

penalty assessment by analyzing the statutory penalty factors in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). The Memorandum did not rely on the 1995 Settlement Penalty Policy referenced in the Show Cause Order because it is only applicable to penalty calculations developed for purposes of settlement.² This Declaration explains how the proposed penalty assessment is consistent with the 1995 Settlement Penalty Policy, as directed by the Show Cause Order.

Declarant's Background and Relevant Experience

2. I have worked at EPA since October 2015. Prior to my employment, I received two bachelor's degrees from Louisiana State University in Forestry and Natural Resource Ecology and Management.
3. I currently work as a Clean Water Act ("CWA") Inspector in the Field, Data and Drinking Water Enforcement Section in EPA Region 10's Enforcement and Compliance Assistance Division, a position I have held since December 2020. My duties and responsibilities in this position include conducting inspections of regulated entities to assess compliance with CWA statutory and regulatory requirements, with a focus on compliance with the National Pollutant Discharge Elimination System ("NPDES") permitting requirements in section 402 of the CWA, 33 U.S.C. § 1342, and EPA implementing regulations at 40 C.F.R. Parts 122 and 123. I conduct inspections to assess NPDES permit compliance at various types of facilities including wastewater treatment plants, aquaculture operations and facilities subject to industrial and construction stormwater permitting requirements. In my current position I spend approximately 75% of my time on duties and responsibilities associated with CWA inspections. The remaining 25% of my time is allocated to working on CWA enforcement

² *Id.* at pp. 3 and 22

matters which includes reviewing CWA inspection reports, developing enforcement cases, communicating with regulated entities to discuss compliance and enforcement actions, participating in settlement negotiations, and analyzing violations and developing penalty calculations consistent with the 1995 Settlement Penalty Policy.

4. Prior to my position as a CWA Inspector, I worked as a CWA Compliance and Enforcement Officer in the Surface Water Enforcement Section in Region 10's Enforcement and Compliance Assistance Division. My duties and responsibilities as a Compliance and Enforcement Officer included providing compliance assistance to regulated entities, reviewing inspection reports of regulated facilities, identifying potential violations at regulated facilities, developing administrative enforcement cases, analyzing violations and developing penalty calculations consistent with applicable EPA policy and statutory factors, participating in settlement discussions, and supporting administrative litigation.
5. In support of CWA administrative enforcement actions, one of my primary responsibilities is the analysis and calculation of an appropriate penalty for cases that involve both settlement and litigation. To calculate a penalty for settlement of administrative enforcement cases, I rely on the 1995 Settlement Penalty Policy and any supplemental guidance issued under the Policy which includes, relevant to this matter, the Supplemental Guidance for Violations of Industrial Stormwater Requirements ("2016 Supplemental Guidance").³ The stated purpose of the 1995 Settlement Penalty Policy is to set forth "... the policy of the EPA for establishing appropriate penalties in settlement of civil judicial and administrative cases. Subject to the circumstances of a particular case, this policy provides the lowest penalty

³ EPA, Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Penalty Policy for Violations of Industrial Stormwater Requirements, Sept. 8, 2016, *available at*: <https://www.epa.gov/enforcement/supplemental-guidance-1995-interim-clean-water-act-settlement-penalty-policy-violations>

figure which the Federal Government should accept in settlement.”⁴ The Policy further explains that it is not intended for use by EPA, violators, courts, or administrative law judges in determining penalties at a hearing or trial.⁵ Accordingly, to calculate an appropriate administrative penalty for actions that are not resolved through settlement, I rely on the statutory penalty factors in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

6. During my time at EPA, I have prepared penalty calculations for settlement of approximately 37 separate administrative enforcement actions. As noted above, because these matters were concluded through settlement, I calculated the penalty consistent with the 1995 Settlement Penalty Policy and any applicable supplemental guidance including the 2016 Supplemental Guidance.

