**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 2
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG. II
2009 OCT -1 PM 1:09
REGIONAL HEARING CLERK

SEP 29 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Inergy Midstream, LLC
7535 Eagle Valley Road
Savona, New York 14879-9784
Attn: Barry Moon, Facility Superintendent

RE: In the Matter of Inergy Midstream, LLC
Docket No. CAA-02-2009-1226

Dear Mr. Moon,

Enclosed please find an Administrative Complaint ("Complaint") that the United States Environmental Protection Agency ("EPA") has filed against Inergy Midsteam, LLC ("Respondent") under the authority of Section 113(d) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(d), regarding compliance with the risk management program requirements.

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint.

If you wish to contest the allegations or the penalty proposed in the Complaint, you must file an Answer within ***thirty (30)*** days of your receipt of the enclosed Complaint to the Environmental Protection Agency's ("EPA") Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer, a default order may be entered against you and the entire proposed penalty may be assessed without further proceedings.

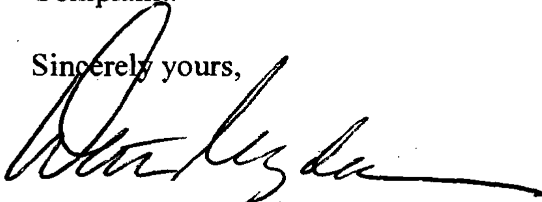
Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal

conference ***does not*** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

Enclosed with this letter is a copy of the "Combined Enforcement Policy for CAA Section 112(r) Risk Management Program," dated August 15, 2001 ("Section 112(r) Penalty Policy"). Also enclosed is a copy of the "Consolidated Rules of Practice," which govern this proceeding. For your general information and use, I also enclose both an "Information Sheet for U.S. EPA Small Business Resources" and a "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings," which may or may not apply to you.

If you have any questions or wish to schedule an informal settlement conference, please contact the attorney for this case, Lauren Charney, at (212) 637-3181, or at her address, as listed in the Complaint.

Sincerely yours,



Walter Mugdan, Director
Emergency and Remedial Response Division

Enclosures

cc: Karen Maples, Regional Hearing Clerk

Brody Smith
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

Inergy Midstream, LLC,
7535 Eagle Valley Road
Savona, New York,

Respondent.

Docket No. CAA-02-2009-1226

Administrative Complaint under
Section 113 of the Clean Air Act,
42 U.S.C. §7413

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
2009 OCT -1 PM 1:09
REGIONAL HEARING CLERK

ADMINISTRATIVE COMPLAINT

I. JURISDICTION

1. This Complaint ("Complaint") initiates an administrative action for the assessment of a civil penalty pursuant to Section 113(d) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(d). The Complainant in this action is the Director of the Emergency and Remedial Response Division of the United States Environmental Protection Agency ("EPA"), Region 2, who has been delegated the authority to institute this action.

2. EPA and the U.S. Department of Justice have determined, pursuant to Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), that EPA may pursue this matter through administrative enforcement action.

II. APPLICABLE STATUTES AND REGULATIONS

3. Section 113(d) of the Act, 42 U.S.C. § 7413(d), provides for the assessment of penalties for violations of Section 112(r) of the Act, 42 U.S.C. § 7412(r).

4. Section 112(r)(7) of the Act, 42 U.S.C. § 7412(r)(7), authorizes the Administrator to promulgate release prevention, detection, and correction requirements regarding regulated substances in order to prevent accidental releases of regulated substances. EPA promulgated the regulations at 40 C.F.R. Part 68 in order to implement Section 112(r)(7) of the Act. These regulations set forth the requirements of risk management programs that must be established and implemented at affected stationary sources. The regulations at 40 C.F.R. Part 68, Subparts A through G, require owners and operators of stationary sources to, among other things, develop and implement: (1) a management system to oversee the implementation of the risk management program elements; and (2) a risk management program that includes, but is not limited to, a

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

| In the Matter of: | ) | Docket No. CAA-02-2009-1226 |
|---|---|---|
| Inergy Midstream, LLC,<br>7535 Eagle Valley Road<br>Savona, New York, | ) | Administrative Complaint under<br>Section 113 of the Clean Air Act,<br>42 U.S.C. §7413 |
| Respondent. | ) | |

ADMINISTRATIVE COMPLAINT

I. JURISDICTION

1. This Complaint ("Complaint") initiates an administrative action for the assessment of a civil penalty pursuant to Section 113(d) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(d). The Complainant in this action is the Director of the Emergency and Remedial Response Division of the United States Environmental Protection Agency ("EPA"), Region 2, who has been delegated the authority to institute this action.

2. EPA and the U.S. Department of Justice have determined, pursuant to Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), that EPA may pursue this matter through administrative enforcement action.

II. APPLICABLE STATUTES AND REGULATIONS

3. Section 113(d) of the Act, 42 U.S.C. § 7413(d), provides for the assessment of penalties for violations of Section 112(r) of the Act, 42 U.S.C. § 7412(r).

4. Section 112(r)(7) of the Act, 42 U.S.C. § 7412(r)(7), authorizes the Administrator to promulgate release prevention, detection, and correction requirements regarding regulated substances in order to prevent accidental releases of regulated substances. EPA promulgated the regulations at 40 C.F.R. Part 68 in order to implement Section 112(r)(7) of the Act. These regulations set forth the requirements of risk management programs that must be established and implemented at affected stationary sources. The regulations at 40 C.F.R. Part 68, Subparts A through G, require owners and operators of stationary sources to, among other things, develop and implement: (1) a management system to oversee the implementation of the risk management program elements; and (2) a risk management program that includes, but is not limited to, a

hazard assessment, a prevention program, and an emergency response program. Pursuant to 40 C.F.R. Part 68, Subparts A and G, the risk management program for a stationary source that is subject to these requirements is to be described in a risk management plan ("RMP") that must be submitted to EPA.

5. Sections 112(r)(3) and (5) of the Act, 42 U.S.C. §§ 7412(r)(3) and (5), require the Administrator to promulgate a list of regulated substances with threshold quantities. EPA promulgated a regulation known as the List Rule, at 40 C.F.R. Part 68, Subpart F, which lists the regulated substances, including propane and butane, and their threshold quantities.

6. Pursuant to Section 112(r)(7) of the Act, 42 U.S.C. §7412(r)(7), and 40 C.F.R. §§ 68.10(a), 68.12, and 68.150, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process shall comply with the requirements of 40 C.F.R. Part 68 (including, but not limited to, submission of an RMP to EPA), no later than June 21, 1999, or three years after the date on which such regulated substance is first listed under 40 C.F.R. § 68.130, or the date on which the regulated substance is first present in a process at a stationary source above the threshold quantity, whichever is latest.

7. The regulations at 40 C.F.R. Part 68 separate the covered processes into three categories, designated as Program 1, Program 2, and Program 3. A covered process is subject to Program 3 requirements, as per 40 C.F.R. § 68.10(d), if the process: a) does not meet one or more of the Program 1 eligibility requirements set forth in 40 C.F.R. § 68.10(b); and b) is listed in one of the specific North American Industry Classification System codes found at 40 C.F.R. § 68.10(d)(1) or is subject to the United States Occupational Safety and Health Administration ("OSHA") process safety management ("PSM") standard set forth in 29 C.F.R. § 1910.119.

8. The regulations at 40 C.F.R. § 68.12(d) require that the owner or operator of a stationary source with a Program 3 process undertake certain tasks, including, but not limited to, development and implementation of a management system (as provided in 40 C.F.R. § 68.15), the implementation of prevention program requirements (as provided in 40 C.F.R. §§ 68.65-68.87), the development and implementation of an emergency response program (pursuant to 40 C.F.R. §§ 68.90-68.95), and the submission of, as part of the RMP, data on prevention program elements for Program 3 processes (as provided in 40 C.F.R. § 68.175).

