UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF: **Paradise Energy Incorporated** 1 Quimby Street P.O. Box 687 Ossining, New York Respondent. Proceeding Pursuant to Section 311(b)(6) of the Clean Water Act, 33 U.S.C. §1321(b)(6).	**Proceeding to Assess Class II Civil Penalty Under Section 311(b)(6) of the Clean Water Act** **Docket No. CWA-02-2015-3804**

MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF ISSUANCE OF DEFAULT ORDER

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INTRODUCTION

Complainant, the United States Environmental Protection Agency, Region 2 ("EPA"), by and through undersigned counsel, hereby moves pursuant to 40 C.F.R. §§ 22.16 and 22.17, for the issuance of an order finding that Paradise Energy Inc. ("Respondent") is in default in this matter, finding that Respondent violated Section 311 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1321, and the federal Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112, and assessing a penalty of $70,151.

BACKGROUND

On September 28, 2015, Complainant issued a "Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing" (hereinafter "the Complaint") against Respondent. *See* Exhibit 1, Compl. The Complaint proposed the assessment of an administrative penalty in the amount of $71,800[1] for Respondent's failure to comply with Section 311 of the Act, 33 U.S.C. § 1321. Exhibit 1, Compl. at 4. The Complaint specifically alleged that during Government-Initiated Unannounced Exercises ("GIUE") on July 29, 2014, and June 25, 2015, at Respondent's facility located at One Quimby Street, Ossining, New York ("the Facility"), Respondent was unable to provide a means to deploy 1,000 feet of containment boom within a one-hour period and was unable to deploy oil recovery devices within a two-hour period, as required by Appendix E Section 3.0 of 40 C.F.R. Part 112, in violation of 40 C.F.R. § 112.20(h)(3). *Id.* Additionally, Respondent failed to develop evaluation procedures for the Facility response drill/exercise program in violation of 40 C.F.R. § 112.21(c) and 40 C.F.R. § 112.20(h)(3), promulgated pursuant to Section 311(j) of the Act.

[1] EPA recently recalculated the penalty and determined that $70,151 was an appropriate penalty, instead of the original proposed assessment of $71,800 in the Complaint.

As of the date of the filing of this Motion, despite five orders granting Respondent an extension of time to file an answer, Respondent has not filed an Answer to the Complaint, sought an extension to file an Answer, or settled this matter with EPA. For this reason, and because Complainant has, as set forth below, shown that Respondent was properly served and that a prima facie case has been pled in the Complaint, Respondent should be found in default under 40 C.F.R. § 22.17 and Section 311(b) of the CWA, 33 U.S.C. §1321. Based on the factual and legal grounds set forth below, a penalty of $70,151 should be assessed against Respondent for its violation of Section 311 of the CWA, 33 U.S.C. §1321. For the reasons set forth below, this motion should be granted.

ARGUMENT

I. Standard for Default Order

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, provide that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint. 40 C.F.R. § 22.17(a); *Donald Haydel D/B/A Haydel Bros./Adam Wrecking Co.*, Docket No. VI-99-1618, 3 (R.J.O. 2000), 2000 WL 436240, at *1 (EPA Region VI April 5, 2000).

In order to find liability when a respondent is in default, the Complainant must, as a preliminary matter, prove that the respondent was properly served a copy of the Complaint. *Donald Haydel D/B/A Haydel Bros./Adam Wrecking Co.*, Docket No. VI-99-1618, 3 (R.J.O. 2000. Complainant must also show that it has pled a prima facie case in its complaint, but does not have to submit evidence proving a prima facie case. *Id.* at 4–6. By providing that the respondent's default constitutes an admission of all facts alleged in the complaint, Section

22.17(a) of the Consolidated Rules does not contemplate submitting evidence when a respondent is in default. *Id.* at 7. If the complainant alleges a prima facie case in its complaint then a respondent's default is an admission of liability, thereby negating any need for the complainant to submit evidence to prove a prima facie case. *Id.*

In order to impose a penalty against a respondent in default, the complainant must state the legal and factual grounds for the proposed penalty in its motion. 40 C.F.R. § 22.17(b). It is insufficient for the complainant to conclusorily state that the penalty was calculated in accordance with the statutory factors. *Id.* Providing the legal and factual grounds for the proposed penalty allows the Presiding Officer to explain the reasoning for adopting the proposed penalty. *Id.*

II. Respondent was Properly Served

The record demonstrates that Respondent was properly served. Pursuant to 40 C.F.R. § 22.5(b)(1), Respondent was served with a true and correct copy of the Complaint by certified mail, return receipt requested. A representative of Respondent signed a return receipt, date stamped October 2, 2015. *See* Exhibit 2, Certified Mail Receipt. *See also* Exhibit 3, USPS Tracking. Section IV, Subsection A of the Complaint, titled "Answering the Complaint," states that:

> Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within thirty (30) days after service of the Complaint. 40 CFR § 22.15(a).

