FINAL DECISION

Decided January 15, 2002

Syllabus

This proceeding arises from inspections by U.S. EPA Region II (the "Region") of a chemical manufacturing facility near Penuelas, Puerto Rico ("the Facility") owned by Industrial Chemicals Corporation ("ICC") to determine the Facility's compliance with regulations at 40 C.F.R. part 112, which require facilities meeting certain jurisdictional requirements to prepare, implement, and amend Spill Prevention Control and Countermeasures Plans ("SPCC Plans"). In its inspections, the Region reported that the Facility had failed to prepare and implement its SPCC Plan in accordance with the regulatory guidelines at 40 C.F.R. § 112.7 ("SPCC guidelines" or "guidelines") that address, in the context of oil spill prevention, such operational details as diversion and containment of oil; handling of bulk storage tanks; cleanup of oil spills; the provision of backup or secondary oil containment; handling of pipelines and other transfer facilities; loading and unloading operations; recordkeeping and inspections; and facility security.

Among the reported deficiencies, the Region noted that ICC had failed to provide a sufficient volume of secondary containment around its individual above-ground oil storage tanks. At the time of the proceeding, the Facility had a facility-wide containment system of sumps and ponds designed to contain drainage of stormwater, oil spills, and chemicals, and to prevent the release of these into the Caribbean Sea, but had not provided individual containment structures around its oil tanks.

Based on its inspections, the Region filed an administrative complaint against ICC pursuant to Clean Water Act ("CWA") section 311 (b)(6)(B)(ii), alleging that the company had failed to prepare, implement, and amend its SPCC Plan as required by 40 C.F.R part 112. The Region's complaint included ten separate claims against ICC for failing to address SPCC guidelines in its SPCC Plan and fourteen claims against the company for failing to implement these guidelines. In proposing a penalty of $15,500 for the company's violations, the Region employed the Agency's Civil Penalty Policy for oil spill prevention, which derives from the applicable statutory penalty factors at CWA section 311(b)(8), 33 U.S.C. § 1321(b)(8).

Following an evidentiary hearing, the Presiding Officer issued his Initial Decision, in which he found ICC liable as alleged by the Region. In agreeing with the Region that the company had not sufficiently provided for secondary containment around its individual oil tanks, the Presiding Officer asserted that individualized, tank-by-tank secondary containment was required by the SPCC guidelines. In assessing a penalty, the Presiding Officer adopted the Region's penalty calculation, except for the Region's enhancement of the penalty based on the company's alleged "major culpability" in failing to expeditiously

come into compliance with the SPCC regulations. The Presiding Officer's penalty calculation resulted in a reduced penalty of $11,475.

In its appeal brief, in which it does not contest that it is subject to 40 C.F.R. part 112, ICC disputes only a limited number of the Presiding Officer's legal conclusions and factual findings. With respect to liability, the company argues that the Presiding Officer erred in finding that the Facility lacked secondary containment for its oil tanks in violation of the guidelines and asserts that the concentration of oil and grease in a chemical sample from the Facility's outfall was indicative of ICC's good environmental performance. Moreover, challenging the Presiding Officer's penalty assessment, the company states that its deficiencies in preparing an SPCC Plan were "inconsequential" given its superior record of environmental performance and competent staff, and that ICC was "a small minority-operated business with limited capabilities."

Held: (1) The Presiding Officer erred in determining that the SPCC guidelines require secondary containment on a tank-by-tank basis, and that ICC's system was inadequate by virtue of the fact that it did not provide sufficient secondary containment around individual oil tanks. Rather, the guidelines prescribe secondary containment for *tank installations*, which presumably can include several tanks. However, the Board determines that ICC failed to install engineered structures to confine spills, as contemplated by the guidelines. Further, in preparing its SPCC Plan, ICC failed to describe how its facility-wide oil containment system would assure secondary containment in accordance with the guidelines, thus failing to meet regulatory requirements to produce a "carefully thought-out" SPCC Plan.

(2) The fact that ICC may not have experienced an oil spill into a navigable water provides no grounds for reversal of any of the Presiding Officer's liability findings. The SPCC regulations are by definition preventive in nature. Thus, the company's supposedly good environmental performance has no bearing on whether it complied with SPCC guidelines designed to ensure that appropriate spill prevention and containment measures are in place.

(3) The supposed inconsequentiality of deficiencies in ICC's SPCC Plan, because of the company's allegedly superior environmental record and staff, provides no basis for reducing the gravity component of the assessed penalty. The SPCC guidelines' emphasis on thorough and detailed SPCC Plans suggests that the Plans themselves play a key role in ensuring a disciplined and well-considered approach to spill prevention, containment, and preparedness. Accordingly, it would be inappropriate to reduce the gravity-based penalty on the basis that judgment or skill of staff provide a suitable alternative to a properly prepared SPCC Plan. Moreover, in assessing penalties for SPCC violations, previous Agency decisions underscore the importance of preparing thorough and detailed SPCC Plans wholly apart from an oil facility's historical record of avoiding environmental calamities.

(4) The Presiding Officer erred when he approved the Region's enhancement of the gravity component of the penalty based solely on the Facility's proximity to the Caribbean Sea. The Presiding Officer's view of the environmental threat posed was not informed by the full range of considerations that properly bear on the assessment of the seriousness of the violation. In particular, given the evidence before him, the Presiding Officer should have considered the protectiveness of ICC's containment system in assessing the environmental threat posed by the Facility. Because this penalty enhancement was not based on all relevant considerations and, given the Presiding Officer's recognition based on evidence in the case that ICC's containment system was somewhat effective in reducing the risk of an oil spill's reaching the Caribbean Sea, we reverse this portion of the Presiding Officer's

penalty calculation, and remove the $1,500 enhancement associated with the seriousness of ICC's violation.

(5) The company provides no basis in law or fact for its assertion that its "status as a small minority-operated business with limited capabilities" supports a reduction in the assessed penalty. Accordingly, we decline to reduce the penalty on this basis.

(6) The Board's conclusion that the Presiding Officer erred in finding that SPCC guidelines call for tank-by-tank secondary containment does not justify a further reduction in the assessed penalty. The Presiding Officer's error is counterbalanced by the Board's additional conclusion that the company failed to meet the requirements for engineered confinement structures and for producing a "carefully thought-out" SPCC Plan and is not of sufficient weight, given the number of established SPCC deficiencies, to justify a reduction in the penalty on this basis.

(7) In accordance with the above, the assessed penalty is recomputed, yielding a total final civil penalty of $9,855 for ICC's SPCC violations.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich and Kathie A Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

Respondent Industrial Chemicals Corporation ("ICC") appeals an Initial Decision by Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") arising from an administrative action filed by U.S. EPA Region II ("Region") against ICC seeking a $15,500 penalty against the company for allegedly failing to properly prepare, amend, and implement a Spill Prevention Control and Countermeasures ("SPCC") Plan in violation of Clean Water Act ("CWA") implementing regulations found at 40 C.F.R. §§ 112.7, 112.3(b), and 112.5(a). In his Initial Decision, the Presiding Officer found ICC liable as alleged by the Region, but reduced the Region's proposed penalty to $11,475. The Region did not appeal the Initial Decision.

