

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR



IN THE MATTER OF)
)
CROWN CENTRAL PETROLEUM) **DOCKET NO. CWA-08-2000-06**
CORP.,)
)
RESPONDENT)

INITIAL DECISION

Federal Water Pollution Control Act (“Clean Water Act”): Pursuant to Section 311(b)(6)(B)(ii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii), Respondent, Crown Central Petroleum Corporation, is assessed a civil penalty of \$137,300 for violating Section 311(b)(6)(A)(i) and Section 311(b)(6)(A)(ii) of the Clean Water Act.

Barbara A. Gunning
Administrative Law Judge

Appearances:

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INTRODUCTION

This civil administrative penalty proceeding arises under the authority of Section 311(b)(6)(B)(ii) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(6)(B)(ii), commonly referred to as the Clean Water Act (“CWA”), as amended by the Oil Pollution Act (“OPA”) of 1990. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the “Rules of Practice”), 40 C.F.R. §§ 22.1-22.32.

The United States Environmental Protection Agency (the “EPA” or “Complainant”) initiated this proceeding by filing with the Regional Hearing Clerk a Complaint against Respondent Crown Central Petroleum Corporation (“Respondent”) on March 31, 2000. The Complaint charges Respondent with two (2) violations of Sections 311(b)(6)(A)(i) and 311(b)(6)(A)(ii) of the Clean Water Act. The Complaint proposes a civil administrative penalty of \$137,300 for the alleged violations.

Specifically, Count I of the Complaint charges that Respondent operated a facility regulated under the Oil Pollution Prevention regulations, 40 C.F.R. Part 112, without implementing a Spill Prevention Control and Countermeasure Plan (“SPCC Plan”) for the period from March 25, 1998 through July 30, 1999, in violation of Section 311(b)(6)(A)(ii) of the Clean Water Act and the implementing regulations at 40 C.F.R. Part 112 (“SPCC regulations”). Count II charges that Respondent, on or about June 4, 1998, discharged approximately 285 to 300 barrels of oil from its facility into or upon navigable waters of the United States in violation of Section 311(b)(6)(A)(i) of the Clean Water Act. The Complaint proposes a penalty of \$63,050 for the SPCC violation and a penalty of \$74,250 for the oil spill violation.

An evidentiary hearing was held in this matter in Denver, Colorado, from May 15 to 17, 2001. Both parties have filed post-hearing briefs and post-hearing reply briefs.^{1/}

^{1/} A Motion for Accelerated Decision was filed by the EPA on April 19, 2001, and an Opposition to Motion for Accelerated Decision was filed by Respondent on May 1, 2001. The EPA filed a Rebuttal to Respondent’s Opposition to Complainant’s Motion for Accelerated Decision on May 10, 2001. None of these filings was received by the Office of Administrative Law Judges prior to the commencement of the hearing on May 15, 2001.

FINDINGS OF FACT

1. Respondent Crown Central Petroleum Corporation is a corporation organized and existing under the laws of the State of Maryland and is authorized to do business in the State of Wyoming. Joint Stipulations, Fact ¶ 1.

2. At all relevant times, Respondent is and has been an “operator” of the Maverick Springs Field Facility (“Facility”), which consists of lease numbers 7746, 7747, and 7749. Joint Stipulations, Fact ¶ 2; Stip. Ex. 1, SPCC Plan; Stip. Ex. 40, 43; Tr. at 631 (Calvert); Compl. Ex. 21: Video. The Facility is located within the exterior boundaries of the Wind River Indian Reservation and is held in trust by the Federal Government on behalf of the Shoshone and Arapaho Tribes. *See* Stip. Ex. 40; Tr. at 342-42 (Yates). The leases on the Facility were obtained from the United States Department of Interior, Bureau of Indian Affairs (“BIA”), Wind River Agency, Fort Washakie, Wyoming and have been in operation since approximately 1918. Joint Stipulations, Fact ¶ 3; Stip. Ex. 40; Tr. at 632 (Calvert). Crude oil production has been conducted at the Facility for at least fifty (50) years. *See* Stip. Ex. 2.

3. Respondent is not an “owner” of the Maverick Springs Field Facility. Joint Stipulations, Fact ¶ 17.

4. Respondent is responsible for maintaining the oil and gas production facilities on the Facility and owns the gathering equipment and storage tanks. *See* Stip. Exs. 9, 40. Respondent has a contract with Nucor, Inc. to control daily operations and maintenance of the Facility. Joint Stipulations, Fact ¶ 8; Stip. Ex. 40.

5. In 1994, Respondent submitted a sundry notice to the Bureau of Land Management (“BLM”) for permission to plug and abandon all the wells at the Facility. Tr. at 342 (Yates). There is no evidence that BLM responded to that sundry notice. *Id.* Respondent submitted an “Application for Surrender” of Tribal Leases # 7746, # 7747, and # 7749 on October 26, 1995 to the BIA. Stip. Ex. 25; Joint Stipulations, Fact ¶ 16, Tr. at 342-43 (Yates). The BIA has not notified Respondent of any action regarding that Application. Tr. at 347 (Yates).

6. The production wells on Lease # 7746 were “shut in” and were not producing oil after May 6, 1998, and the wells on Lease # 7749 were shut in on May 30, 1998. Tr. at 338-40 (Yates), 396 (Yates), 633 (Calvert); Stip. Ex. 31. At no time did Respondent permanently discontinue its use of the Facility: Respondent continued to use the discharge pits for storage of produced water and the 5,000 barrel slop oil tank for storage and transfer of waste oil; Nucor was transferring waste oil from the 5,000 barrel slop oil tank into a process tank on June 4, 1998. *See e.g.* Stip. Ex. 8 (color photo log); Stip. Ex. 2; Answer ¶ 21; Tr. at 659-60 (Calvert).

7. Up to the date of the hearing, some of the wells had been plugged and abandoned but sixteen (16) wells had only been “shut in.” Tr. at 339 (Yates), 348-49 (Yates), 356-57 (Yates), 362 (Yates). To plug and abandon a well, cement is filled in the well, equipment is removed, and a metal plate is

welded into the ground. Tr. at 362-63 (Yates), 634-635 (Calvert). A “shut-in” well is capable of producing oil. Tr. at 356-57 (Yates). Shutting-in a well is a temporary method of stopping oil production and can be accomplished by turning off a valve or pump. Tr. at 362 (Yates), 634 (Calvert). After the shut-in of some wells at the Facility, oil continued to be stored, transferred or treated for sale at the Facility. Tr. at 385-89 (Yates); Stip. Ex. 29.

8. The Facility leases expired when they ceased to produce oil and/or gas in “paying quantities.” Tr. at 394 (Yates). Oil, which was to be sold, was present in the 5,000 barrel slop oil tank at all relevant times. Tr. at 288 (Harrison); Stip. Ex. 2. Respondent continued to be an operator of the Facility after the expiration of the leases. The BLM will not recommend that the BIA approve the surrender of oil Facility leases, such as Respondent’s, until Respondent is in compliance with BLM regulations. Tr. at 323-24 (Harrison). As of the date of the hearing, Respondent had not obtained BLM approval to plug and abandon sixteen (16) wells at Respondent’s Facility. Tr. at 341 (Yates).

9. At all relevant times, the Facility was a non-transportation-related onshore facility engaged in producing and/or storing oil. *See* Stip. Ex. 1, SPCC Plan; Stip. Ex. 43; Compl. Ex. 21: Video.

10. At all relevant times, the Facility was not constantly manned or supervised. Tr. at 113 (Nakad), 149 (Nakad), 210 (Litchford).