Administrative Enforcement Case

7. On or around May 20, 2019, Complainant conducted a CWA compliance inspection of the Respondent’s facility located at 37307 Enchanted Parkway South, Federal Way, Washington, 98003 (“Facility”). Following the inspection of the Facility, I was assigned to review the CWA compliance inspection report and other relevant information. Based on my review of the inspection report and other available information I determined that Respondent likely violated conditions of its Washington State Industrial Stormwater General Permit (“ISGP”). I also reviewed information from King County and the Washington State Department of Ecology related to previous compliance concerns and enforcement actions at the Facility, and the findings of fact and conclusions of law issued by the District Court for the Western District of Washington in a CWA citizen suit filed against Respondent.⁶ Specifically,

⁴ 1995 Settlement Penalty Policy, p. 2 (emphasis in original)

⁵ *Id.* at p. 4

⁶ *Waste Action Project v. Astro Auto Wrecking*, No. 2:15-cv-796-JCC, Dkt. No. 91 (W.D. Wash., Apr. 4, 2017)

following a bench trial, the District Court found Respondent liable for approximately 4,015 violations of the CWA and ordered Respondent to implement specified injunctive relief to come into compliance with the CWA.⁷ The prior violations documented by the District Court and the Department of Ecology are similar to the alleged violations I identified during my review of the CWA inspection report more than two years later.

8. On or around September 20, 2020, Complainant notified Respondent of its intent to file an administrative enforcement case for alleged violations of the CWA, and offered Respondent an opportunity to confer on the allegations and discuss a potential settlement of the matter before the filing of a complaint. To prepare for pre-filing discussions with Respondent, I reviewed the alleged violations documented in the CWA inspection report and other available information and applied the 1995 Settlement Penalty Policy and 2016 Supplemental Guidance to develop a proposed penalty for purposes of settlement discussions.
9. After repeated unsuccessful attempts to reach settlement, described in the Memorandum in Support of Complainant's Motion for Default Judgment (Dkt. No. 4, pp. 3-4), Complainant filed a Complaint against Respondent on April 29, 2021 (Dkt. No. 1). The Complaint set forth the number of alleged violations, the statutory penalty authority for each violation, and included an explanation of the severity of each violation but did not plead a specific penalty to be assessed against Respondent.⁸
10. On March 1, 2022, nearly a year after the Complaint was filed, Complainant filed its Motion for Default Judgment because Respondent had failed to answer the Complaint (Dkt. Nos. 3 to 6). Approximately six weeks after the date by which Respondent was required to answer the Complaint, Complainant notified Respondent of its intent to move for a default judgment and

⁷ *Id.* at p. 10

⁸ 40 C.F.R. § 22.14(a)(4)(ii)

provided more than six months for Respondent to remedy the default before filing the Motion for Default (Dkt. No. 4, pp. 8-9). Even after it was filed, Complainant requested, and the Presiding Officer granted, a series of stays to the Motion for Default to provide Respondent additional time to answer the Complaint and to discuss settlement (*see*, Dkt. Nos. 7, 11, 15, 19, 22 and 24). On September 20, 2022, after repeated unsuccessful attempts to settle the case, Complainant filed a final status report explaining that Respondent had stopped engaging in settlement discussions and requesting that the Presiding Officer issue a decision on its Motion for Default Judgment (Dkt. No. 26). In response, the Presiding Officer issued the Show Cause Order (Dkt. No. 28) to which this Declaration responds.

11. The Complaint alleges that Respondent failed to comply with ten different conditions of its ISGP, and committed multiple violations of certain conditions. A summary of the violations is provided in the table below.

ISGP Condition	Violation Description	Dates of Violations	Number of violations
S3.B.4.b.i.3.d	Failure to immediately clean up spills	May 2019	3
S3.B.4.b.i.4.a	Failure to use secondary containment	May 2019	8
S3.B.4.b.i.4.c	Failure to locate spill kit within 25 ft of a fueling station	May 2019	1
S3.B.4.b.i.4.h	Failure to use drip pans beneath leaks	May 2019	1
S3.B.4.b.i.2.d	Failure to cover dumpsters	May 2019	1
S9.C.1 S9.C.3	Failure to maintain records on-site	May 2019	1
S3.B.3 S3.B.1.c S.3.A.4.b	Failure to maintain a complete and updated Stormwater Pollution Plan	2019	2
S3.B.4.b.i.5 S9.C.1.e	Failure to conduct or document annual Stormwater Pollution Plan training	2018	1
S7.C.1	Failure to accurately complete monthly inspection reports	January 2018 – May 2019	17
S9.A.4	Failure to submit complete DMRs	1Q/2019	1