II. *BACKGROUND*

A. *Regulatory Background*

In its complaint, the Region alleges that ICC violated requirements to properly prepare, implement, and amend an SPCC Plan to prevent oil spills, as specified in part 112 of Title 40 of the Code of Federal Regulations. These regulations are part of a comprehensive scheme created by section 311 of the CWA, 33 U.S.C. § 1321, to establish requirements for preventing and remedying dis-

charges of oil and hazardous substances into navigable waterways and to create a liability regime for violations of these requirements.

The CWA section 311 provision relevant to the instant proceeding directs the President, *inter alia*, to "establish procedures, methods, and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities." *See* CWA § 311(j)(1), 33 U.S.C. § 1321(j)(1). In pursuit of this statutory objective, 40 C.F.R. part 112 requires facilities meeting certain jurisdictional criteria to prepare written SPCC plans describing procedures, methods, and equipment to prevent oil spills into navigable waters. *See* 40 C.F.R. § 112.7.

The requirement to prepare and implement SPCC Plans applies only to non-transportation related onshore facilities[1] which, due to their location, could reasonably be expected to discharge oil to a navigable water in harmful quantities. *See* 40 C.F.R. § 112.1. In addition, such facilities are only subject to this SPCC requirement if they exceed oil storage capacity thresholds. Specifically, this SPCC requirement applies only to such facilities whose *buried storage* (i.e., below-ground) capacity exceeds 42,000 gallons in total and those whose *non-buried* (i.e., above-ground) oil storage capacity exceeds 1,320 gallons in total or 666 gallons for a single containment. *See* 40 C.F.R. § 112.1.(d)(2)(i)-(ii).

The SPCC regulations require that facilities meeting the above jurisdictional requirements prepare written SPCC plans in accordance with a set of guidelines listed at 40 C.F.R. § 112.7 ("SPCC guidelines" or "guidelines"). *See* 40 C.F.R. § 112.3. The SPCC guidelines address, in the context of oil spill prevention, such operational details as: diversion and containment of spilled oil; handling of bulk storage tanks; cleanup of oil spills; the provision of backup or secondary oil containment; handling of pipelines and other transfer facilities; loading and unloading operations; recordkeeping and inspections; and facility security. *See* 40 C.F.R. § 112.7(e)(2). The guidelines state that SPCC Plans "shall be carefully thought-out" and "provide a discussion" of how a facility conforms with the above guidelines. 40 C.F.R. § 112.7.

One of the key elements of the SPCC guidelines is that the Plan demonstrate that the facility has adequate containment structures and equipment to retain any oil spilled at the facility and thus prevent its release to navigable waters. With regard to oil storage containers such as tanks and drums, the SPCC guide-

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[1] Agency jurisdiction under part 112 does not apply to the "[e]quipment or operations of vessels or transportation-related onshore and offshore facilities which are subject to authority and control of the Department of Transportation, as defined in the Memorandum of Understanding between the Secretary of Transportation and the Administrator of the Environmental Protection Agency, dated November 24, 1971, 36 FR 24000." 40 C.F.R. § 112.1(d)(1)(ii). ICC's onshore facility is not vessel or transportation-related and is hence not covered by this exception to the Agency's jurisdiction.

lines require that facilities provide backup or "secondary containment" in addition to the primary containment provided by the tanks or drums. 40 C.F.R. § 112.7(e)(2)(ii),(xi). These guidelines prescribe minimum volumes of secondary containment as well as recommend the use of structures and equipment, such as dikes, pits, and berms, for providing secondary containment. *Id.*

Facilities subject to 40 C.F.R. part 112 that began operations following the effective date of the SPCC regulations must prepare an SPCC plan six months after the date the facility begins operations, and must implement the SPCC plan "as soon as possible but not later than one year after such facility begins operations." 40 C.F.R § 112.3(b). Moreover, a facility required to prepare and implement an SPCC Plan must *amend* its Plan "whenever there is a change in facility design, construction, operations or maintenance which materially affects the facility's potential for the discharge of oil into or upon the navigable waters of the United States or adjoining shorelines." 40 C.F.R. § 112.5(a).

B. *Factual and Procedural Background*

ICC operates a chemical manufacturing facility (the "Facility") located on the south coast of the island of Puerto Rico, near the town of Penuelas. The Facility is located immediately adjacent to the Caribbean Sea shoreline and the Tallaboa River. Hearing Transcript ("Tr.") at 43-46. Commencing operations in 1977, the Facility produces for commercial sale and use sulfuric acid, as well as other inorganic chemicals, including aluminum sulfate and ammonia. Hearing Transcript Exhibit ("Ex.") 15.

The Facility uses a variety of chemicals in its manufacturing process, including ammonium bisulfite solution, ammonia, water, and caustic solution. Chemicals are stored in above-ground tanks on the Facility property. Ex. 2 (ICC, Spill Prevention Control and Countermeasure Plan for Industrial Chemicals Corporation and Puerto Rico Aluminum Corporation, Bo. Tallaboa, Penuelas, Puerto Rico (1994)).

The Facility also stores oil in above-ground tanks for use in various operations. This includes diesel fuel for operating a boiler, a sulfur burner, and five maintenance vehicles, as well as lubricating and hydraulic oils for equipment and vehicle maintenance. The oil storage tanks of relevance to this proceeding include a 2,500 gallon diesel tank, a 16,900 gallon fuel oil tank and a 5,000 gallon used oil tank. Exs. 3, 17. The Facility also stores additional amounts of oil in drums. The Facility's above-ground oil storage capacity totals 24,620 gallons, thus exceeding the storage capacity threshold for application of the SPCC regulations. *Id.*

During the time period relevant to this proceeding, the Facility had a plant-wide diversion and containment system designed to contain drainage from

stormwater, oil spills, and chemicals, and to prevent their release into the Caribbean Sea. This system consisted of three process sumps located down-gradient from the oil tanks, as well as containment ponds. The system was designed to ensure that any spills from the tanks flow by gravity first into one of three process sumps located in different areas of the Facility. If the capacity of these sumps proved insufficient to contain spilled oil, the oil would further flow by gravity into an "East Lake" containment pond. Drainage that collected here would be pumped into a stormwater pond, where the drainage would be examined for water quality parameters. If the drainage in the stormwater pond met acceptable standards, it was then released via an outfall into the Caribbean Sea. Tr. at 122-25; Ex. 2 (attached Facility map); Ex. 8. In addition, the Facility contained a catchment area, located down-gradient of the fuel oil tank, that was designed to provide a collection basin for oil that spilled from the fuel oil tank. Tr. at 125.