Exhibit 1, Compl. at 4.

Subsection A of the Complaint further explicitly states that:

> Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

Id. at 5.

The Presiding Officer in this case has issued five orders granting Respondent extensions of time to file an answer to the Complaint.[2] The most recent order, issued on July 23, 2016, extended Respondent's time to file an Answer or submit payment of the proposed civil penalty to September 9, 2016. To date, EPA has not received an answer to the Complaint. No further requests for extensions of time to answer have been sought or granted, therefore, Respondent is subject to a finding of default under 40 C.F.R. § 22.17.

III. <u>Respondent's Actions Violated Section 311 of the CWA</u>

In addition to demonstrating proper service, Complainant must show that the Complaint establishes a prima facie case of liability against a respondent before a default order may be issued. *Donald Haydel D/B/A Haydel Bros./Adam Wrecking Co.*, Docket No. VI-99-1618, 4–6 (R.J.O. 2000). As noted, this prima facie case need only be established by a preponderance of the evidence through the facts pled in the complaint; the submission of evidence is not necessary. *Id.* at 7. As discussed in greater detail below, the factual allegations outlined in the Complaint satisfy this burden and establish, by a preponderance of the evidence, that Respondent's actions violated Section 311 of the CWA.

Section 311(j)(5)(A) of the Act, 33 U.S.C. § 1321(j)(5)(A)(i), provides that the President shall issue regulations requiring each owner or operator of a facility that requires a Federal Response Plan ("FRP" or "response plan") to "submit to the President a plan for responding, to

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[2] Complainant and Respondent requested, for good cause shown, five extensions of time in which Respondent may file an answer to EPA's Complaint. An extension through January 4, 2016, was granted, effective October 22, 2015; a second extension through March 4, 2016, was granted, effective December 1, 2015; a third extension through May 6, 2016, was granted effective March 2, 2016; a fourth extension of time through July 8, 2016, was granted effective May 3, 2016; and a fifth extension was granted through September 9, 2016, effective July 23, 2016.

the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance." Pursuant to Section 2(d)(1) of Executive Order 12777 (Oct.18, 1991), the President delegated the authorities under Section 311(j) of the Act, that are described above and in the Complaint, to the Administrator of EPA. The Administrator of EPA promulgated regulations, codified at 40 CFR §112.20 and 112.21, implementing these delegated statutory authorities. The requirements promulgated pursuant to these authorities apply to "owners" or "operators" of "non-transportation-related," "onshore facilities" engaged in "drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming" "oil or oil products" that, due to their location, could "reasonably be expected to discharge" oil in "harmful quantities[3]" to "navigable waters of the U.S. or adjoining shorelines." 40 C.F.R. § 112.3. The Complaint filed in this case alleges that each of the requisite jurisdictional elements is met, subjecting Respondent to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112. Exhibit 1, Compl. at 2–3, ¶¶ 1–7.

A. Jurisdictional Allegations

The Complaint alleges that Respondent is a corporation with a place of business located at One Quimby Street, Ossining, New York 12202 ("the Facility") and, therefore, is a "person" within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2. Exhibit 1, Compl. at 1, ¶ 1. Furthermore, it alleges that: Respondent is the owner and operator of the Facility, within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2; that the Facility is an oil storage facility as referenced in 40 C.F.R. § 112.2; is a "non-transportation-related" facility within the meaning of 40 C.F.R. § 112, Appendix A, §II; that the Facility is an "onshore facility" within the meaning of 40 C.F.R. §

[3] Harmful quantities, under 40 C.F.R. § 110.3, are defined as any oil discharge that violates water quality standards or causes film or sheen upon or discoloration on the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

112.2; that because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines of the United States, within the meaning of Section 311(j)(5)(C)(iv) of the Act, 33 U.S.C. § 1321(j)(5)(C)(iv), and Appendix C to 40 C.F.R. Part 112; and is subject to the FRP submission requirements of 40 C.F.R. § 112.20. Exhibit 1, Compl. at 2, Jurisdictional Allegations ¶¶ 2, 4. The Complaint also alleges that Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, or consuming oil or oil products located at the Facility. *Id.* at 2, ¶ 3.