Analysis and Calculation Supporting Requested Penalty Assessment

12. Pursuant to section 309(g)(2) of the CWA, administrative penalty actions are divided into class 1 and class 2 penalties.⁹ For both classes the CWA sets limits on the assessment of penalties. Class 1 penalties are capped at \$25,847 per violation with a maximum penalty amount not to exceed \$64,618, whereas class 2 penalties are capped at \$25,847 per violation with a maximum penalty amount not to exceed \$323,081.¹⁰ The other primary difference between class 1 and class 2 penalties is the specified procedure for administrative hearings. Assessing a penalty under either class requires that the person against whom the penalty is proposed be given notice and the opportunity to request a hearing. However, the hearing procedures for class 2 penalties are subject to Administrative Procedure Act requirements, whereas class 1 penalties require only that any hearing provide a reasonable opportunity to be heard.¹¹ For purposes of this action, Complainant is proposing the assessment of a class 1 penalty with a maximum penalty amount not to exceed \$64,618.
13. As previously noted, the purpose of the 1995 Settlement Penalty Policy is to establish bottom line penalties for purposes of settlement.¹² Application of the 1995 Settlement Penalty Policy to a particular case is based on the circumstances, facts, alleged violations and other factors such as litigation considerations and ability to pay that are unique to each case. Accordingly, the considerations and decisions that are made to calculate a bottom-line penalty to settle any

⁹ 33 USC 1319(g)(2)

¹⁰ See 33 U.S.C. § 1319(g)(2)(A)&(B). Statutory penalty amounts are adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act, 28 U.S.C. § 2461. EPA periodically codifies the required inflation adjustments at 40 C.F.R. § 19.4. The violations at issue in this matter occurred after November 2, 2015, and the penalty assessment, if any, will occur after January 6, 2023.

¹¹ 33 U.S.C. § 1319(g)(2)

¹² 1995 Settlement Penalty Policy, p. 2

specific case are only applicable and relevant to the case at hand and cannot be applied to other enforcement matters.¹³

14. The 1995 Settlement Penalty Policy relies on a formula containing three primary components: (1) the recovery of any economic benefit from noncompliance; (2) a gravity component to account for the severity of the violations and to deter future noncompliance; and (3) penalty adjustment factors that address litigation considerations and the ability of the violator to pay the proposed penalty.¹⁴ The 2016 Supplemental Guidance provides additional guidance for calculating minimum penalties under the 1995 Settlement Policy in matters involving violations of industrial stormwater permitting requirements. Pursuant to the 1995 Settlement Penalty Policy, the bottom-line settlement penalty is calculated based on the following formula:

Penalty = Economic Benefit + [Gravity +/- Gravity Adjustment Factors] – Litigation Considerations – Ability to Pay – Supplemental Environmental Projects

15. The objective of the economic benefit component of a penalty is to place a violator in the same financial position as if it had complied on time by recovering delayed or completely avoided compliance expenditures.¹⁵ Accounting for the economic benefit of noncompliance is also a statutory penalty factor for administrative penalty actions.¹⁶ Under the 1995 Settlement Penalty Policy the standard method for calculating economic benefit is to use EPA's BEN model.¹⁷ Economic benefit is calculated from the first day of noncompliance except that generally the start of noncompliance should not be more than five years before

¹³ *Id.* at p. 23 (Although the Agency may choose to release parts of case-specific settlement calculations, “[t]he release of such information may only be used for settlement negotiations in the case at hand..”)

¹⁴ *Id.* at p. 4

¹⁵ *Id.*

¹⁶ 33 U.S.C. § 1319(g)(3)

¹⁷ 1995 Settlement Penalty Policy, p. 5

the complaint was filed.¹⁸ With respect to this matter, the first day of alleged noncompliance is January 2018, which is well within five years from the date the Complaint was filed in this matter.