In late 1997, the Region received reports from the U.S. Fish and Wildlife Service describing a "sticky and discolored substance along the shoreline adjacent to the ICC facility." Init. Dec. at 3. Prompted by these concerns, the Region dispatched an employee, Angel Rodríguez, to inspect the Facility to assess its compliance with the SPCC regulations at 40 C.F.R. part 112. Tr. at 43-46. On December 20, 1997, Mr. Rodríguez, accompanied by Dr. Bernard V. Baus, Ph.D., President of ICC, and his son James R. Baus, Vice-President of ICC, conducted a walk-through of the Facility, during the course of which Mr. Rodríguez observed areas of oil stains surrounding the oil tanks and drums. Tr. at 17-19. Mr. Rodríguez also examined the Facility's then-current SPCC Plan, which was dated December 1994.

Mr. Rodríguez determined that the Facility had violated a multitude of SPCC requirements by failing to adequately address, in the SPCC Plan, the Facility's provisions for drainage and containment of oil, handling of bulk storage tanks, loading/unloading operations, and plant security, and by correspondingly failing to implement these provisions at the Facility. With regard to secondary containment for oil storage, Mr. Rodríguez noted that ICC had failed to provide sufficient secondary containment volume surrounding the above-ground diesel and used oil tanks. *See* Ex. 2 (SPCC Field Inspection Form). Moreover, Mr. Rodríguez noted that ICC had not amended its SPCC Plan to reflect changes at the Facility, in accordance with 40 C.F.R. § 112.5. *Id.* Mr. Rodríguez recorded these deficiencies in an inspection report, which he faxed to Dr. Baus soon after his inspection. Ex. 6. The Region subsequently sent ICC a notice of noncompliance, dated February 13, 1998, which closely tracked the violations that Mr. Rodríguez had noted in his inspection report. Ex. 5.

Upon receiving the Region's communications of alleged SPCC violations, ICC provided several written responses to the Region. Dr. Baus acknowledged that the Facility's SPCC Plan was not the kind of "extensive document envisioned by the CFR" that might apply to larger facilities, and pledged to rewrite the SPCC

Plan to "conform[] fully to EPA's requirements * * *." Ex. 9 (Letter from B.V. Baus, ICC, to Arlene Anderson, Region II (Mar. 5, 1998)). He also acknowledged that ICC had failed to promptly clean up on-site oil leaks, to record inspections of tanks and pipelines, and to provide adequate oil containment during loading and unloading operations as directed by the SPCC regulations. *Id.*

In addition, in a note sent to the Region shortly after the inspection, Dr. Baus outlined a number of specific steps the company would undertake to address several of the deficiencies Mr. Rodríguez had identified during his inspections. *See* Ex. 3 (Letter from B.V. Baus, President, ICC to Angel Rodríguez, ICC (Jan. 7, 1998)). Dr. Baus's letter indicated that work on these steps had already begun, and provided approximate dates for their completion. In subsequent letters to the Region sent in March and April of 1998, Dr. Baus updated the company's progress, noting that the company had completed most of the steps in its workplan, including the construction of a 3,000-gallon above-ground diesel fuel tank with steel secondary containment. *Id.*; Ex.9 (Letter from B.V. Baus, ICC, to Angel Rodríguez, Region II (Mar. 5, 1998)); Ex. 10 (Letter from B.V. Baus, ICC, to Arlene Anderson, Region II (Apr. 20, 1998)).

In his correspondence with the Region, Dr. Baus did, however, take issue with some of the SPCC violations alleged by the Region. For example, Dr. Baus disputed the Region's allegation that the Facility lacked sufficient secondary containment for oil spills. *See* Ex. 9 (Letter from B.V. Baus, ICC, to Angel Rodríguez, Region II (Jan. 7, 1998)). Baus explained that the Facility's system of process sumps and ponds provided, respectively, "secondary" and "tertiary" containment for any oils spills that occurred on the Facility property, and would consequently render "remote" the possibility of any oil discharge to the Caribbean. Baus also questioned the necessity of some of the SPCC safety requirements that Region alleged the Facility had violated. Ex. 10.

Shortly after the Region's SPCC inspection, Mr. Rodríguez arranged for an additional inspection of the Facility to determine the need for response action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[2] An extensive chemical sampling and analysis program conducted by an Agency contractor determined that no response action under CERCLA was necessary. Ex. 4; Tr. at 34-39, 47-50, 56.

On September 17, 1998, the Region re-inspected the Facility to determine if ICC had achieved compliance with SPCC requirements. Mr. Christopher Jiménez, the Region's inspector, noted that ICC had installed a new diesel tank

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[2] The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, commonly known as "Superfund," provides authority for federal cleanup of uncontrolled hazardous waste sites and response to releases of hazardous substances.

with a steel secondary containment, as promised, but nevertheless reported several of the same deficiencies that Mr. Rodríguez had noted in his initial inspection of the Facility, *see* Ex. 6 (SPCC Field Inspection Report), including the lack of sufficient secondary containment around both the fuel oil and used oil tanks. Ex. 7; Tr. at 75. Mr. Jiménez found additional SPCC deficiencies, such as oil-filled drums that lacked secondary containment, and the absence of a protection system for the oil tanks that would guard against the risk of overfilling. *Id.* at 70-71. Mr. Jiménez also noted that ICC had not amended its SPCC Plan since the previous inspection. Exs. 6, 7. The Region memorialized Mr. Jiménez's findings in a noncompliance letter, which it sent to Dr. Baus on December 13, 1998. Ex. 7.

As requested by Mr. Jiménez at his inspection, Dr. Baus timely provided the Region with a schedule of steps addressing the deficiencies that Mr. Jiménez had identified. *See* Ex. 18 (Letter from B.V. Baus, ICC, to Christopher Jiménez, Region II (Sept. 30, 1998)). The schedule indicated that ICC had begun correcting these deficiencies, but that progress had been impeded by Hurricane Georges, which struck Puerto Rico on September 21, 1998. *Id*; Init. Dec. at 6.

By February and March of 1999, in accordance with its schedules to correct SPCC deficiencies, ICC had constructed clay-lined earthen secondary containment berms around its used oil and #6 fuel oil tanks. ICC also improved the catchment basin in the diesel truck loading area, cleaned up oil-stained soils on the site, and instituted inspection and record-keeping procedures. Ex. 18 (Letter from B.V. Baus, ICC, to Christopher Jiménez, Region II (Sept. 30, 1998)); Tr. at 133-34. On July 27, 1999, ICC produced a revised SPCC Plan, which incorporated the modifications ICC had made at the Facility. *See* Ex. 17; Tr. at 136-37, 143-45.