## III. DEFINITIONS

9. 40 C.F.R. § 68.3 defines "stationary source," in relevant part, as "any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur."

10. 40 C.F.R. § 68.3 defines "threshold quantity" as the quantity specified for regulated substances pursuant to Section 112(r)(5) of the Act, as amended, listed in 40 C.F.R. § 68.130, and determined to be present at a stationary source as specified in 40 C.F.R. § 68.115.

11. 40 C.F.R. § 68.3 defines "regulated substance" as any substance listed pursuant to Section 112(r)(3) of the Act and set forth in 40 C.F.R. § 68.130.

12. 40 C.F.R. § 68.3 defines "process," in relevant part, as any activity involving a regulated substance including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities.

13. 40 C.F.R. § 68.3 defines "covered process" as a process that has a regulated substance present in more than a threshold quantity as determined pursuant to 40 C.F.R. § 68.115.

## IV. FINDINGS OF VIOLATIONS

14. Inergy Midstream, LLC ("Respondent") is, and at all times referred to herein was, a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

15. Respondent is the owner and/or operator of the facility located at 7535 Eagle Valley Road, Savona, New York 14879-9784 ("Facility").

16. The Facility is a "stationary source" as that term is defined at 40 C.F.R. § 68.3.

17. Respondent uses propane and butane at its Facility, which are regulated substances pursuant to Section 112(r)(2) and (3) of the Act and 40 C.F.R. § 68.3, in a process at its Facility.

18. The threshold quantities for propane and butane, as listed in 40 C.F.R. § 68.130, Tables 3 and 4, are 10,000 pounds each.

19. Respondent uses propane and butane at its Facility in amounts exceeding the threshold quantities.

20. On or about October 23, 2006, Respondent submitted to EPA an RMP for the Facility that identified the propane and butane storage process at the Facility as separate Program 2 processes. The Facility's RMP summary registration listed an underground cavern and storage tanks at the Facility as separate processes.

21. EPA conducted an inspection of the Facility on or about November 11, 2007 to assess compliance with Section 112(r) of the Clean Air Act and the applicable regulations including those listed in 40 C.F.R. Part 68.

22. By a letter dated January 14, 2008, EPA informed Respondent of the results of the Facility inspection. Respondent replied by letter dated January 31, 2008.

COUNT 1

23. The allegations set forth in paragraphs 1 through 22 above are incorporated herein by reference.

24. During the inspection, EPA representatives observed that the underground cavern and storage tanks are interconnected and constitute a single process as defined under 40 C.F.R. § 68.3. Respondent incorrectly stated that the Facility operated separate processes in its RMP submission. During the November 11, 2007 inspection, Facility representatives informed EPA that its propane and butane storage process is subject to the OSHA PSM standard, 29 C.F.R. 1910.119.

25. According to information obtained by EPA during the inspection, the RMP-covered process at the Facility is not eligible for Program 1 because it does not meet the requirements set forth in 40 C.F.R. § 68.10(b). The RMP-covered process at the Facility does not meet the requirements for Program 2 because the propane and butane storage process at the Facility is subject to the OSHA PSM standard set forth in 29 C.F.R. § 1910.119. Because the covered process is not eligible for Program 1 and is subject to the OSHA PSM standard, the Facility should have registered the process as Program 3 in its RMP submission and complied with the requirements of 40 C.F.R. § 68.12(d).

26. According to information obtained by EPA during the inspection, Respondent failed to develop and implement hazard assessment documentation as required by 40 C.F.R. § 68.39, including descriptions of the vessel and substances, assumptions, parameters, and rationales used for determining worst-case scenarios and alternative release scenarios. In addition, such documentation should include the distance to endpoints, estimated quantity, rate, and duration of the release as well as impact to populations and environmental receptors.

27. According to information obtained by EPA during the inspection, Respondent failed to develop and compile process safety information required by 40 C.F.R. § 68.65(c) and (d), including a block flow diagram, materials of construction, proper electrical system classification, relief system design, safety systems, and design codes and standards.

28. According to information obtained by EPA during the inspection, Respondent failed to develop and compile piping and instrument diagrams required by 40 C.F.R. § 68.65(d)(1)(ii) consistent with the current equipment configuration at the Facility.

29. According to information obtained by EPA during the inspection, Respondent did not have documentation to demonstrate that the liquefied petroleum gas ("LPG") system complies with good engineering practices as required by 40 C.F.R. § 68.65(d)(2). EPA personnel observed that some of the LPG system components did not comply with recognized and generally accepted good engineering practices, in that some valves, transfer lines, and emergency switches and valves were not properly labeled or color coded.

30. According to information obtained by EPA during the inspection, Respondent incorrectly identified the electrical system for the tank farm storage area as Class 1, Division 2 under the National Electrical Code. EPA personnel noted that Respondent's tank farm storage area did not comply with good engineering practices as required by 40 CFR § 68.65(d)(2) in that some electrical components did not appear to meet the Class 1, Division 2 standards and/or were in need of maintenance.

31. According to information obtained by EPA during the inspection, Respondent did not have an LPG leak detection system in the LPG storage facility consistent with good engineering practices as required by 40 C.F.R. § 68.65(d)(2) nor had Respondent performed a Process Hazard Analysis ("PHA") pursuant to 40 C.F.R. § 68.67 to demonstrate that a leak detection system was not required.

32. According to information obtained by EPA during the inspection, Respondent did not have a formal PHA for its LPG system as required by, and in compliance with, 40 C.F.R. § 68.67.

33. According to information obtained by EPA during the inspection, Respondent failed to develop and implement a formal mechanical integrity program, as required by 40 C.F.R. § 68.73, including written procedures, training for process maintenance activities, and the performance of inspections and tests on process equipment.

34. According to information obtained by EPA during the inspection, Respondent failed to develop and implement written procedures to manage changes as required by 40 C.F.R. § 68.75.

35. According to information obtained by EPA during the inspection, Respondent failed to adequately perform an internal RMP program compliance audit pursuant to the requirements of 40 C.F.R. § 68.79.

36. According to information obtained by EPA during the inspection, Respondent failed to develop and implement a written employee participation plan as required by 40 C.F.R. § 68.83.

37. According to information obtained by EPA during the inspection, Respondent did not have a formal contractor safety review procedure, including documentation of safety reviews and approvals for specific contractors, as required by 40 C.F.R. § 68.87.

38. Respondent's failures to comply with the requirements of 40 C.F.R. Part 68 as described above constitute violations of Section 112(r)(7) of the Act, 42 U.S.C. § 7412(r)(7). Respondent is therefore subject to the assessment of penalties under Section 113(d) of the Act, 42 U.S.C. § 7413(d).

39. On September 30, 2008, EPA issued an Administrative Order, Index Number CAA-02-2008-1217, (the "Order") to Respondent. The Order described the violations of the risk

management program regulations noted during the inspection of the Facility, determined that Respondent had failed to comply with the requirements of 40 C.F.R. Part 68 and that Respondent's failures to comply with the requirements of 40 C.F.R. Part 68 constituted violations of Section 112(r)(7) of the Act, 42 U.S.C. § 7412(r)(7). The Order required Respondent to undertake actions to come into compliance with the requirements of 40 C.F.R. Part 68, including resolving the violations described in the Order, revising and updating its RMP, and submitting a report documenting compliance with the Order. Following the issuance of the Order, Respondent began complying with the requirements of the Order and has been reporting to EPA on its progress.