The Complaint states that Section 311(j)(5)(A) of the Act, 33 U.S.C. § 1321(j)(5)(A)(i), provides that the President shall issue regulations requiring each owner or operator of an FRP facility to "submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance," that through Section 2(d)(1) of Executive Order 12777 (Oct.18, 1991), the President delegated these statutory authorities to the Administrator of EPA and that the Administrator of EPA promulgated implementing regulations, codified at 40 CFR §112.20 and 112.21. *See* Exhibit 1, Compl. at 2, ¶¶ 5–7. Therefore, the Complaint alleges, pursuant to Section 311(j)(5), 33 U.S.C. §1321(j)(5), and 40 C.F.R. §§112.1 and 112.21, that the Facility is subject to the requirements set forth at 40 C.F.R. §§112.20 and 112.21. *Id.* at 2, ¶ 8. The Complaint also alleges that the Hudson River is a "navigable water" as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1, and is, therefore, subject to the jurisdiction of Section 311 of the CWA, 33 U.S.C. § 1321. *Id.* at 2, ¶ 9. Due to the proximity of the Facility to the Hudson River, the Facility could reasonably be expected to discharge oil into the Hudson

River. Furthermore, Respondent's FRP indicates that the spill path is influenced by the tidal flow of the Hudson River. *See* Exhibit 4, Paradise FRP Waterway Pages at 36.

Accordingly, Respondent is subject to the FRP submission requirements and the jurisdictional reach of the CWA.

B. <u>Failure to Comply with 40 C.F.R. § 122.20(h) and Section 311(j) of the CWA</u>

40 C.F.R. § 112.20(h) requires that the owner or operator of an FRP facility shall submit a response plan that, among other things, addresses the elements listed in 40 C.F.R. § 112.20(h)(1) through (h)(10). Pursuant to 40 C.F.R. § 112.20(h)(3), the response plan shall include the identity of private personnel and equipment necessary to remove, to the maximum extent possible, discharges of oil as described in 40 C.F.R. § 112.20(h)(5), and that owners and operators shall follow Appendix E to 40 C.F.R. Part 112 to identify response resources to meet FRP requirements.

Pursuant to 40 C.F.R. § 112.20(h)(5), the response plan shall include discussion of specific planning scenarios for a discharge of 2,100 gallons or less, providing this amount is less than the worst case discharge amount. Appendix E, Section 3.0 of 40 C.F.R. Part 112, provides that a discharge of 2,100 gallons or less is a small discharge, and that for small discharges, the following response resources are required:

a. One thousand feet (1,000) of containment boom, and a means of deploying it within one (1) hour of the discovery of a spill.

b. Deployment of oil recovery devices within two (2) hours of the discovery of a spill.

During GIUEs at Respondent's Facility conducted by EPA on July 29, 2014, and again on June 25, 2015, EPA determined that Respondent was unable to provide a means to deploy 1,000 feet of containment boom within a one-hour period and was unable to deploy oil recovery

devices within a two-hour period, as required by Appendix E Section 3.0 of 40 C.F.R. Part 112, in violation of 40 C.F.R. § 112.20(h)(3), thereby violating regulations issued under Section 311(j) of the Act. Exhibit 1, Compl. at 3, ¶ 5.

Pursuant to 40 C.F.R. § 112.21(c), the owner or operator of an FRP facility shall develop a program of facility response drills/exercises, including evaluation procedures. During GIUEs at Respondent's Facility conducted by EPA on July 29, 2014, and again on June 25, 2015, EPA determined Respondent had failed to develop evaluation procedures for its facility response drill/exercise program, as required by 40 C.F.R. § 112.21(c) and 40 C.F.R. § 112.20(h)(3), thereby violating regulations issued under Section 311(j) of the Act. Exhibit 1, Compl. at 3, ¶ 7.

For these reasons, the Complaint properly sets forth a prima facie case that Respondent has violated the CWA. Respondent's failure to respond to the Complaint constitutes an admission of these facts. Accordingly, a finding of liability is appropriate in this matter.