On June 22, 1999, Region II filed an administrative complaint against ICC pursuant to CWA section 311(b)(6)(B)(ii), 33 U.S.C. § 1321(b)(6)(B)(ii),[3] charging ICC with violating the SPCC regulations issued under the authority of CWA section 311(j)(1). In its Complaint, the Region identified ten separate claims against ICC for failing in its SPCC Plan to address the regulatory guidelines at 40 C.F.R. § 112.7, in violation of § 112.3. Complaint Attach. A. The Complaint also identified fourteen separate claims against ICC for failing to implement these types of requirements. Complaint Attach. B. In addition, the Region alleged that ICC failed to comply with 40 C.F.R. § 112.5 by not amending its SPCC Plan to reflect changes at the Facility bearing on the Facility's potential to discharge oil

[3] CWA section 311(b)(6), 33 U.S.C. § 1321(b)(6), authorizes the Agency to assess administrative penalties for violations of SPCC regulations. Pursuant to CWA section 311(b)(6)(B)(ii), the Agency may assess "Class II" penalties of up to $10,000 per day for each day during which a violation continues, up to a maximum amount of $125,000. These penalty amounts have been increased by 10% by the Civil Monetary Penalty Inflation Rule at 40 C.F.R. part 19.

into a navigable water. In its Complaint, the Region proposed a penalty of $15,500 for these alleged multiple deficiencies.

In proposing a penalty, the Region employed the civil penalty policy the Agency commonly uses to establish settlement and pleading amounts in cases concerning oil spill and prevention violations under the CWA. *See* Ex. 14 (Office of Enforcement and Compliance Assurance, U.S. EPA, *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act* (Aug. 1998) ("Civil Penalty Policy")). The Civil Penalty Policy tracks the statutory penalty factors at CWA Section 311(b)(8), 33 U.S.C. § 1321(b)(8).[4] The Region's proposed penalty, in accordance with the Civil Penalty Policy, was based on a 16-month period of violation lasting from December 1997 (the time of the Region's first inspection) to April 14, 1999.[5] Ex. 13.

A hearing in this proceeding was held on April 11, 2000, at which ICC was represented by its President, Dr. B.V. Baus, appearing without outside counsel. During the hearing, Dr. Baus did not deny that the Facility was subject to the SPCC regulations and did not dispute most of the specific SPCC deficiencies that the Region had identified in its Complaint. However, Dr. Baus asserted that the Facility oil containment system, which he described in considerable detail, was "a better system of handling waste and spills than anything else available." Tr. at 125. Moreover, Dr. Baus stated that by February or March 1999, the Facility had addressed all the operational deficiencies that the Region had identified in its inspections.

After the submission of post-hearing briefs by both parties, the Presiding Officer issued an Initial Decision on September 28, 2000. In his Initial Decision, the Presiding Officer found ICC liable for failure to prepare, implement, and amend the SPCC Plan as alleged by the Region. In doing so, the Presiding Officer endorsed the specific allegations of SPCC deficiencies stated in the Region's complaint. *See* Init. Dec. at 11. In assessing a penalty, the Presiding Officer ratified the Region's application of the Civil Penalty Policy, except for the Region's enhancement of the penalty to reflect the company's "culpability" in failing to comply more expeditiously with the SPCC regulations. *Id.* In rejecting this portion of the proposed penalty, the Presiding Officer stressed that the company had exhibited "good faith" in reacting "immediately" to the Region's inspection reports and compliance letters, in making corrections to the plant design, by attempting to

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[4] The penalty factors under the statute and EPA's penalty policy are discussed in Part III.B., below.

[5] April 14, 1999, is the date on which the Region calculated the proposed penalty for this proceeding. S*ee* Ex. 13 (Proposed [CWA] § 311(j) Penalty Worksheet). Although it is not clear from the record whether ICC was in full compliance by this time, the Region did not factor any violations after this date into its penalty calculation.

persuade the Region that ICC's diversion system was at "at least as protective as the additional secondary containment structures desired by the Region," and by installing the required containment measures as soon as possible after delays caused by Hurricane Georges. *Id.* The Presiding Officer's penalty decision had the effect of reducing the assessed penalty to $11,475. *Id.*

On October 24, 2000, ICC filed a terse appeal brief challenging the Initial Decision. In its appeal brief, the company asserts that: (1) the Presiding Officer erred by concluding that the Facility lacked full secondary containment for its oil storage tanks in violation of the oil pollution regulations; (2) the concentration of oil and grease in a chemical sample at the Facility outfall was indicative of ICC's good environmental performance; (3) any faults cited in the Facility's original SPCC Plan were "inconsequential" given the Facility's superior record of environmental performance and knowledgeable staff; and (4) ICC was a "small minority-operated business with limited capabilities." Appeal Brief at 1-2.

The Region did not appeal the Initial Decision.[6]

III. *DISCUSSION*

Before we analyze the above issues, it is important to highlight the limited scope of this appeal. At the outset, as the Presiding Officer noted in his Initial Decision, ICC does not dispute that the Facility is subject to the SPCC regulations by virtue of its potential to pollute navigable water and its oil storage capacity. Similarly, in its appeal brief, ICC challenges only a very limited number of the Presiding Officer's factual findings and legal conclusions. Accordingly, we leave undisturbed the bulk of the Presiding Officer's findings concerning the company's failure to prepare, implement, and amend its SPCC Plan with respect to such matters as oil diversion and drainage, oil loading and unloading, inspections, and Facility security.

Of the four issues that ICC raises in its appeal brief, the first two — the alleged lack of secondary containment and a concentration of oil and grease in a chemical sample supposedly indicative of good environmental performance — address factual findings by the Presiding Officer and appear to be raised for the

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[6] On October 15, 2001, the Board issued its decision in this matter. On October 26, 2001 the Region filed a timely motion requesting the Board either to vacate its decision, or in the alternative, to reconsider various portions of the decision. By separate order dated January 15, 2002, the Board denied the Region's motion to vacate, but granted its motion to reconsider. *See In re Indus. Chem. Corp.,* CWA Appeal No. 00-7 (EAB, Jan. 15, 2002) (Order on Reconsideration). In keeping with its reconsideration order, the Board is hereby reissuing its October 15, 2001 decision. This decision supersedes in all respects the October 15, 2001 decision, that decision henceforth having no precedential value in this or any other proceeding.

purpose of challenging the Presiding Officer's liability determination. These issues will be discussed in the liability section below. The remaining two issues — the supposed "inconsequential nature" of the company's SPCC Plan deficiencies and the company's alleged minority status and "limited capabilities" — do not challenge any of the Presiding Officer's liability-related findings, but rather appear aimed solely at mitigating the assessed penalty. These two issues will be addressed in final section of this analysis in which we consider the Presiding Officer's penalty assessment.

A. *Liability Issues*

1. *Secondary Containment for Oil Tanks*

ICC challenges as erroneous the Presiding Officer's conclusion that the company lacked an adequate volume of secondary containment around its above-ground oil storage tanks and thus failed to meet SPCC requirements. Appeal Brief at 1; Init. Dec. at 5, 8-9. The company avers that its system of drainage and containment, *see supra* Part II.B, provided "full secondary containment for all oil storage tanks, as well as tertiary containment for all storage tanks both oil and chemical." Appeal Brief at 1. The company further states that "EPA did not like Respondent's system of sumps, catchment basins, and holding ponds, but * * * Respondent believes that Oil Pollution Prevention Regulations provide alternative secondary containment measures to the usual earthen dike around each tank." *Id.* at 2.