## V. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Pursuant to Section 113(d) of the Act, 42 U.S.C. § 7413(d), as modified pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (December 11, 2008), which was mandated by the Debt Collection Improvement Act of 1996, 40 C.F.R. Part 19, EPA is currently authorized to assess civil penalties not to exceed $32,500 per day for each violation of Section 112 of the Act that occurred after March 15, 2004 through January 12, 2009 and $37,500 per day for each violation of Section 112 of the Act that occurred after January 12, 2009. This amount is subject to revision under federal law and regulation. Civil penalties under Section 113 of the Act may be assessed by Administrative Order. On the basis of the violations of the Act described above, Complainant alleges that Respondent is subject to penalties for violating Section 112(r) of the Act, 42 U.S.C. § 7412(r).

The proposed civil penalty in this matter has been determined in accordance with the "Combined Enforcement Policy for CAA Section 112(r) Risk Management Program," dated August 15, 2001 ("Section 112(r) Penalty Policy") and the December 29, 2008 memorandum from Granta Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance, to the Regional Administrators. A copy of the Section 112(r) Penalty Policy accompanies this Complaint. A Penalty Calculation Worksheet which shows how the proposed penalty was calculated is included as Attachment 1.

In determining the amount of any penalty to be assessed, Section 113(e) of the Act, 42 U.S.C. § 7413(e), requires EPA to take into consideration the size of Respondent's business, the economic impact of the proposed penalty on Respondent's business, Respondent's full compliance history and good faith efforts to comply, the duration of the violations as established by any credible evidence, payment by Respondent of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violations.

In accordance with Section 113(d) of the Act, 40 C.F.R. Part 19, and the Section 112(r) Penalty Policy, and based on the facts alleged in this Complaint, Complainant proposes to assess a civil penalty of $91,491 against Respondent.

Payment of a civil penalty shall not affect Respondent's ongoing obligation to comply with the Act and other applicable federal, state, or local laws.

The proposed penalty reflects a presumption of Respondent's ability to pay the penalty and to continue in business based on the size of its business and the economic impact of the proposed penalty on its business. Respondent may submit appropriate documentation to rebut this presumption.

## VI. PROCEDURES GOVERNING THIS ADMINISTRATIVE PROCEEDING

The rules of procedure governing this civil administrative litigation are entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS" (hereinafter, the "Consolidated Rules"), and are codified at 40 C.F.R. Part 22. A copy of the Consolidated Rules accompanies this Complaint.

### A. Notice of Opportunity to Request a Hearing and Answering The Complaint

To request a hearing, Respondent must file an Answer to the Complaint, pursuant to 40 C.F.R. §§ 22.15(a) - (c). Pursuant to 40 C.F.R. § 22.15(a), such Answer must be filed within 30 days after service of the Complaint. An Answer is also to be filed, pursuant to 40 C.F.R. § 22.15(a), if Respondent contests any material fact upon which the Complaint is based, contends that the proposed penalty is inappropriate, or contends that Respondent is entitled to judgment as a matter of law. If filing an Answer, 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. The address of the Regional Hearing Clerk of EPA, Region 2, is:

Karen Maples<br>
Regional Hearing Clerk<br>
U.S. Environmental Protection Agency, Region 2<br>
290 Broadway, 16th floor<br>
New York, New York 10007-1866

Respondent shall also serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. See 40 C.F.R. § 22.15(a). Complainant's copy of Respondent's Answer, as well as a copy of all other documents that Respondent files in this action, shall be sent to:

Lauren P. Charney<br>
Assistant Regional Counsel<br>
New York/Caribbean Superfund Branch<br>
Office of Regional Counsel<br>
U.S. Environmental Protection Agency<br>
290 Broadway, 17th Floor<br>
New York, NY 10007

Pursuant to 40 C.F.R. § 22.15(b), Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with

regard to which Respondent has any knowledge. Where Respondent lacks knowledge of a particular factual allegation and so states that in its Answer, the allegation is deemed denied, pursuant to 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether Respondent requests a hearing.

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation, pursuant to 40 C.F.R. § 22.15(d).

Respondent's failure to affirmatively 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.

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

B. Failure To Answer

If Respondent fails to file a timely answer to the Complaint, EPA may file a Motion for Default pursuant to 40 C.F.R. §§ 22.17(a) and (b), which may result in the issuance of a default order assessing the proposed penalty pursuant to 40 C.F.R. § 22.17(c). If a default order is issued, any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final. If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

## VII. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions and objectives of the Act and the applicable regulations. See 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged; (2) any information relevant to Complainant's calculation of the proposed penalty; (3) the effect the proposed penalty would have on Respondent's ability to continue in business; and/or (4) any other special facts or circumstances Respondent wishes to raise. Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can

demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to the EPA Assistant Regional Counsel identified in Section VI.A., above.

Respondent's request for a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing pursuant to 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction will be made simply because an informal settlement conference is held.

In the event settlement is reached, its terms shall be recorded in a written consent agreement signed by the parties and incorporated into a final order, pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3). Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such consent agreement terminates this administrative litigation and the civil proceedings arising out of the allegations made in this Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy, or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

## VIII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address provided in Section VI.A. above), a copy of the check or other instrument of payment, as provided in 40 C.F.R.§ 22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified in Section VI.A., above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America," in the full amount of the penalty assessed in this Complaint to the following addressee:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The check must be identified with a notation of the name and docket number of this case, which is set forth in the caption on the first page of this Complaint. Pursuant to 40 C.F.R.§ 22.18(a)(3), upon EPA's receipt of such payment, a final order shall be issued. Furthermore, as provided in 40 C.F.R.§ 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's rights to contest the allegations made in the Complaint and to appeal such a final order. Such payment does not extinguish, waive, satisfy, or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: Sept. 29, 2009

Walter Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

TO: Inergy Midstream, LLC
7535 Eagle Valley Road
Savona, New York 14879-9784
Attn: Barry Moon, Facility Superintendant

Brody Smith
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355

Attachment

cc: Karen Maples, Region 2 Hearing Clerk

Prepared by: Ellen Banner, Environmental Scientist/OSC
ERRD - Response & Prevention Branch
September 22, 2009

| **Facility Name/Address:** Inergy Midstream, 7535 Eagle Valley Road, Savona, NY. |
| --- |
| **Violations:** Section 112(r)(7) of the Clean Air Act and the regulations at 40 C.F.R. Part 68 (failure to comply with Risk Management Program requirements) |

**Penalty Calculation Worksheet**

The total penalty was calculated by adding the economic benefit of noncompliance plus an amount that reflects the gravity of the violation.

1. Economic Benefit

"Economic benefit" is the financial gain that a violator accrues by delaying and/or avoiding the costs of compliance. In this case, EPA calculated the economic benefit of Inergy Midstream, LLC ("Respondent) by examining the risk management program elements with which Respondent did not timely comply. EPA's BEN computer program (BEN ver. 4.2) was used to calculate the economic benefit that Respondent gained through noncompliance. The BEN program established that the final economic benefit was $8,291.

2. Gravity Component

a) Extent of deviation: Major

Respondent stores propane and butane at its facility in Savona, New York (the "Facility") for the wholesale distribution of liquefied petroleum gas ("LPG"). The facility stores 30,000,000 pounds of propane and 130,000,000 pounds of butane. On or about October 23, 2006, Respondent submitted to EPA an RMP for the Facility. The RMP incorrectly identified the propane and butane storage process at the Facility as separate Program 2 processes.

EPA conducted an inspection of the Facility on or about November 11, 2007 to assess compliance with Section 112(r) of the Clean Air Act and the applicable regulations including those listed in 40 C.F.R. Part 68. During the inspection, EPA discovered violations of the requirements of 40 C.F.R. Part 68 including violations regarding hazard assessment, process safety, process hazard analysis, mechanical integrity, compliance auditing, and recognized and generally accepted good engineering practices.