III. A Penalty of $70,151 Should Be Assessed

Section 311(b)(6)(B)(ii) of the Act, as adjusted for inflation by Table 1 of 40 C.F.R. § 19.4, authorizes the assessment of a civil administrative penalty of up to $16,000 per day for each day that a violation of Section 311(j) of the CWA continues, up to a maximum penalty of $187,500, for the period after December 6, 2013. Complainant requests the imposition of a $70,151 penalty for Respondent's violations of Section 311(j) of the CWA. The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the proposed penalty amount is appropriate in light of the statutory penalty assessment criteria.

Penalties for violations of Section 311(j) of the CWA are based upon a consideration of the statutory factors found in Section 311(b)(8) of the CWA:

> the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of

> culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

33 U.S.C.§1321(b)(8).

In determining an appropriate penalty in this case, EPA utilized the methodology in its August 1998 *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the CWA* ("Penalty Policy"). *See* Exhibit 5, Penalty Policy; Exhibit 6, Declaration of Michael J. Hodanish ("Hodanish Decl.") at ¶ 1.[4] In light of the facts alleged in the Complaint and described in the Declaration of Michael J. Hodanish, Complainant proposes a $70,151 penalty for Respondent's violations of Section 311(j) of the CWA. Exhibit 6, Hodanish Decl. at ¶ 17.

1. Gravity of Violations

Consistent with the statutory factors, and utilizing the Penalty Policy methodology, EPA calculates the gravity component of the penalty by evaluating four factors: (a) the seriousness of the violation; (b) the culpability of the Respondent; (c) the mitigation efforts of the Respondents; and (d) the history of the Respondent's prior violations. Exhibit 5, Penalty Policy at 6–11, 14–15.

(a) Gravity: Seriousness of the Violation

The seriousness of a Section 311(j) violation depends, in part, on the risk posed to the environment. *Id.* at 7. Risk can encompass the extent of the violation, the likelihood of a spill, the sensitivity of the environment around the facility, and the duration of the violation. *Id.* The Penalty Policy first assesses the seriousness of a violation based on the extent of non-

[4] While the penalty policy for Section 311 of the CWA is also termed a "settlement policy," the methodology it employs can be used to support a penalty at hearing.

compliance. *Id.* at 7–8. Under the Penalty Policy, the violation can fall within one of three categories: minor noncompliance, moderate noncompliance, and major noncompliance. *Id.*

EPA considered the extent of non-compliance here to be "moderate." Exhibit 6, Hodanish Decl. at ¶ 6. This decision was based upon the findings in EPA's field inspection and GIUE at the Facility on July 29, 2014, and June 25, 2015, where Respondent expressed an extreme unwillingness to comply with the applicable regulations when he failed to deploy a containment boom within one hour of the initiation of the exercise and failed to deploy oil recovery service within two hours of the initiation of the exercise, and because of the submission of inadequate plans. *Id.*

During the July 29, 2014 GIUE, Respondent's Oil Spill Removal Organization ("OSRO"), All State ORC, declined to respond to the GIUE at the Facility, reporting that they were engaged in two actual response actions. *Id.* at ¶ 2. By certified mail, dated October 28, 2014, EPA notified Respondent that the July 29, 2014 GIUE and field inspection had revealed site-specific violations and planning deficiencies that needed to be addressed in accordance with the regulatory requirements. *Id.* at ¶ 3. *See* Exhibit 7, Oct. 28, 2014 EPA Letter. The October 28, 2014 letter requested that Respondent provide a schedule explaining when each deficiency would be corrected within fifteen days or receipt of the letter. Exhibit 6, Hodanish Decl. at ¶ 3; Exhibit 7, Oct. 28, 2014 EPA Letter at 2. To date, no such schedule has been received. Exhibit 6, Hodanish Decl. at ¶ 3.

During the June 25, 2015 GIUE, almost a year after the July 29, 2014 GIUE and despite EPA's October 28, 2014 notification, Respondent claimed that his OSRO, Miller Environmental Group, could not be at the Facility within one hour to deploy a containment boom. *Id.* at ¶ 4. Respondent did not call or attempt to summon his OSRO, instead, Respondent provided a

document indicating that the Ossining Fire Department could deploy the boom within a one-hour period. *Id.*; Exhibit 8, Ossining Fire Department Letter. However, closer examination of the document indicated that the fire department would only respond in the event of an actual spill. *Id.* Respondent also declined to call the fire department. Exhibit 6, Hodanish Decl. at ¶ 4. Again, a containment boom was not deployed within one hour and oil recovery equipment was not deployed within two hours. *Id.* at ¶ 3.