In sustaining the Region's liability allegation in his Initial Decision, the Presiding Officer agreed with the Region that ICC had violated the SPCC regulations by not providing a sufficient volume of secondary containment around two of its individual oil tanks. Complaint, Attach. B n.4; Init. Dec. at 8.[7] Specifically, the Presiding Officer found that while the Facility had a "site-wide drainage system of sumps, catchment basins, and ponds," that was "useful and effective in generally preventing pollutants from leaving the site," ICC had nonetheless failed to provide sufficient secondary containment capacity around the individual storage tanks. Init. Dec. at 5-6 (Findings of Fact # 11 & 14); Init. Dec. at 8. The Presiding Officer asserted that such individualized, tank-by tank secondary containment was required by the SPCC regulations. Init. Dec. at 8.

The SPCC guidelines address the subject of providing secondary containment for oil tanks in the following manner:

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[7] In its Complaint, the Region alleges that "secondary containment capacity for the used oil tank does not appear capable of containing the volume of the tank plus sufficient freeboard to allow for precipitation," in violation of 40 C.F.R. § 112.7(e)(2). The Region makes the identical charge with respect to the fuel oil tank. *See* Complaint Attach. B n.4.

> All bulk storage tank installations should be constructed so that a secondary means of containment is provided for the entire content of the largest single tank plus sufficient freeboard to allow for precipitation. Diked areas should be sufficiently impervious to contain spilled oil. Dikes, containment curbs, and pits are commonly employed for this purpose, but they may not always be appropriate. An alternative system could consist of a complete drainage trench enclosure arranged so that a spill could terminate and be safely confined in an in-plant catchment basin or holding pond.

40 C.F.R. § 112.7(e)(2)(ii).

In our view, contrary to the Presiding Officer's finding, and consistent with ICC's argument on appeal, the above language does not clearly prescribe containment structures, with sufficient secondary containment volume, on a tank-by-tank basis. The above language does contemplate the building of such structures as dikes, pits, and containment curbs but, significantly, only with respect to *tank installations* (which presumably can include several tanks), not individual tanks. The only reference to single tanks in this passage ("*largest single tank*") occurs not in the context of methods or forms of containment but rather as a benchmark for establishing the recommended volume of secondary containment for an entire tank installation. Accordingly, we find that the Presiding Officer erred in determining that the ICC had failed to meet SPCC guidelines by not building containment structures with sufficient volume of containment around each of these two oil storage tanks.[8]

However, although the regulations permit the Facility's implementation of some kind of facility-wide (rather than tank-by-tank) form of secondary containment for storage tanks, we nevertheless find that ICC's system of sumps and ponds, while providing a measure of oil containment, did not provide secondary containment for its oil tanks in a manner fully consistent with the guidelines. As explained by Dr. Baus and observed by the two Regional inspectors during the evidentiary hearing, the Facility did not employ dikes, pits or other engineered structures to contain oil that could spill or leak from its oil tanks, as contemplated by the regulations. Tr. at 58-59; 122. Instead, ICC designed its Facility such that any spilled oil from the tanks would be contained by a system of sumps and ponds

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[8] Our finding that the SPCC guidelines do not require secondary containment structures on a tank-by-tank basis is reinforced by the reference in the regulation to a *complete drainage trench enclosure* as an alternative means of secondary containment. This term again appears to contemplate a structure surrounding one or more tanks within a tank installation, rather than a tank-by-tank orientation.

downhill from the tanks. In the event of a spill, oil would then migrate to these containment areas by force of gravity, but would not be conveyed to these containment areas through a channel or conduit. *Id;* Tr. at 58 (testimony of Mr. Rodríguez); Ex. 2 (attached Facility map); Ex.8.

As noted, the regulatory guidelines indicate that "*dikes, containment curbs, and pits*" are commonly used to provide secondary containment for tank installations, but also state that "an alternative system of [secondary containment for the oil tank installation] could consist of a *complete drainage trench enclosure* arranged so that a spill could be safely confined in an in-plant catchment basin or holding pond." While this language makes clear that appropriate forms of secondary containment are not restricted to dikes, containment curbs and pits, the mention of a "trench enclosure" as an alternative form of containment strongly implies that, whatever the methods of containment for oil tanks, spilled oil must be confined within engineered structures.

This implication is reinforced elsewhere in the guidelines. For example, 40 C.F.R. § 112.7(c), which provides general instructions on the provision of oil containment and diversion, states that oil handling facilities should contain "*appropriate containment and/or diversionary structures and equipment*" to prevent oil spills from reaching navigable waters and references among the list of such preventive structures and equipment, "*culverting, gutters, or other drainage systems.*" Further, the guidelines direct an owner or operator electing not to deploy such structures or equipment to demonstrate clearly in the SPCC Plan why such structures and equipment are not practicable. *See* 40 C.F.R. § 112.7. ICC's skeletal SPCC Plan, *see infra,* provides no such demonstration.

Consistent with the foregoing, Mr. Rodríguez characterized the Facility's sole reliance on gravity to direct oil drainage to containment areas as "a violation, because [ICC] didn't have any curving bank or anything like that would specifically directed [sic] the flow on toward the diversionary ponds." Tr. at 58. Mr. Rodríguez's observation appears to be the basis of the Region's claim in its Complaint that ICC had violated guidelines at 40 C.F.R. § 112.7(e)(1)(iii),(iv) specifying general drainage measures for facilities because "[p]lant drainage from undiked areas does not either flow into a pond, lagoon or catchment basin designed to retain oil, or have a diversion system that could return spilled oil to the plant." Complaint Attach. B.

In sum, the guidelines contemplate that, in the ordinary course, a properly constructed secondary containment system would contain facility drainage by way of engineered structures. Because ICC's secondary containment system lacked these features, and ICC has provided no justification for their omission, the system fails to comport fully with the guidelines.

We further conclude that the company, in preparing its SPCC Plan, failed to adequately describe how its system of sumps and ponds would, in fact, assure secondary containment in accordance with the guidelines, and thus failed to meet the regulatory requirement to produce a "carefully thought-out" SPCC Plan. *See supra* Part II.A.

The Agency has had previous occasions to examine what constitutes a "carefully thought-out" SPCC Plan. In *In re Mobil Oil Corp.*, 1 E.A.D. 231, 235-37 (Adm'r 1976), the Administrator determined that an oil storage facility, by preparing an SPCC Plan that contained only a "terse and conclusory" discussion on assuring an adequate volume of secondary containment, had not satisfied the regulatory mandate of producing a "carefully thought-out" SPCC Plan. In reaching this conclusion, the Administrator stressed that the facility owner had omitted a discussion of how its facility would conform with the guidelines regarding the need to provide a sufficient volume of secondary containment and to assure the imperviousness of containment structures. *Mobil*, 1 E.A.D. at 236.