16. In calculating economic benefit, I concluded that the compliance costs associated with six of the alleged violations were de minimis and therefore excluded such costs from the economic benefit calculation. The violations I deemed to have resulted in de minimis economic benefit are: failure to immediately cleanup spills, failure to cover dumpsters, failure to keep records onsite, failure to conduct annual stormwater training, failure to properly locate a spill response kit and failure to use drip pans beneath leaks. For the remaining four violations, I conducted research to develop conservative estimates for the real costs of equipment, labor and services for use in the BEN model. The resulting model output provided the following economic benefit amounts (rounded to the nearest \$100 increment): \$800 for failure to maintain an updated Stormwater Pollution Prevention Plan; \$900 for failure to use secondary containment; \$600 for failure to accurately complete inspection reports; and \$100 for failure to submit complete monitoring reports. Based on the BEN model inputs and outputs the total estimated economic benefit is **\$2,400**.

17. Recovering the economic benefit of noncompliance only places the violator in the same position as if compliance had been achieved on time. Therefore, the 1995 Settlement Penalty Policy includes a gravity component in the penalty calculation to promote deterrence with respect to future violations and on the basis of fairness to ensure the violator is economically worse off for not complying with the law.¹⁹ The gravity component in the 1995 Settlement Penalty Policy is consistent with the statutory penalty factors which take into account "...the

¹⁸ *Id.*

¹⁹ 2016 Supplemental Guidance, pp. 8-25

nature, circumstances, extent and gravity of the violation, or violations.” 33 U.S.C. 1319(g)(3). Pursuant to the 1995 Settlement Penalty Policy, as modified by the 2016 Supplemental Guidance, the gravity component is comprised of three separate factors including the significance of effluent limit violations (factor A), the actual or potential harm to human health and the environment (factor B) and the significance of non-effluent limitation violations (factor D).²⁰ To calculate the total gravity component the 2016 Supplement Guidance uses the following formula:²¹

$$\text{Gravity component} = [(\text{sum of factor A for each month of violation}) \times \$1000] + \text{factor B} + [\text{factor D} \times \$1000]$$

18. The first gravity factor, factor A, addresses the significance of effluent limitation violations and applies only if a permittee is alleged to have violated effluent limitations in a permit. Because the Complaint does not allege that Respondent violated any effluent limitation this factor is inapplicable to the penalty calculation and a penalty amount of \$0 was used for this factor in the formula.
19. The second gravity factor, factor B, addresses the actual or potential harm to human health or the environment over the duration of noncompliance. Calculating a value for factor B involves five steps: Step 1) classification of the quality of the receiving water, Step 2) the duration of noncompliance, Step 3) determination of the actual or potential impacts to health and the environment, Step 4) determination of the appropriate range of values based on Steps 1-3, and Step 5) selection of a dollar amount from the appropriate range that takes into account the magnitude and seriousness of any actual or potential impacts.²²

²⁰ *Id.* at pp. 6-11

²¹ *Id.* at p. 6

²² *Id.* at pp. 9-16

20. For purposes of Step 1, the 2016 Supplemental Guidance identifies three classifications of receiving waters: high quality, medium quality and low quality.²³ As set forth in the Complaint, stormwater runoff from the Facility is discharged to Hylebos Creek which is a tributary to Hylebos Waterway, an inlet of Commencement Bay in Puget Sound. Hylebos Waterway and Commencement Bay are heavily industrialized waters. Hylebos Creek and Hylebos Waterway are also listed as not meeting applicable water quality criteria for a number of pollutants including copper, dissolved oxygen and bacteria (Dkt. No. 1, ¶¶ 3.4 to 3.6). Respondent's ISGP requires that it monitor for pollutants including pH, copper, zinc, lead and petroleum hydrocarbons because these pollutants are reasonably expected to be present in its stormwater discharges. In addition, Copper is a pollutant known to cause adverse impacts to aquatic life including threatened and endangered salmonids (Dkt. No. 1, ¶ 4.3.1). Based on the foregoing, I concluded that Hylebos Creek and the downstream Hylebos Waterway are low quality receiving waters.