Cumulatively, the violations essentially undermine the ability of the Facility to prevent or respond to releases through the development and implementation of the RMP. The "extent of deviation" from the RMP requirements therefore is "major" for purposes of EPA's August 15, 2001 Combined Enforcement Policy for Section 112(r) of the Clean Air Act ("Penalty Policy"). Because the Facility utilizes a Program 3 process, the applicable cell in Table I, the "Penalty Assessment Matrix," in the Penalty Policy is the "Major, Program 3" cell, corresponding to a penalty of not less than $25,001. Pursuant to the Penalty Policy, EPA considered the

circumstances surrounding the violations in determining the specific penalty within the cell, and a penalty of $30,000 was chosen.

b) Adjustment based on actual or potential environmental consequences:

Consistent with the Penalty Policy, the penalty was then adjusted upward to reflect the actual or potential environmental consequences of a potential worst-case release from the Facility. A "major impact" upward adjustment of 25% ($7,500) was selected, due to the presence of large amounts of propane and butane at the Facility and the effect that a release would have on nearby residents and the environment around the Facility. This adjustment raises the penalty figure to $37,500.

c) Duration of violation:

The duration component has been calculated from October 2006, when Respondent acquired the property, through September 2009, which is 36 months. Pursuant to the Penalty Policy, the duration component is therefore $36,000, raising the penalty to $73,500.

d) Size of violator:

Consistent with the Penalty Policy, EPA scales the penalty to the "size of the violator" by calculating the violator's net worth. In cases where EPA is unable to determine a company's net worth, the Penalty Policy establishes that the size of violator may be based on gross revenues from all revenue sources. In this case, EPA was not able to determine Respondent's net worth, but Respondent provided information regarding their earnings. Respondent's gross revenues before interest, taxes, depreciation, and amortization were: $3,925,909 for 2007 and $4,407,242 for 2008. Pursuant to the Penalty Policy, the size of the violator component would therefore be $10,000. The size of the violator component increases the penalty to $83,500.

e) Adjustment to Penalty for Inflation

Pursuant to 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation, for violations that occurred after March 15, 2004 through January 12, 2009, the gravity component is to be multiplied by 1.1723, reflecting a 17.23% increase in civil monetary penalty amounts to account for inflation. This increases the penalty to $97,887.

3. <u>Adjustments to Gravity Component</u>

EPA considered all relevant factors as described below. There were no adjustments made for willfulness or negligence, history of noncompliance, environmental damage, or inability to pay. A reduction of the gravity component of approximately 15% was allowed due to Respondent's cooperation during EPA's pre-filing investigation. This adjustment results in a gravity-based

penalty component of $83,200.

TOTAL PENALTY (Economic Benefit + Gravity Component) = $8,291+ $83,200 =$91,491

**Consideration of Relevant Factors**

*Degree of Willfulness or Negligence*
No upward adjustment for degree of willfulness or negligence.

*Degree of Cooperation*
Respondent has been cooperative during and after the inspection: approximate 15% reduction

*History of Noncompliance*
No upward adjustment for history of noncompliance.

*Environmental Damage*
No upward adjustment for environmental damage

*Economic Impact of the Penalty (Ability to Pay)*
No upward or downward adjustment for economic impact of the penalty (ability to pay).

# Combined Enforcement Policy

# for Section 112(r) of the Clean Air Act

Office of Regulatory Enforcement
Office of Enforcement and Compliance
Assurance
U.S. Environmental Protection Agency

**Combined Enforcement Policy**
**for § 112(r) of the Clean Air Act**

Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Introduction . . . . . . . . . . 2

Summary of Statutory Requirements & Authorities . . . . . . . . . . 2
Statutory Requirements . . . . . . . . . . 2
Statutory Penalty Authorities . . . . . . . . . . 3

Enforcement Response Policy . . . . . . . . . . 3
Non-penalty Actions (Warning Letter, Finding of Violation, Preliminary Determination, or Administrative Order . . . . . . . . . . 3
Penalty Actions . . . . . . . . . . 4
Criminal Sanctions . . . . . . . . . . 5

Penalty Policy . . . . . . . . . . 5
Determination of Economic Benefit . . . . . . . . . . 6
Determination of the Gravity Component . . . . . . . . . . 7
Settlement of Penalties . . . . . . . . . . 17
Documentation of Penalty Settlement Amount . . . . . . . . . . 18

Other Policies . . . . . . . . . . 18

Conclusion . . . . . . . . . . 19

## I Introduction

In recent years, the large number of catastrophic accidents in the chemical industry (and associated facilities) due to the use, handling, production, or storage of highly toxic or flammable chemicals has drawn attention to the safety of these facilities. In an effort to eliminate or mitigate the consequences of such accidents to public health and the environment, on November 15, 1990, Congress passed the Clean Air Act (CAA) Amendments of 1990. The amendments added section 112(r) to the CAA which required the Environmental Protection Agency ("EPA" or "Agency") to promulgate programs and regulations preventing accidental hazardous chemical releases from stationary sources and minimizing the consequences of the accidental releases that do occur. In accordance with CAA § 112(r)(7) EPA promulgated the Risk Management Program ("Program"). This program established regulations codified at 40 C.F.R. Part 68 that are designed to prevent accidental releases of certain regulated substances from stationary sources.

This document is composed of two policies that govern civil enforcement actions for Program violations: the Enforcement Response Policy and the Penalty Policy. EPA is issuing these policies, jointly referred to as the Combined Enforcement Policy (CEP), to ensure that enforcement actions for the CAA § 112(r) are legally justifiable, uniform and consistent; that the enforcement response is appropriate for the violations committed; and that stationary sources will be deterred from committing such violations in the future. This CEP may be used to develop internal negotiation penalty figures for civil judicial enforcement actions and for pleading administrative cases. This CEP does not constitute a statement of EPA policy regarding the prosecution of criminal violations of CAA.

These policies are effective upon issuance and will assist staff in determining the appropriate response to Program violations, in calculating proposed penalties for civil administrative actions, and for settling actions concerning CAA § 112(r)(7). The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. They are not intended to, nor do they, constitute a rulemaking by the EPA. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA reserves the right to act at variance with these policies and to change them at any time without public notice.

## II Summary of Statutory Requirements & Authorities

### A. Statutory Requirements

The CAA § 112(r)(7) authorizes the Administrator to promulgate release prevention, detection, and correction requirements which may include monitoring, record keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. These regulations are codified in 40 C.F.R. Part 68, the Chemical Accident Prevention Provisions. The regulations require covered stationary sources to submit a

Risk Management Plan (RMP) that contains three main elements: a hazard assessment, a prevention program, and an emergency response program.

B. Statutory Penalty Authorities

The CAA § 113(d) authorizes the Administrator to issue an administrative order assessing an administrative penalty of not more than $25,000 per day for each violation of CAA § 112(r) and the implementing regulations found in 40 C.F.R. Part 68. As a result of the Debt Collection Improvement Act of 1996, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, violations of CAA § 112(r) which occur after January 30, 1997, are subject to the new statutory maximum civil penalty of $27,500 per day for each violation. The CAA § 113 authorizes EPA to assess civil administrative penalties and establishes penalty factors. These penalty factors are addressed in Section IV of this document and in the CAA Stationary Source Civil Penalty Policy. Both documents take these factors into consideration in the assessment of any penalty.

## III Enforcement Response Policy

When an owner or operator[1] is found to be in violation of Program requirements, EPA should take an appropriate course of action. An appropriate response will achieve a timely return to compliance and serve as a deterrent to future non-compliance by eliminating any economic benefit received by the violator. All enforcement responses will follow the established guidelines for timely and appropriate action.[2] An appropriate enforcement response may include non-penalty actions (warning letter, finding of violation or preliminary determination), penalty actions (civil administrative action, civil judicial referrals) and criminal sanctions.