In *Mobil*, the Administrator emphasized that the regulatory guidelines should not be treated as "mere advice" that could be ignored in SPCC Plans given the fact that the "guidelines were promulgated pursuant to congressional direction to issue regulations 'establishing procedures, methods, and equipment and other requirements for equipment to prevent discharge of oil from vessels and from onshore facilities and offshore facilities, and to contain such discharges * * *.'" *Mobil*, 1 E.A.D. at 237 (*citing* CWA § 311(j)(1)(c)). *See also in re Ashland Oil, Inc., Floreffe, PA*, 4 E.A.D. 235, 242 (EAB 1992) (holding that for oil handling facilities subject to the SPCC regulation, preparing a "carefully thought-out" plan is mandatory, and that the facility in question had failed to meet this requirement by not disclosing the location of underground storage tanks in its SPCC Plan).

The description of secondary containment in ICC's Plan thus falls short of the detail and description that the Agency has found necessary to satisfy the regulatory requirement of a "carefully thought-out" SPCC Plan. As in *Mobil*, ICC's SPCC Plan does not adequately describe and address the Facility's provision for secondary containment of oil tanks. Although ICC's plan does provide some description of drainage and containment measures, *see* Ex. 8 at 10-12, these are sparse and conclusory.[9] In particular, the plan fails to address *how* the Facility's system of sumps and retention ponds will provide sufficient secondary containment at least equal to that of the "largest single tank plus sufficient freeboard to

[9] In one representative section of its SPCC Plan, ICC conclusorily states that "[i]n the event of a large oil spill our expanded system of sumps, ditches, catch basins and the storm water handling system will reduce and eliminate the chances of oil from entering the navigable water of the U.S." While the SPCC Plan provides a Facility map depicting this system, the Plan provides no further description of how this system can accommodate the volume of "the largest single tank plus sufficient freeboard to allow for precipitation" in accordance with the guidelines. 40 C.F.R. § 112.7(e)(2).

allow for precipitation."[10]

In sum, while the SPCC regulations do not *per se* prohibit a facility-wide system of oil containment akin to that deployed at ICC's facility, the company nevertheless failed to meet SPCC requirements both by failing to provide for engineered structures for confining spills and by not providing a complete and detailed description in its plan of how its system could assure sufficient secondary containment for its storage tanks.

2. *Oil and Grease Levels at ICC Facility Site*

Addressing the Presiding Officer's factual finding in his Initial Decision that chemical sampling during a CERCLA inspection had detected oil and grease "at several locations at the ICC [F]acility," *see* Init. Dec. at 3-4 (Finding of Fact #5), ICC contends that a "corrected" level of oil and grease at one CERCLA sample from the Facility's outfall to the Caribbean Sea was only "1.7 parts per million"[11] and thus consistent with routine use of "asphalt throughout the plant for protective coating and foundations." Appeal Brief at 2. The company asserts that the allegedly low level of oil and grease from this sample was "clear evidence in favor of Respondent's environmental performance." *Id*.

We note here that this factual finding of concern to ICC does not appear to serve as a predicate for any of the Presiding Officer's findings of violation.[12]

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[10] In so ruling, we are not suggesting that the guidelines do not allow for alternative systems for oil containment. The SPCC guidelines do appear to contemplate the use of alternative methods of oil spill prevention, in that they direct oil handlers to provide a "*complete discussion*" of the guidelines as well as "*other effective spill prevention and containment procedures* * * *." 40 C.F.R. § 112.7(e). This being said, the regulations also require a *complete discussion* of any such alternative methods. 40 C.F.R. § 112.7(e).

During the evidentiary hearing, Dr. Baus asserted that the Facility's method of oil containment as "a better system of handling waste or spills or anything else that's available," but nowhere provided a detailed description of how the Facility's plant-wide system of sumps, retention ponds would work to provide more effective containment than the methods contemplated by the guidelines. *See* 40 C.F.R. § 112.7(e). As found in *Mobil*, a facility implementing a spill prevention method not conforming to guidelines must "clearly defin[e] how a plan deviates from the guidelines and support[] the appropriateness of the deviation with an explanation of why it is necessary or constitutes a better engineering practice." *Mobil*, 1 E.A.D. at 237. This, ICC failed to do.

[11] ICC's statement alludes to Dr. Baus's testimony during the evidentiary hearing, in which he observed that sampling data developed as part of the Region's CERCLA inspection, *see* Ex. 4, erroneously overstated concentrations in various chemical samples, including those for oil and grease. *See* Tr. at 139-40.

[12] Although the Presiding Officer made the factual finding that oil and grease were detected at various locations at the Facility, this finding does not appear to be the basis of any of ICC's alleged SPCC deficiencies. The Presiding Officer did endorse the Region's allegation that "[s]pilled oil [at the

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Thus, it is of questionable significance at this stage of the proceeding. To the extent that ICC is arguing that, based on its good environmental performance, it should not be held liable for SPCC-related violations, its arguments are clearly without force. The SPCC regulations are by definition preventive in nature. Accordingly, the fact that ICC — or any oil handling facility — may or may not have spilled oil beyond into a navigable water has no bearing on whether it complied with SPCC guidelines designed to ensure that appropriate spill prevention and containment measures are in place. Thus, the company's claim that the CERCLA oil sampling results indicate good environmental "performance" do not provide a grounds for reversal of any of the Presiding Officer's liability findings in this case. The only potential relevance of such an argument is in the context of penalty assessment, to which we now turn.

B. *The Penalty*

CWA section 311 directs the Agency to consider a list of factors ("statutory penalty factors") in the imposition of penalties for violations of oil spill and prevention regulations, including SPCC violations. *See* CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8). These factors include:

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

Id. The governing regulations at 40 C.F.R. part 22 provide that the Region bears the burden of demonstrating that its proposed penalty is appropriate.[13] 40 C.F.R. § 22.24.

In assessing a penalty, the Presiding Officer largely accepted the Region's proposed penalty, which was based on the Region's application of EPA's Civil Penalty Policy. As we have noted, that policy derives from the statutory penalty

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Facility] has not been cleaned up," *see* Init. Dec. Attach. B, but this determination was based not on CERCLA sampling, but rather on the Region's observation of oil stains surrounding tanks and drums during its SPCC inspection. *See supra* Part II.B.

[13] Section 22.24 of Title 40 of the Code of Federal Regulations states that "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate."

factors.[14]

In terms of understanding both the Presiding Officer's penalty assessment and the penalty issues that need to be addressed on appeal, it is instructive to review the bases for the Region's proposed penalty. In accordance with the Civil Penalty Policy, the Region's proposed penalty was based on consideration of: (1) the "gravity" or severity of the violation; (2) whether a gravity-based penalty should be adjusted downward in light of any mitigating factors, such as a respondent's ability to pay the penalty, previous payment of penalties for the same incident, and other "factors as justice may require;" and (3) any economic benefit realized by the company as a result of delaying compliance. Ex. 14.