21. For purposes of Step 2, the duration of noncompliance, the 2016 Supplemental Guidance provides for the calculation of the total number of months in which there was one or more violation and in which there was at least one precipitation event resulting in a discharge. A discharge event can be determined either by an observed discharge or by reference to rainfall data. The 2016 Supplemental Guidance recommends a conservative assumption that a discharge occurs when there is 0.5 inches of precipitation over a 24-hour period.²⁴ As alleged in the Complaint, one of the ISGP conditions that Respondent violated was for failure to accurately complete inspection reports including whether a discharge was occurring at the time of inspection (Dkt. No. 1, ¶ 3.64). Absent information concerning observed discharges, I

²³ *Id.* at pp. 10-11

²⁴ 2016 Supplemental Guidance, p. 11

relied on the assumption that 0.5 inches of precipitation over a 24-hour period results in a discharge. Applying this assumption, I reviewed weather data from a nearby weather station and concluded that, between January 2018 and May 2019, there were twelve months in which a discharge from the Facility occurred. According to the 2016 Supplemental Guidance, twelve months is considered medium term noncompliance.²⁵

22. For purposes of Step 3, determining the actual or potential harm to health and the environment, the 2016 Supplemental Guidance differentiates between actual impacts and potential impacts.²⁶ Absent evidence of any actual impacts, I concluded that the violations would have potential impacts because the alleged violations included failure to implement best management practices to eliminate and reduce stormwater pollution and failure to conduct required monitoring.
23. Step 4 of factor B requires a determination of the appropriate range of values presented in tables in the 2016 Supplemental Guidance based on the receiving water quality (step 1), duration of noncompliance (step 2) and actual or potential harm (step 3).²⁷ As noted above, I determined that the discharge was to a low quality water, the duration of noncompliance was medium term, and there was a potential for harm. Consistent with the 2016 Supplement Guidance factor B tables the range of values is \$3,000 to \$25,000.
24. Step 5 of factor B provides for the selection of a specific dollar amount within the range identified in Step 4 and with consideration of the applicable industry classification and impacts to human health and the environment.²⁸ With respect to industry classification, as alleged in the Complaint, Respondent's activities are classified under SIC codes 5015 and

²⁵ 2016 Supplemental Guidance, p. 11

²⁶ *Id.* at pp. 11-12

²⁷ *Id.* at p. 16

²⁸ *Id.* at pp. 12-15

5093 (Recycling facilities involved in the recycling of materials, including but not limited to, metal scrap yards, battery reclaimers, salvage yards, auto recyclers, and automobile junkyards) which are considered high priority industries or sectors under the 2016 Supplemental Guidance.²⁹ In addition, as noted above, and as set forth in the Memorandum in Support of the Motion for Default Judgment, a Federal District Court concluded that it is more likely than not that Respondent's discharges were contaminated with petroleum or petroleum byproducts, there are known sources of zinc and copper in Respondent's discharges, the receiving waters exceed applicable water quality criteria for copper and other pollutants, copper is known to cause adverse impacts to aquatic life including threatened and endangered salmonids in Puget Sound (Dkt. No. 4, pp. 14-15). Based on Respondent's classification as a high priority industry or sector and information supporting the potential for impacts to the environment, I selected a factor B value of **\$15,500**.