A. Non-penalty Actions (Warning Letter, Finding of Violation, Preliminary Determination, or Administrative Order)

A warning letter is a document EPA may issue in the event that problems are found with a source's RMP. No additional penalties are attached to a warning letter. Warning letters may be an appropriate response for easily correctable deficiencies which do not warrant further action. In the event that a source does not address the deficiencies noted in a warning letter, EPA will generally pursue an elevated enforcement response.

---

[1] The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source, including the technician who operates a stationary source, as well as the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician or employee.

[2] See The Timely and Appropriate (T&A) Enforcement Response To High Priority Violations (HPVs), March 16, 1999, http://www.epa.gov/oeca/ore/aed/comp/bcomp/hpvguide.pdf This guidance document establishes time periods for addressing violations of certain requirements of the Clean Air Act. For Part 68, the requirement to file an RMP is addressed in this policy.

Similarly, Regions may issue a finding of violation (FOV) when any Program violation is found. FOVs are an appropriate response to violations of a more significant nature but which do not rise to the level of a penalty action. An FOV may be crafted similarly to the notice of violation which is required by CAA § 113(a)(1) to address state implementation plan violations. Failure to address deficiencies identified in an FOV should result in a penalty action.

A preliminary determination is issued as a result of an audit conducted pursuant to 40 C.F.R. § 68.220. This provision requires the implementing agency to periodically audit RMPs in order to review their adequacy and to require necessary revisions. The determination consists of a written notice detailing any deviations from statutory or regulatory requirements, describing deficiencies in a source's RMP and an explanation for the basis of the findings, reflecting, if applicable, industry standards and guidelines. A preliminary determination should only be issued to address discrepancies found as a result of a 40 C.F.R. § 68.220 audit. In the event that the discrepancies uncovered by the audit warrant a more severe enforcement response, Regions may concurrently or subsequently pursue other enforcement options.

An administrative order (AO) pursuant to CAA § 113(a)(3)(B) is a formal action ordering compliance with the CAA. As with an FOV, an AO cites the relevant statutory or regulatory requirements not being met. Similarly, failure to address deficiencies identified in an AO will also result in a penalty action.

EPA's enforcement response may consist only of a warning letter, preliminary determination, FOV or AO, or the response may consist of a combination of these documents in addition to penalty actions. Issuing only a warning letter, preliminary determination, FOV, or AO is the appropriate enforcement response for easily correctable violations including easily correctable violations uncovered during an audit pursuant to 40 C.F.R. § 68.220(f)-(h) if it can be documented that they are likely to have minimal adverse health and safety implications. Owners or operators of facilities who fail to return to compliance following receipt of an FOV or AO (per 40 C.F.R. § 68.220) should have their violations escalated to civil administrative enforcement level.

B. Penalty Actions

Penalty actions are appropriate for owners or operators of facilities which have significant violations of the regulations or of CAA § 112(r)(7). Noncompliance that caused actual exposure or a substantial likelihood of exposure to accidentally released hazardous chemicals is a significant violation. The actual or substantial likelihood of exposure should be evaluated using facility-specific environmental and exposure information whenever possible in order to establish the magnitude of the potential or actual release. This may include evaluating potential exposure pathways and the mobility and toxicity of the released substance. Finally, the litigation team should determine whether owners or operators of Program facilities are chronic or recalcitrant violators.

If the nature of the violation lends itself to be classified as a significant violation then it should be addressed through a penalty action. This response should initiate a civil judicial or administrative process which results in an enforceable agreement or order. The formal enforcement response should ensure that the non-compliant owner or operator of the facility expeditiously returns the facility to full compliance.

The Administrator of EPA, under CAA § 113(b), may refer civil judicial cases to the United States Department of Justice (DOJ) for assessment and/or collection of the penalty in the appropriate U.S. District Court. EPA may also refer to DOJ an action for permanent or temporary injunction. In addition, EPA must refer to DOJ cases which result in penalties greater than $220,000 or for which the first alleged date of violation occurred more than 12 months prior to initiation of the administrative action. EPA may, however, seek a waiver from DOJ to address these cases administratively.

C. Criminal Sanctions

This policy does not address criminal sanctions EPA may impose. Matters involving possible criminal behavior by individuals or organizations should be referred to the Regional Criminal Enforcement Counsel.

## IV Penalty Policy

The factors relevant to setting an appropriate penalty appear in CAA § 113(e). These factors are: the size of the business; the economic impact of the penalty on the business; the violator's full compliance history and good faith efforts to comply; the duration of the violation as established by any credible evidence; payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance; the seriousness of the violation; and other factors as justice may require. The purposes of this Penalty Policy are to ensure that: (1) civil penalties are assessed in accordance with the CAA and in a fair and consistent manner; (2) penalties are appropriate for the gravity of the violation; (3) economic incentives for non-compliance are eliminated; (4) penalties are sufficient to deter persons from committing violations; (5) and compliance is expeditiously achieved and maintained.

Penalties assessed are composed of two components: (1) the amount equal to the economic benefit of the noncompliance, and (2) an amount reflective of the gravity of the violation. These components should be calculated using the most aggressive assumptions supportable (i.e., assumptions most protective of the environment). This policy allows a penalty to be mitigated or aggravated, depending on the circumstances. However, pleading must always include the full economic benefit component. As a general rule, the gravity component of the penalty should not be mitigated, although this policy does allow for mitigation as discussed below.

The proposed penalty amount is the result of the following formula:

Penalty = [Economic Benefit ± adjustment factors] + [Gravity Component $_{(\text{seriousness of violation + duration of violation + size of violator})}$ ± adjustment factors]

A. Determination of Economic Benefit

1. Factors for Determining the Economic Benefit

The preliminary economic benefit component is based on the economic savings from delayed and/or avoided costs required to comply with the regulations and any benefits other than cost savings. The economic benefit of delayed compliance and from avoided costs should generally be computed using the methodology given in "Detailed Calculations," Appendix A of the BEN User's Manual, September 1999[3]. (See also "Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases," 64 FR 32,948 (June 18, 1999)[4] and "A Framework for Statute-Specific Approaches to Penalty Assessments," #GM-22 (1984), U.S. EPA General Enforcement Policy Compendium.) The benefit other than cost savings should be computed when the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for EPA to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology.

(a) Delayed Cost Benefit

An economic benefit derived from noncompliance is the ability to delay expenditures necessary to achieve compliance. For example, a owner or operator who fails to implement necessary changes to process instrumentation and equipment (e.g., monitoring systems such as high temperature, pressure, level, and flow indicators and alarms) which are necessary to safely operate the facility has achieved an economic benefit by avoiding the costs associated with those changes. The BEN methodology can be used to calculate this figure.

(b) Avoided Cost Benefit

Another type of economic benefit derived from noncompliance is the ability to avoid entirely expenditures necessary to achieve compliance. An owner or operator avoids costs if he or she fails to, for example: train operators on new instrumentation and equipment; update and change piping and instrumentation diagrams; or revise operating procedures. Additionally, an owner or operator of a facility, who fails to establish or follow precautionary procedures (e.g., a pre start-up review [40 C.F.R. § 68.77]), as required by regulations has achieved the avoided cost benefit of less down time and greater production.