The Region derived the gravity component — the bulk of the proposed penalty — from a number of different subcomponents. First, the Region derived a base "seriousness" penalty from a matrix in the Civil Penalty Policy that calculates a dollar figure based on the intersection of two variables: (1) a respondent's degree of noncompliance and (2) a facility's volumetric storage capacity. Ranking ICC's degree of noncompliance as "moderate" and placing the Facility in the appropriate storage capacity category (42,000-gallons or less), the Region selected a "seriousness" value of $6,000 from the matrix. Exs.13, 14; Tr. at 96. The Region then adjusted this amount upward by 25% ($1,500), to $7,500, to reflect the alleged "major" environmental impact a worst-case spill would cause at the Facility. Exs. 13, 14. To account for the duration of the company's violation, the Region then raised this amount by 8% (½ % per month for the 16 months of violation) to arrive at a figure of $8,100. *Id.*; Tr. at 108. Finally, the Region increased the last figure by 50%, or $4,050, to account for ICC's alleged "major" culpability for failing to expeditiously achieve compliance upon being informed by the Region. Exs. 13, 14. This last adjustment yielded a final gravity penalty of $12,150.

Next, the Region determined that consideration of the Civil Penalty Policy's adjustment factors did not justify a reduction in the gravity component of the penalty. Exs. 13, 14. With regard to ICC's ability to pay the proposed penalty, the Region concluded that the ICC was "viable," that the penalty would cause minimal economic impact, and that, furthermore, the company had not provided information showing that a reduction in the penalty was warranted on this basis.[15] *Id.*

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[14] We note that, in general, a presiding officer is not required to strictly follow Agency penalty policies and can depart from a penalty policy as long as he or she adequately explains the reasons for doing so. *In re B & R Oil Co.*, 8 E.A.D. 39. 63 (EAB 1998); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 600 (EAB 1996); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 and n.10 (EAB 1995). Moreover, a presiding officer may reject a proposed penalty even if that penalty is calculated is accordance with the penalty policy, as long as the statutory penalty criteria are properly applied. *B & R Oil*, slip op. at 32; *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 756 (EAB 1997).

[15] In its penalty worksheet it used to calculate the proposed penalty, the Region reported that ICC had annual revenues of $3,000,000. Ex. 13.

Finally, the Region calculated that ICC had realized an economic benefit of $3,375 by delaying costs, such as secondary containment, necessary to achieve SPCC compliance, and also in avoiding some costs altogether by not maintaining records. The Region added the above economic benefit figure to the gravity component ($12,150), to arrive at a total of $15,525, which it rounded down to $15,500 as a proposed penalty amount. Ex. 13.

As indicated earlier, the Presiding Officer upheld all of the Region's penalty calculation, except for the Region's enhancement of the penalty to reflect the company's alleged high culpability. *See supra* Part II.B. The Presiding Officer voided the Region's $4,050 penalty enhancement to arrive at a final penalty assessment of $11,475.[16] Init. Dec. at 11.

In its appeal brief, ICC states, "We sincerely trust that this appeal can be resolved more on the basis of what is fair than on the strict interpretation of the C.F.R." Appeal Brief at 3. In this regard, ICC raises only two particularized concerns regarding the Presiding Officer's penalty assessment. First, ICC argues, in essence, that the penalty assessment overstates the gravity of the violation, in that the violations were "inconsequential," particularly in view of "the Facility's superior record of environmental performance and knowledgeable staff." Appeal Brief at 1-2. Second, ICC argues that the penalty is too large in view of its status as a "small minority-operated business with limited capabilities." *Id.* In addition to these arguments, we also need to consider whether our earlier determination that the Presiding Officer had erred in his conclusion that 40 C.F.R. § 112.7(e)(2) requires secondary containment on a tank-by-tank basis warrants any reduction in the assessed penalty.

As discussed below, with one exception, we are unpersuaded that the Presiding Officer's penalty assessment should be overturned. With respect to the exception noted, we order a small reduction in the penalty assessment.[17]

1. *Issues Concerning the Gravity of the Violations*

We reject most of the features of ICC's argument that the deficiencies in the SPCC plan were "inconsequential." We are not moved, for example, by ICC's explanation that the company was staffed with individuals with background and ability to direct its operation," and that despite possible omissions in the SPCC

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[16] The Presiding Officer arrived at the $11, 475 assessment by subtracting the Region's $4,050 penalty enhancement on culpability grounds from the Region's original, pre-rounded proposed penalty amount of $15,525.

[17] As provided by the regulations governing this proceeding at 40 C.F.R. part 22, the Environmental Appeals Board has the authority to impose a penalty that is higher or lower than the one assessed in the Initial Decision. 40 C.F.R. § 22.30(f).

Plan, these individuals "knew always what had to be done and saw that such actions were carried out." Appeal Brief at 2.

The SPCC guidelines place great emphasis upon on the need to prepare "carefully thought-out" and complete SPCC Plans that detail procedures, methods, and equipment necessary to prevent and contain oil spills. The SPCC planning process would be rendered superfluous if a facility could satisfy its obligations merely by demonstrating that it had competent or adequately trained staff. If anything, the SPCC guidelines' emphasis on thorough and detailed SPCC Plans suggests that the plans themselves play a key role in ensuring a disciplined and well-considered approach to spill prevention, containment, and preparedness. Accordingly, relying on the good judgment or skill of staff as an alternative to properly prepared plans would be inappropriate.

We are likewise unmoved by the company's argument that its omissions were insignificant in view of the company's record of preventing oil spills during its 25 years of operation. *Id.* In assessing penalties for SPCC violations, previous Agency decisions underscore the importance of preparing thorough and detailed SPCC Plans wholly apart from an oil facility's historical record of avoiding environmental calamities. For example, in one case in which an oil handling facility contested a SPCC penalty as excessive, the facility argued that its SPCC violation "lacked substantial gravity" despite its lack of an SPCC Plan since "spill prevention actions, in the form of an oil spill retention system, had been taken." *In re Brewer Chem. Corp.*, 1 E.A.D. 247, 251 (Adm'r 1976). The Administrator rejected this argument, stating that "even if all necessary actions had already been taken to implement what would be required by an adequate SPCC plan, the lack of a plan is a substantial violation." *Id; see also In re Marathon Oil Co.*, 1 E.A.D. 150, 152 (Adm'r 1975)(where the Administrator stated that "even where existing man-made features make a spill oil into navigable waters highly unlikely," an SPCC plan will at a minimum, assure proper maintenance and use of such features").