11. As part of the oil production process at the Facility, large quantities of water mixed with oil are produced. Tr. at 151 (Nakad). Produced oil, water, and gas are separated in tanks by gravity, heat, and emulsion breaking chemicals. Stip. Ex. 43. Initially, the water and oil are separated utilizing a heater treater and vertical treater, which separate the oil from the water. Tr. at 152 (Nakad). The separated oil is stored in tank batteries, which are located uphill from the incise channel, the discharge stream, and the Unnamed Creek. *See* Stip. Exs. 1: Map, 2; Compl. Ex. 21: Video. Oil remaining mixed with the produced water is piped downgradient into two large discharge pits (or “skimming pits”) in use by the Facility. Tr. at 248-49 (Harrison), 631 (Calvert); Stip. Ex. 43. Oil, which is lighter than water, rises to the top of the pits where it is to be removed by skimming or vacuuming by the Facility operator. Tr. at 180 (Nakad); Stip. Ex. 1: SPCC Plan. The water, which is heavier than oil, is discharged from the pits through T-siphons. *See* Stip. Exs. 2, 7 (black and white photo logs); Compl. Ex. 21: Video. The upper pit discharges into the lower pit, and any remaining oil is to be removed prior to the discharge of the produced water through an outfall point. *See* Stip. Exs. 2, 7 (black and white photo logs); Stip. Ex. 43; Compl. Ex. 21. The outfall point is a pipe that discharges into the discharge stream (a.k.a. “unnamed drainage”). *See id.* The skimmed oil is stored in a 5,000 barrel slop oil tank. *See id.*

12. At the top of hilly terrain, there are several tank batteries, on leases # 7746, 7747, and 7749. *See* Ex. 1: SPCC Plan – Map, 2, 7; Compl. Ex. 21: Video. The 5,000 barrel slop oil tank is one of the tanks on lease # 7749. *See id.* Downhill from the tank batteries on leases 7747 and 7749 are the two large discharge pits. *See id.*

13. The discharge stream consists of a combination of produced waters from the discharge pits, water seeps, and the occasional rainfall and other precipitation. Tr. at 544 (Goedert); Stip. Ex. 2.

The discharge stream is an intermittently flowing stream, whose flow depends on produced water and occasionally rainwater and water seeps. Tr. at 83 (Nakad), 293 (Harrison), 451 (Hawthorne), 503 (Goedert), 543 (Goedert), and 692-93 (Calvert). The discharge stream usually had water flowing in it up until at least the end of May 1998. Tr. at 694 (Calvert); Stip. Ex. 29. The discharge stream primarily has carried “produced water” released pursuant to the Facility’s National Pollutant Discharge Elimination Systems (“NPDES”) permit. Tr. at 692-94 (Calvert). On lease #7749 for the month of May 1998, Respondent produced more than 14 million gallons (346,158 barrels) of water for eventual discharge. *See* Stip. Ex. 29.

14. The Facility is located in an area of rough terrain which is highly susceptible to erosion. Tr. at 408-09 (Aragon). The Facility periodically experiences flash floods, cloudbursts, and snowmelts. Tr. at 175 (Nakad), 408 (Aragon), 475 (Hawthorne); Stip. Ex. 2 (report).

15. The Facility is situated within a natural drainage system consisting of gullies, natural contours in the land, and a large incise channel, which have been naturally created by rainfall and other precipitation. Tr. at 84 (Nakad), 202 (Litchford), 213 (Litchford), 227-28 (Litchford), 681-84 (Calvert), 715-16 (Calvert); Stip. Ex. 8 at 1. Proceeding downhill and southward from the 5,000 barrel slop oil tank, there are gullies and natural contours in the land that lead to a large incise channel. *See* Stip. Ex. 2 (black and white photo log); Compl. Ex. 21: Video. The incise channel has been formed by erosion and rain runoff over a period of two to three years. Tr. at 84 (Nakad), 103 (Nakad), 715-16 (Calvert). The incise channel, which is parallel to the discharge pits, is three to five (3-5) feet away from the discharge pits, at some points. *See* Stip. Exs. 2 and 7 (black and white photo logs); Compl. Ex. 21: Video. The natural drainage system, including the incise channel, is comprised of intermittently flowing water, including natural water seeps. Tr. at 176 (Nakad), 409 (Aragon), 544 (Goedert); Stip. Ex. 2. The natural drainage system, including the incise channel, carries a large volume of water when there is precipitation. Stip. Exs. 2 and 7; Tr. at 692-95 (Calvert). The incise channel ranges from one to five (1-5) feet in depth and is at least two (2) feet wide. *See* Compl. Ex. 21: Video; Stip. Exs. 2, 7, and 8 (photo logs); Tr. at 176 (Nakad). The incise channel is a well-defined water pathway. Tr. at 213 (Litchford). Waters from the natural drainage system, including the incise channel, bypass the discharge pits and bypass the outfall point of the lower discharge pit. *See* Compl. Ex. 21: Video; Stip. Exs. 2, 7, and 8 (photo logs). The incise channel then converges with the discharge stream (a.k.a. “unnamed drainage”) about 30 yards downstream from the outfall point. *See* Tr. at 84 (Nakad), 94-95 (Nakad), 177 (Nakad), 191 (Nakad), 212 (Litchford); Stip. Exs. 2 (black and white photo log), 7 (black and white photo log), and 8 (color photo log); Compl. Ex. 21: Video. This confluence of the discharge stream and the incise channel forms a creek which is referred to hereinafter as the “Unnamed Creek.” During heavy rains, water flows through the incise channel and into the Unnamed Creek. Tr. at 236 (Litchford), 238 (Litchford).

16. The Unnamed Creek consists of a combination of produced waters, water seeps, and water from precipitation. Tr. at 203 (Litchford), 213 (Litchford), 407-09 (Aragon), 417 (Aragon), 544 (Goedert), 692-93 (Calvert); Stip. Ex. 2. Water occasionally flows in the Unnamed Creek even when the Facility is not discharging produced water through the outfall point. Tr. at 177 (Nakad). At various times, the Unnamed Creek carries a large volume of water. Tr. at 503 (Goedert). The

Unnamed Creek eventually flows at intermittent times through Blue Draw and into Five Mile Creek, which is approximately one mile south of the outfall point, and the Unnamed Creek is a tributary to Five Mile Creek. Tr. at 83 (Nakad), 94 (Nakad), 103 (Nakad), 212 (Litchford), 227 (Litchford), 409-11 (Aragon), and 693 (Calvert); Stip. Ex. 8. Blue Draw is a canyon and a catchment for several discharge streams fed mainly by produced water from several oil fields, and it is a tributary of Five Mile Creek. Tr. at 211-12 (Litchford), 411 (Aragon). Five Mile Creek flows into Boysen Reservoir. Tr. at 83 (Nakad), 409-10 (Aragon). Boysen Reservoir (with its dam) is a large body of water that stores the water for the Wind River Reservation and provides drinking water for the two towns of Thermopolis, Wyoming and Worland, Wyoming. Tr. at 410 (Aragon). Boysen Reservoir is also used for recreational activities including fishing. *Id.* Boysen Reservoir is large enough to afford the passage of at least some small boats or other waterborne crafts. The Facility's outfall point is no more than 25 miles away from the dam in Boysen Reservoir. *Id.*

17. The incise channel in the natural drainage system, the discharge stream, the Unnamed Creek, Blue Draw, Five Mile Creek, and Boysen Reservoir are all "waters of the United States." The incise channel, the discharge stream, the Unnamed Creek, Blue Draw, and Five Mile Creek are tributaries of Boysen Reservoir. Tr. at 83 (Nakad), 94 (Nakad), 212 (Litchford), 227 (Litchford), 409-10 (Aragon), and 693 (Calvert); Stip. Ex. 8; Photo Logs from Stip. Exs. 2, 7, 8, and 43; Compl. Ex. 21: Videotape. Boysen Reservoir is navigable-in-fact. *See* Tr. at 410-11 (Aragon). The discharge stream, the Unnamed Creek, and Blue Draw are all at least partly used for the purpose of discharging water produced during the production of oil, which is to be sold in interstate commerce. *See* Stip. Ex. 43; Tr. at 358-59 (Yates), 411 (Aragon), 659-60 (Calvert).