---

[3] http://www.epa.gov/oeca/models/ben.pdf

[4] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1999_register&docid=fr18jn99-118].pdf

2. Adjustment to the Economic Benefit Component

Normally, general EPA policy is not to adjust for or mitigate the economic benefit component of noncompliance. However, three general circumstances exist where EPA has discretion to mitigate the economic benefit component. The following are the limited circumstances in which EPA can, if determined to be appropriate, mitigate the economic benefit component of the penalty:

- Economic benefit component involves an insignificant amount;
- Compelling public concerns exist; and/or
- Litigation Risks.

The Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than $5,000 (see p. 7 of the general policy). Regions are, however, encouraged to assess an economic benefit component if the circumstances warrant unless the benefit is less than $500.

B. Determination of the Gravity Component

1. Factors for Determining the Gravity Component

The statutory considerations relevant in determining the gravity component are the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties previously assessed for the same violation, and the seriousness of the violation. Three of the factors (seriousness of the violation, duration of the violation, and size of the violator) are incorporated into Tables I, II, and III. The other statutory factors are discussed below in section IV.B.2., Adjustments To The Gravity Component.

(a) Seriousness of the Violation

The seriousness of a violation depends in part on the risk posed to the surrounding population and the environment as a result of the violation. Risk is a function of the extent of the deviations from the requirements, the likelihood of a release, and the sensitivity of the environment around the facility. The extent of the deviations depends on the degree and nature of the violations of the relevant requirements and their cumulative effect. The greater the extent of deviation the more likely that the owner or operator of the facility has compromised the safe operation of the facility and the safe management of the chemicals. The sensitivity of the environment can be characterized by considering the potential impact of the violation on the surrounding population and the environment from a worst-case release at the facility.

In determining the seriousness component of a penalty, Regions should first determine an initial figure from the following table. Within each range, Regions should choose an appropriate

figure, considering the type of the facility and the extent of deviation only, since other considerations are incorporated in later steps.

Table I
Penalty Assessment Matrix
for violations which occurred after June 22, 1999

| | | Type of Facility[5] | | |
|---|---|---|---|---|
| | | **Program 3** | **Program 2** | **Program 1** |
| **Extent of Deviation** | **Major** | Not less than $25,001 | $60,000 $25,001 | $30,000 $15,001 |
| | **Moderate** | $50,000 $12,001 | $25,000 $12,001 | $15,000 $6,001 |
| | **Minor** | $20,000 $5,000 | $12,000 $5,000 | $6,000 $2,000 |

To determine the extent of deviation from a particular Program requirement use the following guidelines:

Major: Cumulatively, the violations essentially undermine the ability of the facility to prevent or respond to releases through the development and implementation of the RMP.

Moderate: Cumulatively, the violations have a significant effect on the ability of the facility to prevent or respond to releases through the development and implementation of the RMP.

Minor: Cumulatively, the violations have only a minor effect on the ability of the facility to prevent or respond to releases through the development and implementation of the RMP.

Regions should understand that the statutory maximum for penalties under the Clean Air Act is $27,500 per day per violation. Some of the penalty amounts in the matrix above exceed the statutory maximum. Penalties in excess of the statutory maximum may only be used if the Agency alleges that more than one violation has occurred.

---

[5]The facilities subject to part 68 fall into one of three categories: Program 1 , 2 or 3. The program levels are defined in the RMP regulations are a based upon the level of risk posed by processes subject to the risk management program.

Regions should consider the circumstances surrounding the violation(s) to arrive at a specific penalty within the range for a given cell. Some examples of relevant factors are:

- Amount of pollutant
- Toxicity of the pollutant – Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.
- The potential for emergency personnel, the community, and the environment, to be exposed to hazards;
- The relative proximity of the surrounding population;
- The extent of community evacuation required or potentially required;
- The effect noncompliance has on the community's ability to plan for chemical emergencies; and,
- Any actual problems that first responders and emergency managers encountered because of the facility's violation.

After choosing an appropriate number from Table I, Regions should adjust the number to reflect the actual or potential environmental consequences of the actual or worst-case release. In order to do this, choose the most serious applicable category:

Major Impact: A release would likely have a significant effect on human health, a sensitive ecosystem, or wildlife (especially endangered species). Upward adjustment of 25% to 50%.

Moderate Impact: A release would likely have an effect on the surrounding, non-sensitive ecosystem. Upward adjustment of up to 25%.

Minor Impact: No adjustment.

(b) Duration of Violation

For the purposes of determining the duration of a violation, violations should be assumed to be continuous from the first provable date of the violation until the source demonstrates compliance.[6] Table II is to be used in determining the duration component of a penalty.

---

[6] In accordance with the October 25, 1991, CAA Stationary Source Civil Penalty Policy which intended "continuous" to apply to monitoring, maintenance, and implementing violations.

Table II
Duration of a Violation Component for
Violations Which Occurred after June 22, 1999

| Months | Penalty |
| --- | --- |
| 0-12 | $500/month |
| 13-24 | $1,000/month |
| 25-36 | $1,500/month |
| 37 + | $2,000/month |

For example, if a violation is found to have a duration of 30 months, the duration component would be:
$6,000 ($500/month for the first 12 months) + $12,000 ($1,000/month for the second 12 months) + $9,000 ($1,500/month for the final 6 months) = $27,000

(c) Size of Violator

EPA will scale the penalty to the size of the violator.[7] The size of the violator is determined from an individual's or company's net worth. In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, generally only the size of the entity sued should be considered. If the Region is unable to determine a company's net worth, it may determine the size of the violator based on gross revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the prior three years may be used. The case development team should consider reducing the size of violator component if the initial penalty calculation could lead to an inequitable result of a large penalty due to the size of violator component and a comparatively small gravity component. Where the size of the violator figure (as determined in Table III) represents over 50% of the total penalty, the litigation team may, but need not, reduce the size of the violator figure to an amount equal to the rest of the penalty without the size of violator figure included. For example, suppose an initial penalty of $100,000, with $70,000 for size of violator and $30,000 for the remaining penalty elements. Since the $70,000 size of violator component is more than 50% of the $100,000 total penalty, the size of violator component can be reduced to $30,000 -- an amount equal to the rest of penalty ($30,000). With this reduction, the final resulting penalty will be $60,000, and the size of violator component will be 50% of this amount. For further information on the size of violator component, see the Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991.

[7]Regional personnel should also consult the Small Business Policy and the Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, if applicable, when assessing the size of violator component in penalty calculations.

Table III
Size of Violator Component

| Net Worth | Size Adjustment |
| --- | --- |
| Under $1,000,000 | $0 |
| $1,000,000 – $5,000,000 | $10,000 |
| $5,000,001 – $20,000,000 | $20,000 |
| $20,000,001 – $40,000,000 | $35,000 |
| $40,000,001 – $70,000,000 | $50,000 |
| $70,000,001 – $100,000,000 | $70,000 |
| Over $100,000,001 | $70,000 + $25,000 for every additional $30,000,000 |

2. Adjustments To The Gravity Component

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of cooperation as specified in the CAA Stationary Source Civil Penalty Policy. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

In order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case, yet must produce results consistent enough to ensure that similarly-situated violators are treated similarly. This is accomplished by identifying the legitimate differences between cases and adjusting the gravity component in light of those facts. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

(a) Degree of Willfulness or Negligence

This factor may only be used to raise the penalty. The CAA is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, some adjustment may be made for a violator's degree of culpability. The violator's willfulness and/or negligence are relevant in assessing an appropriate penalty. The four principal criteria for assessing culpability are:

- The violator's familiarity with the particular requirement;
- The degree of the violator's control over the events constituting the violation;
- The ability to foresee the events constituting the violation; and
- The level of sophistication within the industry in dealing with compliance issues or the availability of appropriate control technology to mitigate the violation.