By certified mail, dated July 30, 2015, EPA notified Respondent that the June 25, 2015 GIUE and field inspection had revealed site-specific violations and planning deficiencies that needed to be addressed in accordance with the regulatory requirements, and requested a schedule for implementing changes within fifteen days of receipt. Exhibit 9, July 30, 2015 EPA Letter. By certified mail, dated August 3, 2016, EPA notified Respondent that its FRP review revealed several planning deficiencies and requested information or a schedule detailing when Respondent would make the necessary changes within 45 days of receipt. Exhibit 10, Aug. 3, 2016 EPA Letter. Respondent has not provided EPA with any of the requested information.

Based on the extent of non-compliance and the size of the facility, a matrix value of $20,000 was assessed. *Id.* at ¶ 7. A matrix value of $20,000 is appropriate for a facility with moderate noncompliance and over one million gallons in storage volume. *Id.* The Facility has an oil storage capacity of 3,532,485 gallons. *Id.*

The environmental impact of these failures was considered "major" since a discharge of oil at the Facility would likely have a significant impact on human health, a sensitive ecosystem, or wildlife, because it could potentially impact the Hudson River, including tidal marshes and tributaries, which serve as wildlife, waterfowl, and marine life refuge areas. *Id.* at ¶ 8. A letter from the New York Natural Heritage Program dated August 18, 2014, documents that shortnose

sturgeon, a New York State endangered species, and breeding bald eagles, a New York State threatened species, have been reported within one (1) mile of the facility. *Id.*; Exhibit 11, Aug. 18, 2014, New York Natural Heritage Program Letter. Oil spills at the Facility could also potentially impact marinas, water intakes, fifteen parks and recreational areas, as well as forty-four bays and streams within the planning distance. Exhibit 4, Paradise FRP Waterway Pages at 32–35; Exhibit 6, Hodanish Decl. at ¶ 8. Based on these considerations, the $20,000 penalty was adjusted upward by 35% ($7,000), raising the total penalty calculation to $27,000. Exhibit 6, Hodanish Decl. at ¶ 8.

The duration of violation was assessed at thirty-two months, since EPA determined from the field inspection GIUE on July 29, 2014, that the Facility was not in compliance with the FRP rule and the Facility was still not in compliance, thirty-two months later, at the date of the penalty assessment. *Id.* at ¶ 9. Based on this factor, the penalty total was adjusted upward by 16% ($4,320) resulting in a total seriousness component of the gravity calculation of $31,320. *Id.*

(b) <u>Gravity: Culpability of the Respondent</u>

To determine culpability, the Penalty Policy considers the degree to which the respondent should have been able to prevent the violation, considering its level of sophistication, amount of available information, and any history of regulatory staff explaining to the respondent its legal obligations or notifying the respondent of its compliance requirements. Exhibit 5, Penalty Policy at 10.

As a company engaged in the oil delivery business, Respondent should have some level of sophistication with respect to oil distribution and storage requirements, and should be familiar with the procedures and duties associated with this business, including the federal Oil Pollution

Prevention Regulations, 40 C.F.R. Part 112, first promulgated in 1973. Exhibit 6, Hodanish Decl. at ¶ 10. In addition, Respondent was notified by letter sent via certified mail from EPA dated October 28, 2015, that the FRP was inadequate and that changes needed to be made, yet, almost a year later, on June 25, 2015, the violations had not been corrected. *Id.* at ¶ 10. Based on these facts, EPA determined that Respondent was highly culpable. *Id.*

The Penalty Policy suggests a maximum increase of 75% for culpability. *See* Exhibit 5, Penalty Policy at 10. Based on the facts above, EPA applied an upward penalty adjustment of 60% ($18,792) for culpability, raising the total preliminary gravity calculation to $50,112. *See* Exhibit 6, Hodanish Decl. at ¶ 10.