18. The Facility, due to its location and geographical characteristics, could reasonably be expected to discharge oil in harmful quantities into navigable waters or the adjoining shorelines of such waters. Specifically, the Facility is positioned so that spilled oil from the tank batteries and the 5,000 barrel slop oil tank will flow downgradient and then into the incise channel and the Unnamed Creek. *See* Tr. at 83 (Nakad), 191-92 (Nakad), 211 (Litchford); Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video.

19. The Facility has an unburied storage capacity greater than 1,320 gallons of oil and has at least one single container above ground with a storage capacity greater than 660 gallons of oil. Answer ¶ 9. The Facility has an oil storage capacity of 462,000 gallons. Tr. at 568-69 (Nakad), 617 (Nakad). The largest tank at the Facility is a 5,000 barrel slop oil tank located on lease number 7749, which has an oil storage capacity of 210,000 gallons. Tr. at 570 (Nakad).

20. Produced water is discharged out of the large discharge pits pursuant to NPDES permit # WY-0000469. *See* Stip. Ex. 43. That permit authorizes the discharge of produced water from the Facility through an outfall point to the receiving waters designated as: "Blue Draw via unnamed drainage." *See* Joint Stipulations, Fact ¶ 14; Stip. Ex. 1: SPCC Plan; Stip. Ex. 43; Tr. at 178 (Nakad), 431 (Aragon). Discharges at other locations are not authorized by the permit. *See* Stip. Ex. 43, at 5. The Facility's NPDES permit prohibits either of the following: (a) a 10 milligram per liter concentration of oil in the receiving water and (b) a visible sheen in the receiving water or its shorelines. Stip. Ex. 43; Tr. at 368-69 (Yates). The discharge stream and the Unnamed Creek are the same "unnamed

drainage” as described in the Facility’s discharge permit. Joint Stipulations, Fact ¶ 14; Stip. Ex. 43.

21. The Facility prepared a Spill Prevention Control and Countermeasure (“SPCC”) Plan on January 15, 1992. Joint Stipulations, Fact ¶ 4; Stip. Ex. 1: SPCC Plan.

22. At all relevant times, the 5,000 barrel slop oil tank was not listed in the SPCC Plan. *See* Stip. Ex. 1: SPCC Plan; Stip. Ex. 2; Tr. at 371-72 (Yates).

23. The Facility’s SPCC Plan provided that trenches would direct oil spills from the oil tank area to the discharge pits (a.k.a. “skimming pits”), where the oil would later be collected and pumped back into tanks. Joint Stipulations, Fact ¶ 4; Stip. Ex. 1: SPCC Plan; Tr. at 148 (Nakad). The SPCC Plan stated that the Facility was to be under “constant supervision.” Stip. Ex. 1: SPCC Plan. The SPCC Plan provided that a spill of more than 10,000 gallons (or approximately 240 barrels) is a “major” oil spill. *See id.* The SPCC Plan provided that the Respondent was to promptly repair oil leaks and the accumulations of oil in drainage ditches. Stip. Ex. 1: SPCC Plan, Attachment 4.

24. Respondent prepared an Oil Spill Contingency Plan, which is attached to its SPCC Plan, to control and remove any harmful oil discharge for occasions when a reportable oil spill might occur. Joint Stipulations, Fact ¶ 5; Stip. Ex. 1. Such plan did not meet the requirements in order to qualify as a “*Strong* Oil Spill Contingency Plan.” *See* Stip. Ex. 1: Attachment; 40 C.F.R. Part 109.

25. Respondent has not demonstrated that the installation of diversionary structures or equipment to prevent discharges of oil from the tanks and treaters of the Facility from reaching navigable waters was impracticable. *See* Stip. Ex. 1, Attachment: SPCC Plan, Part II, Alternate B, page 3 of 3. Respondent’s Oil Spill Contingency Plan admits that secondary containment for the Facility is practicable, except as to flowlines. *See* Stip. Ex. 1: SPCC Plan, Attachment #2, “Oil Spill Contingency Plans and Written Commitment of Manpower.”

26. EPA inspectors conducted an unannounced inspection at the Facility on or about March 25, 1998. Joint Stipulations, Fact ¶ 6; Tr. at 82 (Nakad). At the time of that inspection, water was flowing in the incise channel, the discharge stream, and the Unnamed Creek. Tr. at 104-05 (Nakad).

27. The following violations were in existence at the time of the March 25, 1998 inspection: lack of appropriate secondary containment, tanks not engineered to prevent oil spills, oil traps and sumps allowed to overflow, pooling of oil or oil-saturated ground, open leaking pipes and valves, inadequate pipe supports, and the presence of a sheen on the discharge stream. Tr. at 88-91 (Nakad), 94 (Nakad), 96 (Nakad), 98 (Nakad), 102 (Nakad), 106-14 (Nakad), 135-37 (Nakad), 250 (Harrison); Stip. Ex. 7 (report and photo logs); Compl. Ex. 21: Video. There had been some overtopping of oil beyond the confines of the discharge pits and a sheen was observed in the discharge stream. Stip. Ex. 7 (black and white photo logs); Compl. Ex. 21: Video. There was oil seepage downhill from the tank battery for as far as 40 to 50 feet. *See id.*; Tr. at 98-99 (Nakad). At the time of the March 25, 1998 inspection, the Facility was actively producing oil and fresh oil was leaking in the vicinity of the tank batteries and the heater-treater. Tr. at 87-88 (Nakad), 135 (Nakad); Stip. Ex. 7 (black and white photo logs); Compl. Ex. 21: Video.

28. At the time of the March 25, 1998 inspection, Respondent did have a shallow berm, one foot in height, around one of the many tanks at its Facility. *See* Compl. Ex. 21: Video; Tr. at 111 (Nakad), 138 (Nakad). However, this extremely shallow berm was inadequate to contain a spill from the tank it served or any of the other tanks at the Facility. *See id.* Small emergency pits throughout the Facility were filled almost to capacity with oil. *See id.* These small emergency pits and the one shallow berm are insufficient to contain a moderate oil discharge. *See id.*; Stip. Ex. 7 (black and white photo log).

29. There was no adequate or appropriate secondary containment for the Facility at least as early as 1997 and as late as October 21, 1999. Tr. at 88-90 (Nakad), 109-110 (Nakad), 136-37 (Nakad), 168-71 (Nakad), 250 (Harrison), 328 (Harrison), 439 (Aragon), 723-25 (Calvert); Stip. Exs. 7 (black and white photo logs) and 8 (color photo log); Compl. Ex. 21: Video. Respondent did not have a dike in place for the 5,000 barrel slop oil tank prior to or at the March 25, 1998 inspection. *See id.* The “very small dike” Respondent alleged it had built as secondary containment prior to the March 25, 1998 inspection was not designed to control flash floods. Tr. at 636-37 (Calvert). At all relevant times, Respondent lacked trenches to direct oil discharges or any other appropriate mechanism to direct an oil spill into the discharge pits as provided in its SPCC Plan. Tr. at 101 (Nakad), 106 (Nakad), 109 (Nakad), 148 (Nakad), 310 (Harrison), 448 (Hawthorne), 475 (Hawthorne), 488-89 (Hawthorne), 507 (Goedert), 528 (Goedert), 656 (Calvert), 690 (Calvert); Stip. Exs. 2, 7, and 8; Compl. Ex. 21: Video.