To arrive at an appropriate adjustment, Regions should consider the degree to which the respondent should have been able to prevent the violation, considering the sophistication of the respondent and the resources and information available to it, and any history of regulatory staff explaining to the respondent its legal obligations or notifying the respondent of violations. Depending upon the degree of culpability, the litigation team may increase the amount from Table 1 by as much as 75%.

In cases where the violator knowingly committed an act that he or she knew to be a violation, potential criminal action may be warranted and should be considered.

(b) Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the gravity component because the source is not making efforts to come into compliance and is negotiating with the Agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance – The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.
2. Prompt correction of noncompliance – The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into

compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.
3. Cooperation during pre-filing investigation – Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

(c) History of Noncompliance

The penalty amounts reflected in the gravity component penalty matrix apply to first time violators. Where a violator has demonstrated a history of prior violations, the penalty may need to be adjusted upward. The need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation or not ensuring continuous compliance after a non-penalty informal enforcement response. Another reason for penalizing repeat violators more severely than first time violators is the increased resources that are spent on the same violator. Therefore, this factor may be used only to raise a penalty.

For the purposes of determining the history of noncompliance, the litigation team should check for and consider prior violations of CAA § 112(r)(7) and/or prior violations of any of the provisions of 40 C.F.R. Part 68 that have occurred. In addition, the litigation team is encouraged to check for and consider prior violations under all environmental statues enforced by EPA in determining the amount of the adjustment to be made under this factor. The following criteria apply in evaluating history of prior violations:

(1) Regardless of whether an owner or operator admits to the violation, evidence of a prior violation may be: a consent agreement and final order/consent order, a federal court judgment, a default judgment, a consent decree, an FOV, an AO, or a warning letter. A prior violation refers collectively to all the violations which may have been described in any of the documents listed above.

(2) Companies with multiple facilities, or wholly or partly owned subsidiaries with a parent corporation, may be considered as one when determining history of prior violations, however, two facilities may not necessarily affect each other's violation history if they are in substantially different lines of business, or if they are substantially independent of one another in their management and in the functioning of their Boards of Directors.

In determining the size of the adjustment, the litigation team should consider the following points: (1) similarity of the violation in question to prior violations; (2) time elapsed since the prior violation; (3) the number of prior violations; (4) violator's response to prior violations with regard to correcting the previous violation and attempts to avoid future violations; and (5) the extent to which the gravity component was already increased to reflect the repeated violation.

A history of noncompliance may reflect an owner's or operator's indifference to protection of the environment. Therefore, upward adjustments to the base penalty are warranted and may be calculated in the following manner: for second or subsequent violations of CAA § 112(r) or 40 C.F.R. Part 68, the gravity based component may be increased up to 100% provided that the final penalty does not exceed the $27,500 per day per violation statutory maximum.

(d) Environmental Damage

The gravity component already reflects the extent or potential extent of environmental damage, taking into account such factors as the toxicity of the pollutant, the sensitivity of the environment, the length of time the violation continues, and the degree to which the source has deviated from a requirement. However, there may be cases where the actual environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, in the case of a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

(e) Other Adjustment Factors

In settling cases brought under this Penalty Policy, EPA may consider other adjustment factors (besides the gravity adjustment factors above) when establishing an appropriate penalty. Statutory adjustment factors that may apply are the economic impact of the penalty on the business and payments made by the violator of penalties previously assessed for the same violation. In addition, EPA may consider litigation risks and supplemental environmental projects in any potential adjustments.

(i) Economic Impact of the Penalty (Ability to Pay)

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary figure, both gravity component and economic benefit component, using any economic information available at the time[8]. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business. For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

Enforcement personnel should conduct a preliminary inquiry into the financial status of the party against whom a proposed penalty is being assessed. This inquiry may include a review

[8] See "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," 5/28/96.

of publicly available information through services such as Dun & Bradstreet. Should the violator raise the Ability to Pay issue after commencement of negotiations, the litigation team should assess the factor only if the violator provides the necessary financial information to evaluate the claim. If the violator fails to provide sufficient information, then the litigation team should rely on the information it has in adjusting the penalty or disregard this factor entirely (as appropriate). The violator's ability to pay should be determined according to the December 16, 1986, Guidance on Determining a Violator's Ability to Pay a Civil Penalty, codified as PT 2-1 in the General Enforcement Policy Compendium (previously codified as GM-56). The relevant computer models used for determining the ability to pay are ABEL[9], used for businesses, and INDIPAY[10], used for individuals. In the case of municipalities or other local governmental bodies, the litigation team should assess the ability to pay using the MUNIPAY model.[11] Regions may also consider obtaining the services of a financial analyst for assistance in determining a violator's ability to pay.

If an alleged violator raises the ability to pay argument as a defense in its answer, or in the course of settlement negotiations, EPA should request the following types of information:

- 3 -5 years of signed tax returns plus schedules
- Balance sheets
- Income statements
- Statements of changes in financial position
- Statement of operations
- Retained earnings statements
- Loan applications, financing agreements, security agreements, business plans, financial projections
- Annual and quarterly reports to shareholders and the SEC, including 10K reports
- If a closely held corporation, the W-2 for the corporate officers

The burden of proof in ability to pay situations varies depending upon the forum in which the Agency finds itself. In judicial cases, the burden of proof is on the violator. In Administrative Procedures Act (APA) type hearings, the burden is on the Agency.[12] In informal administrative hearings, the burden is arguably on the violator. While discovery is readily

---

[9] ABEL is found at http://www.epa.gov/oeca/models/abel.html.

[10] INDIPAY is found at http://www.epa.gov/oeca/models/indipay.html.

[11] MUNIPAY is found at http://www.epa.gov/oeca/models/munipay.html.

[12] In re: New Waterbury, Ltd. 5 E.A.D. 529 (1994). In this case, the Environmental Appeals Board (EAB) included a detailed discussion regarding the burdens on the parties to present evidence of the Respondent's ability to pay a penalty. The EAB refined this analysis in In re: Robert Wallin (slip opinion, May 30, 2001) by requiring the Respondent to present specific inability-to-pay information once EPA has satisfied its initial burden of producing general financial information regarding Respondent's financial status (e.g., its sales volume or apparent solvency) sufficient to support the inference that the penalty assessment need not be reduced.

available in federal district court, it is much less available in APA hearings. It is essential that the litigation team make the presiding officer aware of what financial records the Agency needs in order to perform a professional ability to pay analysis early in the proceedings.[13]

Finally, in the event that the violator is a small business, Regions should refer to and apply all relevant factors given in EPA's Small Business Compliance Policy[14]. For reference, the Small Business Compliance Policy contains the following definition of a small business:

> A small business is a person, corporation, partnership, or other entity that employs 100 or fewer individuals (across all facilities and operations owned by the small business). Entities, as defined under SBREFA, also include small governments and small organizations. Facilities that are operated by municipalities or other local governments may be covered under the Small Communities Policy (see http://www.epa.gov/oeca/scpolcy.html). Facilities that are disclosing violations involving multiple facilities should refer to the sections on multiple facilities in the Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (the Audit Policy) of April 11, 2000.

(ii) Litigation Risks

Both the economic benefit and gravity components of the penalty may be mitigated in appropriate circumstances based on the risk of litigation. The following list briefly describes some of the types of litigation risks which should be considered in each case:

- Indications by the Court that it is prepared to recommend a penalty below the minimum settlement amount;
- Credibility of government witnesses;
- Specific facts, equities, evidentiary issues or other legal problems of a particular case; and
- Adverse legal precedent affirmatively argued by the violator which is indistinguishable from the current enforcement action.

Cases raising legal issues of first impression (i.e., new statutory laws or new regulations, such as the Program regulations) should be carefully chosen to present the issues fairly in a factual context EPA is prepared to litigate. Consequently, in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. Mitigation based on litigation risk should be carefully documented and explained in particular detail in each case.