25. The final gravity factor, factor D, reflects the seriousness and significance of non-numeric effluent limitation violations. The 2016 Supplemental Guidance provides three tables for purposes of determining an appropriate value for factor D.³⁰ The first table identifies a range of values based on the type of violation at issue. If there are multiple violations that fit into one type of violation, the 2016 Supplemental Guidance directs that all violations in a category be considered together and a single value be selected for the category. There are three categories of violations in factor D table relevant to the violations alleged in the Compliant: (a) Noncompliant Stormwater Pollution Prevention Plan, (b) failure to adequately

²⁹ *Id.* at p. 13

³⁰ *Id.* at pp. 16-25

conduct control measures of take corrective actions, and (c) failure to conduct or report compliance.³¹

26. Category a sets out two subcategories, one for having no Stormwater Pollution Prevention Plan or a Plan with major deficiencies (subcategory a.i) and a second for a Plan with minor or moderate deficiencies (subcategory a.ii).³² The Complaint alleges that Respondent failed to maintain a complete and updated Stormwater Pollution Prevention Plan because the Plan failed to identify the stormwater pollution prevention team, failed to identify stormwater drainage structures at the Facility and contained an inaccurate and outdated site map (Dkt. No. 1, ¶¶ 3.56 to 3.58). I concluded that these violations fall into subcategory a.ii for minor or moderate deficiencies which provides a range of values from 0.1 to 3. The 2016 Supplemental Guidance further states that the greater the number of key missing Plan elements the higher the factor D value. I concluded that the failure to identify stormwater structures in the Plan and the outdated site map were key missing parts and therefore selected a value of 1.5.

27. Category b addresses violations related to implementation of adequate control measures or corrective actions, including programmatic controls such as employee training, and provides for a range of values from 0.1 to 5.³³ The Complaint alleges that Respondent violated six ISGP conditions in this category a total of 15 times. The violations include failure to immediately cleanup spills (three counts), failure to use secondary containment (eight counts), failure to properly locate spill response kit (one count), failure to use drip pans beneath leaks (one count), failure to cover dumpsters (one count) and failure to conduct

³¹ *Id.* at p. 18

³² *Id.* at p. 19

³³ *Id.* at pp. 20-21

annual stormwater training (one count) (Dkt. No. 1, pp. 11-16). The 2016 Supplemental Guidance instructs that the value for deficient control measures should generally be higher where the number of measures violated is higher and the importance of such measures is greater. In consideration of the number of control measures violated, the total number of violations and the importance of some of the measures in preventing or reducing stormwater pollution I selected a value of 2.

28. Category c addresses violations for failure to adequately conduct or report compliance and includes two subcategories, the first for failing to conduct the required monitoring (c.i) and the second for failing to properly maintain, prepare or timely submit required reports (c.ii). The Complaint alleges that Respondent violated the conditions of its ISGP by failing to accurately complete monthly inspection reports (17 counts), failing to submit a complete discharge monitoring report (one count) and failing to maintain compliance records onsite (one count) (Dkt. No. 1, pp. 14, 16-20). These violations fall under subcategory c.ii which provides a range of values from 0.1 to 2. The 2016 Supplemental Guidance instructs that in selecting a specific value the importance of the monitoring and reporting should be considered. With respect to the alleged violations, the completion of accurate monthly inspection reports and discharge monitoring reports is important for identifying shortcomings in stormwater controls and impacts to receiving waters. Failing to maintain compliance records onsite impedes review and assessment of Respondent's compliance with the ISGP. In consideration of the purpose of these permit requirements, and the number of inspection reports alleged to be deficient, I selected a value of 1.5.

29. Once preliminary values are assigned in each factor D category, the 2016 Supplement Guidance provides for an adjustment of the preliminary values based on the duration of

noncompliance. The duration adjustment is based on the number of months of noncompliance in each category.³⁴ The for both categories a and b the alleged violations were determined based on the May 2019 CWA compliance inspection and the duration of the violations in each category is assumed to be one month. Accordingly, the duration adjustment factor applicable to these two categories is 2. The alleged violations associated with category c were determined based on a review of Respondent’s compliance records which identified 17 months of noncompliance. Accordingly, the duration adjustment factor applicable to category c is 7. The noncompliance adjustments, therefore, are as follows:

Category	Factor D Value	Multiplier	Duration Adjusted D Factor
a	1.5	2	3
b	2.0	2	4
c	1.5	7	10.5
Total Adjusted D Factor			17.5