30. In 1993, the BLM originally issued Onshore Order # 7, prohibiting the flow of surface water into produced water discharge pits. Tr. at 309 (Harrison). Prior to March 25, 1998, the BLM had verbally expressed concerns to Respondent about the secondary containment discharge pits. Tr. at 642-43 (Calvert). At the March 25, 1998 inspection, there were only six inches of freeboard and considerable erosion of the discharge pits, which put them in danger of breaching. Tr. at 254-55 (Harrison), 686 (Calvert); Stip. Exs. 26 and 27. A dead bird was recovered from the discharge pits. Tr. at 256 (Harrison). On April 2 and 8, 1998, the BLM issued written orders to Respondent reporting BLM’s findings at its inspection on March 25, 1998 and requiring Respondent to prevent the flow of surface water from entering the discharge pits, to reduce the amount of freeboard, and to perform maintenance on the pits. Tr. at 257 (Harrison), 651-63 (Calvert); Stip. Exs. 26 and 27. The BLM’s orders did not prevent Respondent from building an alternative form of secondary containment. *See* Stip. Exs. 26 and 27. Respondent failed to amend its SPCC Plan to account for any alleged conflict caused by the BLM’s orders and did not appeal the BLM’s orders. *See* Stip. Ex. 1: Attachment; Stip. Ex. 8.

31. On June 4, 1998, a field pumper for Nucor began pumping oil from the 5,000 barrel slop oil tank to the production tanks in an attempt to prepare the waste oil for sale. Tr. at 659-61 (Calvert). At about 5:30 p.m., Nucor elected to let the pump run overnight, leaving open a valve to transfer the waste oil from the 5,000 barrel slop oil tank. While the oil was being transferred on the evening of June 4, 1998, the connection between the two-inch flow line and pump failed, allowing the slop oil to discharge. Answer ¶ 21; Stip. Exs. 2, 11, and 40; Tr. at 659-60 (Calvert). The transfer of the oil precipitating the spill was for the purpose of preparing the oil to be sold in interstate commerce. Tr. at 386 (Yates), 389 (Yates), 659-60 (Calvert).

32. During the night of June 4, and the early hours of June 5, 1998, the 5,000 barrel slop oil tank spilled. The oil from that tank was a viscous substance. *See* Joint Stipulations, Fact ¶¶ 7, 14. The spill occurred due to equipment failure. Stip. Exs. 4, 5, 6, 11, and 40; Tr. at 478-79 (Hawthorne), 501-02 (Goedert), 660 (Calvert). The spill was discovered at about 6:30 a.m. on the morning of June 5, 1998. Joint Stipulations of Fact, ¶ 11; Tr. at 661-62 (Calvert).

33. No diking was in existence for the 5,000 barrel slop oil tank at the time of the spill. Stip. Ex. 2; Joint Stipulations, Fact ¶ 9. At the time of the spill, there were no trenches directing the oil spill from the oil tank into the discharge pits, as is required by the SPCC Plan. Tr. at 101 (Nakad), 310 (Harrison); Stip. Ex. 2 (black and white photo log). At the time of the spill, the Facility had not implemented any appropriate secondary containment system. Stip. Ex. 2 (black and white photo log); Tr. at 475 (Hawthorne); *see* Answer ¶ 42;. Respondent has not demonstrated that it was impracticable to have built trenches directing oil spills from the heater treater and the storage tanks into the discharge pits. *See* Stip. Ex. 1: Attachment. It was not impracticable to have implemented any appropriate secondary containment system for the heater treater and the storage tanks at the Facility. *See id.*

34. The oil spill discharged at least 290 barrels (approximately 12,180 gallons at 42 gallons per barrel) of crude slop oil. Stip. Exs. 30 and 34; Joint Stipulations, Fact ¶ 10; Tr. at 263 (Harrison), 660-61 (Calvert), 665 (Calvert). At the beginning of the oil spill, there were at least 1,100 barrels of oil stored in the 5,000 barrel tank. Tr. at 658-59 (Calvert). The oil spill flowed southward down the hill from the 5,000 barrel slop oil tank following the natural drainage into the incise channel and then flowed down the incise channel past the discharge pits and into the Unnamed Creek. Tr. at 267-69 (Harrison), 415-18 (Aragon), 440 (Aragon), 450-52 (Hawthorne), 474-75 (Hawthorne), 518 (Goedert), 664-65 (Calvert), 692 (Calvert), 733-34 (Calvert). The oil spill flowed southward downhill from the 5,000 barrel tank for a distance of about 300 yards at a width ranging from 2 feet to 20 feet to the Unnamed Creek and then flowed through the Unnamed Creek for at least another 200 yards in a direction towards Five Mile Creek. Stip. Exs. 11 and 30; Tr. at 450 (Hawthorne), 474-75 (Hawthorne), 659 (Calvert), 664-65 (Calvert), 692 (Calvert). The oil spill did not reach Five Mile Creek. Tr. at 354 (Yates), 539 (Goedert), 593 (Nakad), 672-65 (Calvert), 691 (Calvert).

35. On June 5, 1998, water from a spring and natural water seeps was running in the incise channel and in the Unnamed Creek. Tr. at 417-18 (Aragon), 543 (Goedert); Stip. Ex. 2. Immediately after the spill began, water was present in the Unnamed Creek. Tr. at 736 (Calvert). Rainwater and water seeps were in present in the Unnamed Creek at various times during the oil discharge. Tr. at 293 (Harrison), 417-18 (Aragon), 451-53 (Hawthorne), 503-04 (Goedert), 543 (Goedert). In addition, water was flowing under and past the T-siphon dam in the Unnamed Creek and towards Five Mile Creek at the time of the oil discharge. Tr. at 507-08 (Goedert), 536 (Goedert); Stip. Ex. 2 (Black and White Photo #1). Visible oil was seen in and upon flowing water in the incise channel and the Unnamed Creek on June 5 and June 12 of 1998. Tr. at 263 (Harrison), 417-18 (Aragon), 452 (Hawthorne). No produced water was being discharged into the incise channel, the discharge stream, the Unnamed Creek, or Blue Draw at the time of the oil spill. Tr. at 536-37 (Goedert), 632-33 (Calvert), 678-79 (Calvert); Stip. Ex. 29. No oil or sheen in the Unnamed Creek is shown to be the result of any discharge of oil which is authorized by Respondent's NPDES permit.

36. On June 5, 1998, Nucor mobilized a backhoe to the spill site and constructed two earthen containment dams in the Unnamed Creek to contain the flow of the oil. Joint Stipulations, Fact ¶ 11; Stip. Ex. 11; Tr. at 450-51 (Hawthorne). The oil spill was not completely contained by the earthen dams and visible oil flowed on the water in the Unnamed Creek past the lower earthen containment dam. Tr. at 266 (Harrison), 417-19 (Aragon), 452 (Hawthorne); *see* Stip. Ex. 11. The BLM expressed concerns to Respondent on June 5, 1998 that the earthen dams would be washed away by rain. Tr. at 265 (Harrison), 323 (Harrison). Some oil was recovered by vacuum sometime between June 5 and 7, 1998 by Respondent, who estimated that it recovered 200 barrels. Tr. at 263-64 (Harrison), 266 (Harrison), 505-06 (Goedert) Tr. at 667-68 (Calvert); Stip. Ex. 34. Respondent did not further remove any oil until June 12, 1998, when the EPA arrived at the Facility. *See* Tr. at 419-23 (Aragon), 451 (Hawthorne), 506-07 (Goedert). Fresh oil was seen pooled behind the lower earthen dam in the Unnamed Creek until June 12, 1998. Tr. at 266 (Harrison); Tr. at 417, 419-21, 423 (Aragon).

37. Respondent had difficulties obtaining the equipment and personnel it needed in order to clean up the spill in a timely manner. Tr. at 638-40 (Calvert). Rain and muddy conditions on June 9, 1998 complicated efforts to get heavy equipment into the area to clean up the oil on that day. Tr. at 295 (Harrison), 423-24 (Aragon), 449 (Hawthorne), 505 (Goedert); Stip. Ex. 30. The roads to the Facility were passable after the June 9, 1998 cloudburst no later than June 11, 1998. Tr. at 424 (Aragon).