---

[13] For further guidance in this area, see Appendix A of the ability to pay case memorandum, available from the Multimedia Enforcement Division of the Office of Regulatory Enforcement, (202) 564-2230.

[14]The Small Business Policy can be found at http://www.epa.gov/oeca/sbcp2000.pdf and applies to violations which have been disclosed and corrected the by facility.

(iii) Offsetting Penalties Paid to State and Local Governments or Citizen Groups for the Same Violations

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

(iv) Supplemental Environmental Projects (SEPs)

To further the goals of the EPA to protect and enhance public health and the environment, certain environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement.[15] SEPs are environmentally beneficial projects which an owner or operator agrees to undertake in settlement of an environmental enforcement action, but which the violator is not otherwise legally required to perform. In return, some percentage of the cost of the SEP is considered as a factor in establishing the final penalty to be paid by the owner or operator.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. The commitment to perform a SEP may indicate an owner's or operator's new or extraordinary efforts to be a good environmental citizen. While SEPs may not be appropriate in settlement of all cases, they are an important part of EPA's enforcement program. EPA's litigation team has the sole discretion to include a SEP as part of a settlement of an enforcement action. EPA should ensure that the inclusion of a SEP in the settlement is consistent with EPA's SEP Policy in effect at the time of the settlement. While the cost of a SEP may be used to mitigate a penalty for the purposes of settlement, it is not to be used as an adjustment factor in litigation.

C. Settlement of Penalties

This Penalty Policy is immediately applicable and should be used to calculate penalties sought in all Program administrative complaints or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the policy, regardless of the date of the violation. To the maximum extent practicable, the policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the policy is issued.

---

[15] EPA's May 1, 1998, Supplemental Environmental Projects Policy can be found at http://www.epa.gov/oeca/sep/sepfinal.html.

D. Documentation of Penalty Settlement Amount

Until settlement discussions or the pre-hearing information exchanges are held with the owner or operator, mitigating and equitable factors and overall strength of EPA's enforcement case may be difficult to assess. Accordingly, preparation of a penalty calculation worksheet for purposes of establishing EPA's settlement position on penalty amount may not be feasible prior to the time that negotiations with the violator commence. Once the violator has presented the Region with its best arguments relative to penalty mitigation, the Region may, at its discretion, complete a penalty calculation worksheet to establish its initial bottom line settlement position. However, at a minimum, prior to final approval of any settlement, whether administrative or judicial, enforcement personnel should complete a final worksheet and narrative explanation which provides the rationale for the final settlement amount to be included in the case file for internal management use and oversight purposes only. As noted above, enforcement personnel may, in arriving at a penalty settlement amount, deviate significantly from the penalty amount sought in an administrative complaint, provided such discretion is exercised in accordance with the provisions of this policy.

## V Other Policies

Regions should consult the following policies, some of which have already been mentioned in this CEP, as appropriate. Also, distributing a SBREFA information sheet is required at the time of the first enforcement action (which includes an inspection):

- CAA Stationary Civil Penalty Policy, October 25, 1991.
- Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Audit Policy)[16], effective May 11, 2000.
- Small Business Compliance Policy
- Policy on Flexible State Enforcement Responses to Small Community Violations, November 1995[17]
- Supplemental Environmental Projects Policy
- Timely and Appropriate (T&A) Enforcement Response To High Priority Violations (HPVs)
- Equal Access to Justice Act

Note that both the audit and the small business policies control where facilities meet the conditions of those policies.

---

[16] Found at http://www.epa.gov/oeca/finalpolstate.pdf

[17] http://www.epa.gov/oeca/scpolicy.html

## VI Conclusion

Establishing fair, consistent, and sensible guidelines for addressing violators is central to the credibility of the EPA's enforcement effort of the CAA § 112(r) and to the success of achieving the goal of equitable treatment. This policy establishes several mechanisms to promote consistency and flexibility when determining significant violations of the regulations. Also, the systematic methods for calculating the economic benefit and gravity component base penalties, which add up to the preliminary deterrence amount, both have the consistency and flexibility to address any issue fairly (tailored to the specific circumstances of the violation). Furthermore, this policy sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount after negotiations have begun.

In order to ensure that EPA promotes consistency, it is essential that each case file contain a complete description of how each penalty was calculated as required by the August 9, 1990, Guidance on Documenting Penalty Calculations and Justification in EPA Enforcement Actions[18]. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. Furthermore, it should explain the facts and reasons which support such adjustments.

[18] http://www.epa.gov/oeca/ore/rcra/cmp/080990.pdf

## NOTICE OF SECURITIES AND EXCHANGE COMMISSION REGISTRANTS' DUTY TO DISCLOSE ENVIRONMENTAL LEGAL PROCEEDINGS

Securities and Exchange Commission regulations require companies registered with the SEC (e.g., publicly traded companies) to disclose, on at least a quarterly basis, the existence of certain administrative or judicial proceedings taken against them arising under Federal, State or local provisions that have the primary purpose of protecting the environment. Instruction 5 to Item 103 of the SEC's Regulation S-K (17 CFR 229.103) requires disclosure of these environmental legal proceedings. For those SEC registrants that use the SEC's "small business issuer" reporting system, Instructions 1-4 to Item 103 of the SEC's Regulation S-B (17 CFR 228.103) requires disclosure of these environmental legal proceedings.

If you are an SEC registrant, you have a duty to disclose the existence of pending or known to be contemplated environmental legal proceedings that meet any of the following criteria (17 CFR 229.103(5)(A)-(C)):

A. Such proceeding is material to the business or financial condition of the registrant;
B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

Specific information regarding the environmental legal proceedings that must be disclosed is set forth in Item 103 of Regulation S-K or, for registrants using the "small business issuer" reporting system, Item 103(a)-(b) of Regulation S-B. If disclosure is required, it must briefly describe the proceeding, "including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought."

You have been identified as a party to an environmental legal proceeding to which the United States government is, or was, a party. If you are an SEC registrant, this environmental legal proceeding may trigger, or may already have triggered, the disclosure obligation under the SEC regulations described above.

This notice is being provided to inform you of SEC registrants' duty to disclose any relevant environmental legal proceedings to the SEC. This notice does not create, modify or interpret any existing legal obligations, it is not intended to be an exhaustive description of the legally applicable requirements and it is not a substitute for regulations published in the Code of Federal Regulations. This notice has been issued to you for information purposes only. No determination of the applicability of this reporting requirement to your company has been made by any governmental entity. You should seek competent counsel in determining the applicability of these and other SEC requirements to the environmental legal proceeding at issue, as well as any other proceedings known to be contemplated by governmental authorities.

If you have any questions about the SEC's environmental disclosure requirements, please contact the SEC Office of the Special Senior Counsel for Disclosure Operations at (202) 942-1888.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

| | | |
|---|---|---|
| In the Matter of:<br><br>Inergy Midstream, LLC,<br>7535 Eagle Valley Road<br>Savona, New York,<br><br>Respondent. | ) ) ) ) ) ) ) ) ) | Docket No. CAA-02-2009-1226<br><br>Administrative Complaint under Section 113 of the Clean Air Act, 42 U.S.C. §7413 |

**CERTIFICATION OF SERVICE**

I certify that the foregoing Administrative Complaint has been sent this day in the following manner to the addresses listed below:

Original and one copy by hand delivery to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by certified mail to:

Inergy Midstream, LLC
7535 Eagle Valley Road
Savona, New York 14879-9784
Attn: Barry Moon, Facility Superintendent

Brody Smith
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355

Date: 10/1/09

Name: Brenda Hadley

Title: Branch Secretary

Address: 290 Broadway
New York, NY 10007