30. After the factor D value is adjusted to account for the duration of noncompliance, the 2016 Supplemental Guidance provides for a final adjustment based on the size and sophistication of the respondent. Specifically, the Supplemental Guidance includes a table with adjustment factors associated with three tiers based on the size and sophistication of the respondent. Tier 1 entities are minor to small businesses with little sophistication, tier 2 entities are small to mid-sized businesses with some sophistication and tier 3 entities are larger and sophisticated business. The 2016 Supplemental Guidance notes that because of the variability between business sectors there are not concrete criteria to apply in determining the appropriate tier. However, the 2016 Supplemental Guidance sets out factors to consider in selecting a tier and the appropriate adjustment.³⁵ Here, Respondent is a small business with a single facility and

³⁴ 2016 Supplemental Guidance, pp. 22-23

³⁵ *Id.* at pp. 23-24

under ten employees. Although Respondent is a small business, it has operated for nearly 20 years and has been covered under the ISGP for more than ten years.³⁶ In addition, Respondent has been previously notified of what it needs to do to comply with the requirements of the ISGP.³⁷ In consideration of the totality of the circumstances, I determined that Respondent is a tier 2 entity because although it is a small business the duration of its operations and length of time it has been covered under the ISGP, in addition to the prior notice and actions concerning what is required to comply with the ISGP, provide an indicia of sophistication. The adjustment factor specified for tier 2 entities is a range of 0.75 to 1.25. Within this range I selected an adjustment multiplier of 1, meaning there is no adjustment to the factor D value based on Respondent's size and sophistication. Accordingly, the final factor D value for purposes of the gravity component is $17.5 \times \$1000 = \mathbf{\$17,500}$.

31. Based on the foregoing analysis in Paragraphs 17-30, and consistent with the 2016 Supplemental Guidance, the formula to calculate the gravity component of the proposed penalty is as follows:

Gravity component = Factor A value of \$0 + Factor B value of \$15,500 + Factor D value of \$17,500 = Total gravity component of \$33,000

32. The 1995 Settlement Penalty Policy and the 2016 Supplement Guidance provide for adjustments to the total gravity component based the respondent's history of recalcitrance and an adjustment for quick settlement.³⁸ The quick settlement adjustment is a mitigating factor that can reduce the overall gravity component by 10%. Despite Complainant's considerable effort and after providing multiple opportunities, Respondent was unwilling to

³⁶ Exhibits to Memorandum in Support of Motion for Default Judgment, Dkt. No. 5, Exhibit 4, pp. 5-6

³⁷ *Id.* at Exhibits 14, 15, 16 and 18

³⁸ 2016 Supplemental Guidance, pp. 25-26

engage in productive settlement discussions. Accordingly, this mitigating adjustment does not apply. With respect to history of recalcitrance, Complainant set forth the basis for applying this aggravating adjustment in both the Complaint and Memorandum in Support for Motion for Default Judgment (Dkt. No. 1, pp. 21-22 and Dkt. No. 4, p. 16). However, Complainant is not applying this aggravating adjustment factor for purposes of the calculation requested by the Presiding Officer's Show Cause Order.

33. The 1995 Settlement Penalty Policy and the 2016 Supplemental Guidance also provide for consideration of other factors that can affect the penalty assessment including litigation considerations and respondent's ability to pay. I did not apply these additional factors because there are no weaknesses in the case that would warrant a reduction due to litigation considerations and I have no information concerning Respondent's ability to pay the proposed penalty. Therefore, no adjustments were made based on these considerations.

34. Based on the foregoing, and the formula set forth in Paragraph 14, the penalty Complainant proposes for assessment in the Motion for Default Judgment, as analyzed and calculated through the 1995 Settlement Penalty Policy consistent with the Presiding Officer's Show Cause Order, is as follows:

Economic Benefit of \$2,400 + Gravity of \$33,000 – Litigation Considerations of \$0 – Ability to Pay of \$0 – Supplemental Environmental Projects of \$0 = Proposed penalty assessment of \$35,400

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the EPA.

Dated: _____

Raymond Andrews
CWA Inspector and Compliance Office
Water Enforcement and Field Branch
Enforcement and Compliance Assistance Division
U.S. EPA, Region 10