38. Respondent did not have a contractor employed to clean up the oil spill until June 12, 1998, when the EPA arrived at the Facility. Tr. at 421-22 (Aragon), 671-72 (Calvert). On June 11 and 12 of 1998, pooled oil and oil-stained soil were still present behind the T-siphon dam (lower dam) in the Unnamed Creek. Joint Stipulations, Fact ¶ 12; Tr. at 423 (Aragon); Stip. Ex. 2. Respondent did not introduce water into the incise channel or the Unnamed Creek to assist in the removal of oil until June 12, 1998. Tr. at 422 (Aragon), 469-70 (Hawthorne), 544-45 (Goedert), and 739 (Calvert). On June 13, 1998, Respondent began excavation of soil in the Unnamed Creek upgradient from the lower containment dam where the fresh oil had stained the watercourse. Stip. Ex. 13. Ultimately, approximately 2,800 cubic yards of soil were excavated. Stip. Ex. 13; Tr. at 672 (Calvert).

39. A few drops of oil can create a sheen on water. Tr. 486-87 (Hawthorne).

40. The earthen dams created to stop the oil spill from reaching Five Mile Creek were washed out by heavy rains and by a water seep from the incise channel sometime between June 18 and June 26, 1998, resulting in a restaining of the cleaned portion of the Unnamed Creek. Tr. at 426 (Aragon), 522-24 (Goedert), 540 (Goedert), 544 (Goedert), 621 (Nakad); Stip. Ex. 2 (black and white photo #17). On June 18 and June 26, 1998, oil and oil sheens were seen on the Unnamed Creek. Tr. at 524 (Goedert), 580 (Nakad). The lowest dam constructed to contain the oil spill was 550 yards away from the 5,000 barrel oil tank, or approximately three-fourths of a mile away from Five Mile Creek. Tr. at 693 (Calvert). By June 26, 1998, Respondent had not completed its excavation of the bottom of the Unnamed Creek. Tr. at 526-27 (Goedert).

41. At all relevant times, Respondent lacked a written commitment of manpower, equipment, and

materials to expeditiously control an oil discharge. *See* Stip. Ex. 1: Attachment; Resp. Post-Hrg. Br. at 14.

42. Respondent did not construct secondary containment berms around its tanks, including the 5,000 barrel slop oil tank, until ordered by the EPA in July of 1998. Tr. at 462 (Hawthorne). A berm was finally completed around the 5,000 barrel slop oil tank by July 9, 1998. Stip. Ex. 38; Tr. at 315 (Harrison). The berms for the 1,000 and the 2,000 barrel production tanks on lease # 7749 were completed by July 14, 1998. *Id.* After the spill, the berm that was finally constructed for the 5,000 barrel slop oil tank was six feet high and bordered the tank on its west, south, and east sides on the downslope side of the tank and had a capacity of 5,900 barrels of oil. Tr. at 315-16 (Harrison), 658 (Calvert); Stip. Ex. 2 (Black and White Photo #19); Stip. Ex. 38.

43. Respondent spent approximately \$54,000 on oil spill clean-up activities. Tr. at 351 (Yates), 691 (Calvert); Stip. Ex. 41.

44. On October 21, 1999, Bob Litchford conducted an unannounced inspection of the Maverick Springs Facility. *See* Stip. Ex. 8. At the time of that inspection, Respondent still had not amended its SPCC Plan to list the 5,000 barrel slop oil tank on the tank list. *See id.* There were no trenches directing potential oil spills into the discharge pits, in violation of the SPCC Plan. *See id.* (color photo log). The SPCC Plan had not been reviewed every three years, as required by the regulations. *See id.* (report). Respondent did not have any appropriate secondary containment for tank groups on two of the three leases of which the Facility consists, in violation of both the SPCC Plan and the SPCC regulations. *See id.* (report and color photo log); Tr. at 229-230 (Litchford). Fresh oil was leaking from the heater-treater. Tr. at 208 (Litchford), 231 (Litchford). *See id.* Three to four (3-4) dead birds were recovered from the discharge pits. Stip. Ex. 8 (report and color photo log). The sloping geographical and locational characteristics of the two leases lacking appropriate secondary containment were such that oil would flow through the natural drainage system, then into the incise channel, and then into the Unnamed Creek and Blue Draw, which would flow into Five Mile Creek during periods of significant precipitation. Tr. at 211-12 (Litchford), 218 (Litchford), 229 (Litchford).

45. On July 30, 1999, Respondent and the EPA engaged in a confidential settlement conference pursuant to Federal Rule of Evidence 408. Tr. at 706 (Calvert). A few days prior to that settlement conference, Respondent's attorneys sent a letter to the EPA confirming a telephone conversation in which they agreed that their conference would be confidential pursuant to Rule 408. *See* Submission of Affidavits in Support of Crown Central Petroleum Corp.'s Motion to Strike, June 11, 2001: "Exhibit A," Affidavit of Scott W. Hardt, Esq.; Tr. at 40-41 (Swanson, Fognani).

46. The EPA calculated the cut-off date for the duration of the SPCC violation based on information obtained during the July 30, 1999 settlement conference. Tr. at 570-71 (Nakad). Rather than using October 21, 1999 as the ending date for the SPCC violation, the EPA used the July 30, 1999 date in selecting a more lenient cutoff date as to the duration of the SPCC penalty. Tr. at 709 (Mangone).

47. Under the applicable Penalty Policy, the seriousness of Respondent's SPCC violation warrants

a base penalty of \$35,500, based on its Facility's overall oil storage capacity of 462,000 gallons (with the largest tank having a 210,000 gallon capacity) and Respondent's "major noncompliance," which undermined its ability to prevent or respond to worst case spills through the implementation of both its Plan and the SPCC regulations. In addition, the secondary containment at the Facility from March 1998 to October 1999 was at least grossly inadequate. Respondent was in "major noncompliance" from at least March 25, 1998 through October 21, 1999.

48. The potential environmental impact of the SPCC violation was of "moderate impact" in that it would likely have a significant effect on navigable waters (other than a drinking water supply), adjoining shorelines, or vegetation (other than a sensitive ecosystem) due to factors such as proximity to water or adequacy of containment. This "moderate impact" warrants a 15% upward adjustment of the penalty.

49. Although the duration of the SPCC violation was nineteen (19) months, from March 25, 1998 through October 21, 1999, the shorter duration of sixteen (16) months used by the EPA in calculating the adjustment to the gravity penalty will not be disturbed. The sixteen-month duration of the SPCC violation warrants an 8% upward adjustment of the penalty. The penalty based on the statutory factor of seriousness is \$44,091.

50. Respondent's level of culpability for the SPCC violation warrants a 30% upward adjustment of the penalty to \$57,318. Respondent is and has been a sophisticated business that was knowledgeable or should have been knowledgeable about oil regulations.

51. No adjustments to the penalty for the SPCC violation are warranted based on the factors of mitigation, any other penalty for the same incident, economic impact on or benefit to the Respondent, or other matters as justice may require.

52. Respondent's history of prior violations warrants a 10% upward adjustment in the SPCC penalty.

53. The total penalty for the SPCC violation is \$63,050.

54. The seriousness of Respondent's oil discharge violation, based on the duration of the discharge, warrants a base penalty of \$67,500. The actual duration of the discharge was twenty-two (22) days. The EPA used its discretion to find a discharge duration of only nine (9) days, taking into account factors such as interference from adverse weather.

55. No adjustment to the discharge penalty based on culpability, economic benefit to the Respondent, other penalty for the same incident, economic impact on the Respondent, or other matters as justice requires are warranted. Respondent's mitigation of the discharge violation was adequate and does not warrant either an upwards or downwards adjustment in the discharge penalty.