(c) <u>Gravity: Mitigation Efforts of the Respondent</u>

Under the Penalty Policy, EPA also considers the "nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge" in calculating the portion of the penalty attributable to gravity. *See* Exhibit 5, Penalty Policy at 10. Although a violation of FRP regulations increases the threat of a discharge rather than actually causing a discharge, this factor can be taken into account by considering how quickly the violator comes into compliance and thereby mitigates the threat of a discharge. *See id.* at 10. As of this date, Respondent has not conducted any mitigation efforts, and the Facility continues to be in noncompliance, therefore no adjustment was applied to the preliminary gravity calculation under this factor. *See* Exhibit 6, Hodanish Decl. at ¶ 11.

(d) <u>Gravity: History of the Respondent's Prior Violations</u>

Under the Penalty Policy, the penalty can be adjusted upward if the respondent has a relevant history of violations within the past five years. Exhibit 5, Penalty Policy at 10–11.

Since the Facility has no history of past violations, no adjustment was applied to the preliminary gravity calculation under this factor. *See* Exhibit 6, Hodanish Decl. at ¶ 12.

2. <u>Adjustments to Gravity</u>

There are three factors to consider when making adjustments to gravity under the Penalty Policy: (1) other penalties for the same incident, (2) other matters as justice may require, and (3) the economic impact of the penalty on the violator. *See* Exhibit 5, Penalty Policy at 15. Based on information available to EPA, Respondent has not paid a penalty for the same incident and, therefore, EPA did not adjust the penalty under this factor. *See* Exhibit 6, Hodanish Decl. at ¶ 13. There are also no other facts known to EPA that warrant an adjustment to the penalty for other matters as justice may require, and EPA has no information which suggests that the economic impact on Respondent should reduce the amount of the proposed settlement. *Id.* at ¶ 14.

3. <u>Inflation Adjustment</u>

Pursuant to the 2013 Civil Monetary Penalty Inflation Adjustment Rule (Effective December 6, 2013), the gravity portion of the penalty was adjusted to account for inflation. *Id.* at ¶ 15. Specifically, the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act, dated August 1998 ("Civil Penalty Policy), was applied to calculate the inflation adjustment amount. *Id.* Based on the Civil Penalty Policy, violations that occurred after December 6, 2013, must be increased by thirty-five percent (35%). *Id.* Since the violations at the Facility occurred after December 6, 2013, an upward penalty adjustment of 35% ($17,539) was applied, raising the cumulative penalty calculation to $67,651. *Id.*

4. Other Adjustments: Economic Benefit

Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8), states that a penalty shall consider the "economic benefit to the operator, if any, resulting from the violation." Economic benefit can accrue to a violator by "delaying necessary pollution control expenditures, avoiding necessary pollution control expenditures, and/or obtaining an illegal competitive advantage." *Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases*, 70 Fed. Reg. 50,326 (August 26, 2005). EPA recaptures economic benefit to prevent a violator from profiting from its own wrongdoing. *U.S. v. Mun. Auth. of Union Township*, 150 F.3d 259, 264 (3d Cir. 1998). In other words, "[c]ourts use economic benefit analysis to level the economic playing field and prevent violators from gaining an unfair competitive advantage" over competitors who make the necessary expenditures for environmental compliance. *U.S. v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 348 (E.D.Va.1997).

EPA uses the benefit of economic noncompliance ("BEN") computer model to calculate a violator's economic benefit from delaying or avoiding pollution control expenditures. *See* Exhibit 5, Penalty Policy at 16 n. 14. BEN calculates economic benefit after considering capital investments, one-time non-depreciable expenditures, and annual recurring costs avoided through non-compliance. *See* Exhibit 6, Hodanish Decl. at ¶ 17. EPA determined that the estimated economic benefit to Respondent resulting from the failure to prepare and implement a proper FRP was $2,500, and raised the total penalty to $70,151 accordingly. *Id.*

5. A $70,151 Penalty is Consistent with Penalties Assessed to Similarly Situated Respondents

The proposed penalty of $70,151 assessed in this matter comports with how similarly situated Respondents were treated for violations of Section 311(j) and the federal Oil Pollution

Prevention regulations that include failure to accomplish the required response drills and exercises during a government inspection.

For instance, EPA sought a penalty of $91,498[5] against a respondent who was unable to demonstrate that it had adequately developed and implemented the required response drills and exercises program under the FRP during a government inspection. *Pa. Oil Co.*, CWA-03-2009-0288, Compl. ¶¶ 65– 67, 110 (where EPA's total proposed penalty was $140,332 for all violations at two facilities, and included a $91,498 penalty for inadequate drill and exercise programs at one facility which borders a river).