Here, the Presiding Officer's decision to impose a substantial gravity penalty upon ICC based in part upon the company's failure to prepare a complete SPCC Plan is consistent with emphasis in *Brewer* on the *preparation* of SPCC Plans as an important, independent factor in assessing penalties for SPCC violations. Thus, in keeping with *Brewer*, the Presiding Officer deemed that a substantial gravity penalty was warranted despite his acknowledgment that the company's oil containment system "was useful and effective in generally preventing pollutants from leaving the site." Init. Dec. at 8. While to be sure, ICC, unlike the oil facility in *Brewer*, did prepare an SPCC Plan, the plan's shortcomings were significant and therefore merit a substantial penalty in view of the importance that the SPCC regulatory guidelines place on the preparation of complete and detailed SPCC Plans. In our view, the Presiding Officer's penalty assessment appropri-

ately reflected this regulatory priority by treating the company's violation as an instance of "moderate noncompliance."

Upon examining the Presiding Officer's gravity-based penalty assessment in this proceeding, the Board does, however, find one instance of reversible error. This concerns the Presiding Officer's decision to approve the Region's proposed increase of the gravity-based penalty by $1,500 based on the Facility's "proximity to the sensitive ecosystem of the Caribbean Sea." Init. Dec. at 8. While proximity to a sensitive ecosystem is certainly relevant to the "seriousness of the violation" criterion of the statutory penalty factors, *see* 42 U.S.C. § 1321(b)(8), so too, in our view, are facility design and other features that serve to reduce environmental risk[18] — considerations apparently ignored in this part of the Presiding Officer's analysis.

We note in this regard that the Presiding Officer's observations regarding the company's containment system, if anything, tend to cast a favorable light upon the system. As noted above, the Presiding Officer remarked that "the record shows that [ICC's facility-wide containment] system is useful and effective in generally preventing pollutants from leaving the site" and that there was "no record of any spill of oil or any other chemical substance migrating from the ICC site to the Caribbean Sea." Init. Dec. at 5, 8. We find that the President Officer erred in disregarding these considerations in increasing the gravity-based penalty by $1,500.

Because the enhancement of ICC's penalty on environmental impacts grounds was not based upon all relevant considerations, and, given the Presiding Officer's statements based on the evidence in the case that ICC's containment system was somewhat effective in reducing the risk of an oil spill's reaching the Caribbean Sea, we reverse this portion of the Presiding Officer's penalty assessment and we remove from the Presiding Officer's penalty calculation, described

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[18] We note that our broader view regarding the assessment of environmental threat appears to comport with the Civil Penalty Policy's orientation to this issue. Under the policy, the ranking of the environmental impact of a worst-case spill as "major" involves the following criteria:

> A discharge would likely have a significant effect on human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife (especially endangered species), due to factors such as proximity to water or *adequacy of containment.*

Civil Penalty Policy at 9 (emphasis added). While the policy statement is framed in the disjunctive (i.e., proximity to water *or* adequacy of containment), we think that, at a minimum, it contemplates that where there is relevant evidence regarding the adequacy of containment, it be considered in the analysis. *See In re Brewer Chem. Corp.* 1 E.A.D. 247, 251 (Adm'r 1976) (finding that SPCC respondent was entitled to a penalty reduction because the presence of an oil spill retention system at one of the respondent's oil facilities lessened the risk of a discharge, thereby reducing the gravity of its violation).

above, the $1,500 enhancement associated with the environmental impact of ICC's violation. A recomputation of the penalty results in a total final penalty amount of $9,855.[19,20]

2. *ICC's Status as a "Small Minority-Operated Business with Limited Capabilities"*

ICC argues its penalty should be reduced because it is a "small minority-operated business with limited capabilities." The company, however, provides no basis in fact or law for asserting that the its alleged minority status justifies a reduction in the penalty. Furthermore, to the extent that the company's "limited capabilities" could refer to the Facility's financial capacity to pay the assessed penalty, ICC nowhere in this proceeding challenged the Region's determination that the company was viable and the economic impact upon the company of the proposed would be "minimal." *See* Ex. 13. Accordingly, we decline to reduce the penalty on this basis.

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[19] The total final penalty amount is obtained by starting with the undisturbed base "seriousness" amount of $6,000 and adding to it $480 (8% x $6,000), the recalculated figure representing the time period of ICC's SPCC violation. The sum of these two numbers, $6,480, represents the new gravity component, since no adjustments are now made for the elements of environmental impact and culpability. The gravity component figure of $6,480 is added to the economic benefit component of figure of $3,375 to produce a total final penalty amount of $9,855. *Id.*

[20] The Board sees no reason to alter the Presiding Officer's adoption of the Region's economic benefit calculation and his decision to eliminate the Region's increase of the penalty on grounds of "major culpability."

First, as the Presiding Officer observed, the company did not challenge the Region's economic benefit calculation during this proceeding, and the Region presented the "only substantial evidence" on this issue. Init. Dec. at 11. Also, the economic benefit calculation is highly conservative given that the company's claims it spent "over $20,000" during 1998 and 1999 to satisfy the Region's compliance requests, whereas the economic benefit component was based on delayed compliance expenditures of only $9,000. *See* Init. Dec. at 3; Tr. at 111. Therefore, the economic benefit figure of $3,375 hardly strikes us as exorbitant or unreasonable, given the number of established SPCC deficiencies.

Additionally, we regard the Presiding Officer's elimination of the Region's penalty enhancement based on culpability, which the Region has not challenged on appeal, as generous but reasonably supported by the record. In our view, while ICC appeared to be somewhat slow in achieving compliance, the record also shows that the company was diligent in corresponding with the Region concerning its alleged deficiencies, in developing plans to address these deficiencies, and in conscientiously trying to demonstrate the effectiveness of its facility-wide oil containment system. *See supra* Part II.B. Thus, there is sufficient evidence in the record supporting the Presiding Officer's conclusion that the company had exhibited "good faith" and that, accordingly, a culpability-based increase in its penalty was not warranted.

3. *Addressing the Error in the Liability Analysis*

Our earlier conclusion that the Presiding Officer erred in his conclusion that 40 C.F.R. § 112.7(e)(2) calls for tank-by-tank secondary containment does not, in our view, justify a further reduction in the assessed penalty. The Presiding Officer's error is counterbalanced by our additional conclusion that the company did, in fact, fail to meet a number of SPCC requirements. The Presiding Officer's error touches on only one out of ICC's many SPCC deficiencies. As such, we do not regard the Presiding Officer's error to be of sufficient weight to justify a reduction in the Presiding Officer's penalty assessment.

IV. *CONCLUSION*

In accordance with the above discussion and pursuant to CWA section 311(b)(6)(B)(ii), Respondent ICC is hereby assessed a civil administrative penalty of $9,855 for its violation of SPCC regulations found at 40 C.F.R. part 112. Respondent shall pay the full amount of the penalty within thirty (30) days of receipt of this decision. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

EPA-Region II
Karen Maples
Regional Hearing Clerk
P.O. Box 360188
Pittsburgh, PA 15251-6188

So ordered.