56. Respondent's history of violations warrants a 10% upward adjustment of the oil discharge penalty.

57. The total penalty for the oil discharge violation is \$74,250.

CONCLUSIONS OF LAW

1. Respondent is a “person” within the meaning of Section 311 of the Clean Water Act. 33 U.S.C. § 1321(a)(7); 40 C.F.R. § 112.2 (1997-99).
2. Respondent is an “operator” of a non-transportation related “onshore facility” within the meaning of Section 311(a)(6) of the Clean Water Act and 40 C.F.R. § 112.3.
3. From at least March 25, 1998 to October 21, 1999, Respondent’s Facility had an oil storage capacity subjecting it to the requirements of the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.
4. The incise channel, the discharge stream, the Unnamed Creek, Blue Draw, Five Mile Creek, and Boysen Reservoir are “waters of the United States” and thus “navigable waters” within the meaning of Sections 502(7) and 311(j) of the Clean Water Act and its implementing regulations as to Oil Pollution Prevention, including Spill Prevention Control and Countermeasures (“SPCC”) at 40 C.F.R. Part 112. The incise channel, the discharge stream, the Unnamed Creek, Blue Draw, and Five Mile Creek are tributaries of a navigable-in-fact body of water within the meaning of 40 C.F.R. § 112.2. Boysen Reservoir is navigable-in-fact and a “navigable water” within the meaning of Sections 502(7) and 311 of the Clean Water Act.
5. Due to its location and geography, Respondent’s Facility could reasonably be expected to discharge oil in harmful quantities into Five Mile Creek, Blue Draw, the discharge stream, the Unnamed Creek, and the incise channel; therefore, Respondent is subject to the requirements of 40 C.F.R. § 112.3 to prepare and implement an SPCC Plan. *See* 40 C.F.R. § 112.1.
6. Respondent violated Section 311(j) of the CWA and the implementing SPCC regulations at 40 C.F.R. Part 112 for the period from March 25, 1998 to October 21, 1999 for its failure to implement an SPCC Plan.
7. Boysen Reservoir, Five Mile Creek, Blue Draw, the discharge stream, the Unnamed Creek, and the incise channel in the Facility’s natural drainage system are all “waters of the United States” and thus “navigable waters” within the meaning of Sections 502(7) and 311(b)(3) of the Clean Water Act and its implementing regulations as to Discharges of Oil at 40 C.F.R. Part 110 (1997). Five Mile Creek, Blue Draw, the discharge stream, the Unnamed Creek, and the incise channel are tributaries to Boysen Reservoir within the meaning of 40 C.F.R. § 110.1.
8. Beginning June 4, 1998 and continuing through June 26, 1998, Respondent’s Facility discharged

oil in harmful quantities into the Unnamed Creek and the incise channel, which are “waters of the United States” and thus “navigable waters” within the meaning of the Clean Water Act in violation of Section 311(b)(3) of the Clean Water Act, 33 U.S.C. § 1321(b)(3).

9. Liability for civil administrative actions brought pursuant to Section 311(b)(6) of the Clean Water Act are subject to strict liability, 33 U.S.C. § 1321(b)(6).

10. An appropriate and reasonable civil administrative penalty for Respondent’s violation of Section 311(j) of the Clean Water Act and its implementing SPCC regulations at 40 C.F.R. §§ 112.3, 112.7 (1997-99) for its failure to implement an SPCC Plan is \$63,050. CWA § 311(b)(8); 33 U.S.C. § 1321(b)(8).

11. An appropriate and reasonable civil administrative penalty for Respondent’s violation of Section 311(b)(3) of the Clean Water Act and its implementing oil discharge regulations at 40 C.F.R. Part 110 (1997) is \$74,250. CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8).

RULINGS ON ADMISSIBILITY OF PARTIES’ PROFFERED EVIDENCE

Before proceeding into a discussion of the relevant liability and penalty issues in this matter, I first address evidentiary matters that arose at the hearing.

Admissibility of Color Photographs in Stipulated Exhibits 2 and 7

Prior to the hearing, the parties filed stipulations and stipulated exhibits. The stipulated exhibits include Stipulated Exhibit 2, which reads as follows: “US EPA Region VIII Site Activities Report, Contract No. 68-W5-0031, prepared by the Superfund Technical Assessment and Response Team (August 21, 1998). (EPA’s copy of this report contains color copies of the photographs; however, the original photographs have been included per the ALJ’s order as Exhibit 2A.) (Cmpl. Ex. 2.” Stipulated Exhibit 7 is “US EPA SPCC Compliance Inspection Report for Onshore Oil Production Facilities prepared by Jane Nakad for Crown Central Petroleum Corporation, Maverick Springs Field (March 25, 1998). (Cmpl. Ex. 7).” At the beginning of the hearing on May 15, 2001, the EPA moved to introduce into the record all the stipulated exhibits, including Stipulated Exhibits 2 and 7 with their color photographs identified in those exhibits. Respondent objected. Tr. at 26-27 (Fognani).

Section 22.22(a) of the Rules of Practice, in pertinent part, provides:

If, however, a party fails to *provide any document, exhibit*, witness name or summary of expected testimony required to be exchanged under Sec. 22.19 (a), (e) or (f) *to all parties* at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good

cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

40 C.F.R. § 22.22(a) (1999) (emphasis supplied).

Pursuant to Section 22.19(a) of the Rules of Practice, the undersigned issued a Prehearing Order, which directed the parties to submit “[C]opies of all documents and exhibits which each party intends to introduce into evidence at the hearing.” Prehearing Order at 2, Nov. 14, 2000. The Rules of Practice require that “[E]ach party shall file a prehearing information exchange” with the Regional Hearing Clerk. 40 C.F.R. §§ 22.19(a), 22.5(a). Furthermore, a copy of each document filed must be served on each party. 40 C.F.R. § 22.5(b).

Respondent moved to exclude the color photographs included in Stipulated Exhibits 2 and 7 on the ground that the EPA had failed to provide them to Respondent 15 days before the hearing date. Tr. at 26-27 (Fognani). In contrast, Respondent stipulated to the color photographs included in Stipulated Exhibit 8 because it did receive them in the prehearing exchange. Tr. at 27 (Fognani), 34 (Fognani). Respondent claimed that it did not receive color photocopies of the color photographs included in Stipulated Exhibits 2 and 7 until the day of the hearing. *Id.* Instead, Respondent stated that it had only received black and white photocopies of the color photographs. Tr. at 34 (Fognani).

The EPA admitted that it had not provided color photocopies of the color photographs to the Respondent prior to the date of the hearing. Tr. at 31 (Mangone). However, the EPA argued that the color photographs should be admissible because the EPA provided them to (or filed them with) the Regional Hearing Clerk before the 15-day deadline. Tr. at 28 (Swanson), 30-32 (Mangone). Furthermore, the EPA argued that the black and white photocopies of the color photographs were “the same.” Tr. at 28 (Swanson), 32 (Mangone). I conclude that merely providing the color photographs to the Regional Hearing Clerk, as in this case, was not sufficient because the Rules of Practice clearly require the EPA to provide either the original color photographs or color photocopies of the color photographs to its opposing party, the Respondent. *See* 40 C.F.R. § 22.5(b).

The issue remains as to whether the EPA had “good cause” for its failure to provide color photocopies of the color photographs to Respondent prior to the 15-day deadline. The EPA indicated some reasons for its failure to provide Respondent with the color photographs, including miscommunication within its staff, their inaccurate records as to what photographs had been exchanged, the insufficiencies of one of its copy centers, and personal matters. Tr. at 35 (Swanson). I observe that the EPA did have the capability to make color photocopies of the color photographs for Stipulated Exhibit 8 at one of its copy centers. Tr. at 35 (Swanson). Surely, the EPA had the capability or should have had the capability to make color photocopies of the color photographs for Stipulated Exhibits 2 and 7 in a timely manner.

Another significant factor in this good cause determination is Respondent’s specific request concerning the color photographs. At the hearing, the EPA stipulated to having received a faxed letter from Respondent dated May 8, 2001, seven days prior to the hearing. Tr. at 40-41 (Swanson).