In another case, EPA sought a penalty of $92,216.18[6] against a respondent who was unable to demonstrate that it had developed and implemented the required response drill and exercise programs during a government inspection. *Oehlert Bros., Inc.*, CWA-03-2008-0425, Compl. ¶¶ 56–59, 80 (where EPA's total proposed penalty was $141,857.68 for all violations at the facility, including an assessed penalty of $92,216.18 for failure to develop and implement required response drill and exercise programs, when the facility had over one million gallons in capacity and was in close proximity to a creek that connects to a river).

EPA sought a $133,500[7] penalty against a respondent who failed to provide a means to deploy 1,000 feet of containment boom and oil recovery devices within a two-hour period during a GIUE. *Sprague Energy Corp.*, CWA-02-2008-3808, Compl. 4–5 (where respondent also failed to properly instruct facility personnel in the procedures to respond to discharges of oil and in applicable oil spill response laws, rules and regulations). *Sprague* is particularly informative for the purpose of determining that the penalty in this matter comports with similarly situated

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[5] The parties subsequently settled the matter for $66,000 for all claims. Consent Agreement and Final Order p.7, *Pa. Oil Co.*, CWA-03-2009-0288.

[6] The parties subsequently settled the matter for $50,000 for all claims. Consent Agreement and Final Order p.6, *Oehlert Bros., Inc.*, CWA-03-2008-0425.

[7] The parties subsequently settled the matter for a $72,000 penalty and $17,500 Supplemental Environmental Project. Consent Agreement and Final Order p.4,8, *Sprague Energy Corp.*, CWA-02-2008-3808.

respondents, because the respondent in *Sprague* and Respondent in this matter both failed to implement or develop programs required under 40 C.F.R. Section 112.21, and both respondents failed to deploy containment devices within the specified period of time.

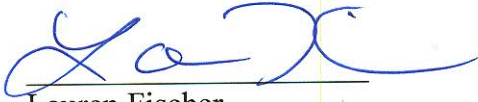
Additionally, in comparing this matter to cases discussed above, it should be noted that the respondents in the cited cases tried, but failed, to successfully accomplish the required drills and exercises. Here, Respondent failed to even attempt to meet the inspection standards and should therefore receive less favorable treatment than those that had at least tried.

For all these reasons, Respondent's failure to even attempt to comply with the FRP regulations on two separate occasions warrant imposition of the proposed penalty of $71,784. As demonstrated above, the proposed penalty is consistent with EPA's policy and past practice.

CONCLUSION

Based on the foregoing facts and law, Complainant requests that the Regional Judicial Officer issue an order finding Respondent in default and liable for violations of the Oil Pollution Prevention regulations at 40 C.F.R. Part 112, promulgated under Section 311(j) of the CWA, 33 U.S.C. § 1321(j). Based on the facts of the case as alleged in the Complaint and by affidavit, the penalty factors identified in the statute, and previous cases assessing penalties, EPA further requests that a penalty be assessed in the amount of $70,151 for Respondent's violations of Section 311 of the CWA.

Respectfully submitted,



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5/24/17
Dated

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF: **Paradise Energy Incorporated** 1 Quimby Street P.O. Box 687 Ossining, New York Respondent. Proceeding Pursuant to Section 311(b)(6) of the Clean Water Act, 33 U.S.C. §1321(b)(6).	**Proceeding to Assess Class II** **Docket No. CWA-02-2015-3804**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion and Incorporated Memorandum of Law in Support of Issuance of Default Order, dated May 24, 2017, along with the following supporting exhibits, was sent this day in the following manner to the addresses listed below:

Original and One Copy By Hand:	Office of Regional Hearing Clerk U.S. Environmental Protection Agency - Region 2 290 Broadway, 16th floor New York, New York 10007-1866
Copy By Hand:	Helen Ferrara U.S. Environmental Protection Agency - Region 2 290 Broadway, 16th floor New York, New York 10007-1866
Copy by Certified Mail Return Receipt Requested:	Scott Fein, Esq. Whiteman, Osterman & Hanna One Commerce Plaza Albany, New York 11260

Dated: May 25, 2017
New York, New York

Yolanda Majette
Office of Regional Counsel Secretary