That letter requested that the EPA either give Respondent the color photographs or advise Respondent if the EPA intended to use the color photographs. Tr. at 40 (Fognani). However, the EPA failed to respond to that letter. *Id.*

The EPA also argued that the black and white photocopies of the color photographs which were provided to Respondent before the 15-day deadline were “the same” as the color photographs. Tr. at 28 (Swanson), 32 (Mangone). I disagree. Although the black and white photocopies are copies of the color photographs, the quality of the color photographs is much better and provides a dramatic difference in portraying the events and the condition of the Facility. Therefore, the black and white photocopies are not truly “the same” as the color photographs. In light of Respondent’s specific request concerning the color photographs and the lack of compelling reasons for failing to promptly respond to that request, I conclude that the EPA did not have “good cause” for failing to exchange the color photographs included in Stipulated Exhibits 2 and 7 until the day of the hearing. Therefore, the color photographs included in Stipulated Exhibits 2 and 7 are excluded from the record. *See* 40 C.F.R. § 22.22(a). However, the black and white photocopies of the photographs from Stipulated Exhibits 2 and 7 are admitted. The Respondent stipulated to the black and white photocopies of those exhibits. Tr. at 29 (Fognani), 34 (Fognani).

Admissibility of the VCR Videotape

In addition, Respondent objected to the admission of the VCR format of a videotape, Complainant’s Exhibit 21, which portrays in part an inspection of the Facility on March 25, 1998. Tr. at 10 (Fognani), 118-19 (Fognani). Originally, the tape, as part of Complainant’s prehearing exchange, was filed with the Regional Hearing Clerk in 8-millimeter format on January 17, 2001. Tr. at 11 (Swanson), 19 (Swanson). However, the 8 millimeter format of the tape was never provided to Respondent. Tr. at 20 (Swanson). Because 8 millimeter is not a standard video format for viewing, the EPA converted the 8 millimeter video to a VCR tape, but technical and financial difficulties impeded the conversion process. Tr. at 11 (Swanson), 16 (Swanson), 20 (Swanson). The EPA admits, however, that the converted VCR format of the tape was never filed with the Regional Hearing Clerk. Tr. at 20 (Swanson). But the prehearing exchange notified Respondent that the original format of the tape, the 8 millimeter format, was on file with the Regional Hearing Clerk. Tr. at 21 (Swanson).

On April 30, 2001, Respondent verbally requested a copy of the tape from the Complainant and later made a request for the tape in writing on May 2, 2001. Tr. at 15 (Fognani), 16-17 (Swanson). Apparently, the EPA did not have possession of the converted, VCR format of the tape, and it was not available for the EPA’s viewing until May 1, 2001. Tr. at 63-64 (Swanson). The tape was then promptly served on Respondent by mail on May 1, 2001 and received on May 3, 2001. Tr. at 12 (Swanson, Fognani), 16 (Fognani), 19 (Swanson). Therefore, the tape was provided to Respondent twelve (12) days before the hearing but not within the 15-day deadline specified by the Rules of Practice, 40 C.F.R. § 22.22(a).

I must determine whether the EPA had “good cause” for missing the 15-day deadline.

Unlike the issue concerning the color photographs, here the EPA promptly provided the VCR tape once Respondent brought the matter to the EPA's attention. Unlike the color photographs, Respondent had twelve days to review the tape in contrast to having it provided to them on the day of the hearing. Furthermore, Respondent made no allegation that the VCR tape differs in any substantial way from the 8 millimeter tape in what it portrays in contrast to the obvious differences between the color photographs and their black and white photocopies. Therefore, I find that the EPA did have good cause for its slight delay in failing to meet the 15-day deadline. Furthermore, this slight delay is not significantly prejudicial to Respondent. Therefore, the VCR tape is not inadmissible. *See* 40 C.F.R. § 22.22(a).

Respondent also argued that the tape or at the very least its sound should be excluded. Tr. at 14 (Fognani), 119 (Fognani). In response to Respondent's claims that the narration on the video was prejudicial and that the narrator was unavailable, the EPA agreed to mute the video tape. Tr. at 17 (Swanson), 120 (Swanson). Respondent further argued that the tape's content is prejudicial because the person who actually filmed the tape was not available for cross-examination. Tr. at 13-14 (Fognani), 121 (Fognani). However, Jane Nakad, who was in charge of the March 25, 1998 EPA inspection and was the person directing the person filming the Facility and was at least in visual and voice range of that person at all times, was available to be cross-examined. Tr. at 115-16 (Nakad). Ms. Nakad is an OPA compliance specialist and enforcement officer. Tr. at 70 (Nakad). She has held that position for at least three (3) years. *See* Stip. Ex. 21. Ms. Nakad conducts inspections and reviews reports of inspections conducted by others. Tr. at 70-71 (Nakad). Prior to being an OPA compliance specialist, she was an OPA Coordinator for ten (10) years. Stip. Ex. 21. There is no credible claim that the video was filmed in such a way as to provide an inaccurate presentation of the Facility on the date of the March 25, 1998 inspection. I conclude that the tape as muted is not unduly prejudicial.

The remaining issue concerning the admissibility of the VCR tape is whether to admit all portions of the tape or just those portions that relate to the inspection of Respondent's Facility. In this regard, I note that the tape also includes footage of other facilities not owned or operated by Respondent and not mentioned in the Complaint. Tr. at 126 (Swanson), 126-27 (Fognani). The EPA objected to viewing the portions of the tape not related to Respondent's Facility on the ground that it was irrelevant to the matters charged in the Complaint. Tr. at 125 (Swanson). Respondent claimed that a comparison to the amount of penalty assessed at other facilities was relevant because it claimed that it was charged with the statutory maximum penalty whereas the other facility inspected was assessed a lesser penalty for supposedly "greater" violations. Tr. at 14-15 (Fognani), 126-28 (Fognani).

The footage of the facilities other than Respondent's is not relevant and not probative to matters charged in the Complaint. *See Butz v. Glover Livestock Comm'n. Co.*, 411 U.S. 182, 187 (1973); *In the Matter of Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-27 (CJO, June 24, 1991); Tr. at 128-29 (Judge Gunning). Therefore, that footage is excluded. Additionally, I observe that Respondent was not assessed the statutory maximum penalty, as will be discussed later. The maximum penalty is determined *per count* charged in the Complaint. Consequently, the EPA could have sought a penalty more than twice the amount it sought in the Complaint.

Admissibility of Evidence from the July 30, 1999 Settlement Conference

The EPA calculated the proposed penalties in this matter according to the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (August 1998) (“Penalty Policy”). *See* Stip. Ex. 20. The SPCC Penalty Policy specifies that in calculating the penalty for an SPCC violation, the EPA may increase the base amount of the penalty to account for the duration of the violation. Stip. Ex. 20; “Penalty Policy” at 9. To determine this higher amount, the EPA is to determine the number of months that the violation continued. *Id.* Then, for each month the EPA should add one half of one percent to the penalty up to a maximum of 30 percent. In the instant case, the EPA calculated the duration of the SPCC violation based on a beginning date of March 1998 and a cutoff date of July 1999 for a total of sixteen (16) months. Compl. ¶ 37; Stip. Ex. 20. Based on this sixteen (16) month duration, the EPA enhanced the penalty for the SPCC violation by eight (8) percent. *See* Stip. Ex. 20.

The record reflects that a settlement conference between the parties was held on July 30, 1999. During this conference, Respondent’s counsel allegedly revealed that the Respondent was still not in compliance with the SPCC requirements at that time. *See* Tr. at 600-01 (Nakad). During the hearing, the EPA, specifically Jane Nakad, testified that she chose July 30, 1999 as the cutoff date for the duration of the SPCC violation. Tr. at 571 (Nakad). Ms. Nakad is responsible for preparing penalties for violations pertaining to the OPA, including the penalty assessed in the instant case. Tr. at 71 (Nakad); Stip. Exs. 20 and 21. In addition to Ms. Nakad’s testimony concerning the penalty calculation, the EPA also presented the testimony of Bob Litchford. Mr. Litchford is employed by URS Operating Services, which provides emergency response and site assessments solely to the EPA. Tr. at 194 (Litchford); Stip. Ex. 21. Mr. Litchford conducted an inspection of Respondent’s Facility on October 21, 1999, and he testified that Respondent’s Facility was still in violation of the SPCC requirements at that time. *See* Stip. Ex. 8 (report).

Near the conclusion of the hearing and following the testimony of Ms. Nakad and Mr. Litchford, Respondent moved to strike the testimony of Jane Nakad and Bob Litchford pertaining to the July 30, 1999 meeting between the parties. Tr. at 708 (Fognani). Respondent’s motion was brought on the ground that the testimony of Ms. Nakad and Mr. Litchford included information obtained during the July 30, 1999 settlement conference between the parties and that such testimony must be excluded under Rule 408 of the Federal Rules of Evidence because it relates to confidential settlement discussions between the parties. Tr. at 708-09 (Fognani).^{2/}

^{2/} Counsel for Respondent stated that Respondent’s objection to Ms. Nakad’s and Mr. Litchford’s testimony concerning the cut-off date for the alleged violation was not raised earlier during the hearing because it was not apparent to Respondent why the EPA had chosen the July 1999 date until the conclusion of the hearing. *See* Tr. at 707-08 (Fognani).

Subsequent to the hearing, the parties proffered evidence in affidavit form pertaining to whether the July 30, 1999 conference was a Rule 408 conference.^{3/} Scott Hardt, who is an attorney for Respondent, submitted an affidavit including a letter addressed to the EPA dated July 27, 1999, a date prior to the settlement conference. *See* “Submission of Affidavits in Support of Crown Central Petroleum Corp.’s Motion to Strike,” June 11, 2001, Exhibit A: Affidavit of Scott W. Hardt, Esq. In that letter, Mr. Hardt attempted to confirm a telephone conversation with an EPA representative in which the parties agreed that the July 30, 1999 settlement conference would be a Rule 408 conference. *See id.* In addition to Mr. Hardt’s affidavit, Respondent proffered affidavits from Raissa Kirk, Edward Calvert, and Tom Yates to corroborate Respondent’s assertion that it was its understanding that the conference would be a Rule 408 settlement negotiation. *See id.*, Exhibits A, B, C, and D. Mr. Calvert is employed by Nucor, which has a contract with Respondent to control daily operations and maintenance of the Facility. Tr. at 628-30 (Calvert). Mr. Calvert’s responsibilities include primarily, supervision of the field pumper at the Facility, and he also communicates between the field pumper and Tom Yates. Tr. at 629-30 (Calvert). Mr. Yates, a registered professional engineer, is a contractor for Respondent, and he is responsible for day-to-day oversight of the Facility. Tr. at 337 (Yates).

Jane Nakad presented an affidavit referring to a meeting date of July 31, 1999, stating that there were two conferences on that date: the first being a Rule 408 settlement conference in the morning and the second being a non-confidential discussion. *See* Declaration of Jane Nakad, June 6, 2001. Although an affidavit was proffered by Mr. Litchford, he was not a participant in the settlement conference, and he had nothing to add as to the nature of the conference. Respondent now moves to strike the affidavits of Ms. Nakad and Mr. Litchford, which were submitted after the hearing in support of the EPA’s position that none of their testimony concerning the July 1999 meeting is inadmissible. *See* Resp. Motion to Strike Affidavits, June 27, 2001.

The Rules of Practice specify that the Presiding Officer shall admit evidence “[E]xcept that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.” 40 C.F.R. § 22.22(a)(1) (1999). Federal Rule of Evidence 408 provides:

[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence *otherwise discoverable* merely

^{3/} At the hearing, I invited the parties to submit affidavits for the limited purpose of supporting their respective positions on the question of the July 30, 1999 meeting and its alleged confidentiality under Rule 408. Tr. at 709 (Judge Gunning).

because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(Emphasis supplied).

Rule 408 makes an exception to the exclusion of matters other than the use of settlement discussions purely to show liability or the extent of liability. For instance, Rule 408 does not require exclusion of evidence of “other matters” such as those in support of an equitable estoppel defense or rebuttal evidence. *See In the Matter of Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 529-31 (EAB, Feb. 24, 1993) (holding that it was an error to exclude evidence of equitable estoppel revealed in settlement discussions); *In the Matter of United States Air Force, Tinker Air Force Base*, RCRA-6-98-001, 2000 EPA ALJ LEXIS 63, at *6-10 (EPA ALJ, Aug. 18, 2000) (Order allowed rebuttal evidence from settlement discussions to be used but excluded evidence of a settlement offer).

First, in light of the fact that July 31, 1999 fell on a Saturday and due to the lack of corroborating evidence, I find that Ms. Nakad’s affidavit is not persuasive on this matter. Ms. Nakad’s assessment of the conference and mistake as to the date of the conference appear to be innocent errors, and thus I do not find that such discrepancies impeach her credibility. On the other hand, I find that Respondent’s affidavits are persuasive and that it was Respondent’s understanding that the July 30, 1999 conference was a settlement conference pursuant to Rule 408. As to what is to be excluded, I find Mr. Hardt’s affidavit to be persuasive that *all* matters discussed at that hearing were to be confidential. *See Exhibit A: Affidavit of Scott W. Hardt, Esq. of “Submission of Affidavits in Support of Crown Central Petroleum Corp.’s Motion to Strike,”* June 11, 2001.

In response to Respondent’s Motion to Strike, I rule that only that portion of Ms. Nakad’s testimony and affidavit concerning Respondent’s liability and admissions as to not being in compliance as to SPCC requirements on the date of the settlement conference should be stricken. However, as will be discussed later, I find that Complainant’s use of the date of the settlement conference in arriving at a more lenient cutoff date is admissible as an “other matter” as to the penalty amount.

DISCUSSION

Section 311 (“Oil and Hazardous Substance Liability”) of the Federal Water Pollution Control Act, which is commonly referred to as the Clean Water Act (“CWA”), sets forth a national policy against discharges of oil or hazardous substances into waters of the United States. 33 U.S.C. §1321(b)(1). Section 311(b)(1) states that “[T]here should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . .” *Id.* Originally, Section 311 was included in the Water Quality Act of 1970, Pub. L. 91-224, 84 Stat. 94 (1970), and then reintegrated into the Federal Water

Pollution Control Act Amendments of 1972 when Congress added hazardous substances to that section. *See* Pub. L. 92-500, 86 Stat. 816 (1972). Then, after the Exxon Valdez oil spill, Congress enacted the Oil Pollution Act of 1990 (“OPA”), which strengthened Section 311 of the CWA in several areas, including greater penalties, a restructured administrative penalty process, and expanded requirements in planning for oil spills. *See* O.P.A., Pub. L. 101-380, 104 Stat. 484 (1990).

I. NAVIGABLE WATERS

As a threshold issue, I must address the issue of whether the bodies of water cited in the Complaint constitute “navigable waters” within the meaning of the CWA. Under the CWA, “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” CWA § 502(7). The United States Supreme Court in *United States v. Riverside Bayview Homes*, noted that “Congress chose to define the waters covered by the Act broadly,” and the Court determined that the CWA’s “[D]efinition of ‘navigable waters’ as ‘waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.” 474 U.S. 121, 133 (1985) (unanimous decision). The Court further determined that in adopting this broad definition of “navigable waters,” “Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Id.*

In *Riverside*, the Court was presented with the question as to whether the CWA “[T]ogether with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.” *Id.* at 123. The Corps had issued regulations defining “‘the waters of the United States’ to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce.” *Id.*, citing 40 Fed. Reg. 31320 (1975). The Corps further had construed the CWA to cover all freshwater wetlands that were adjacent to other covered waters. *Id.* at 124. *Riverside* concerned a non-navigable wetland consisting of 80 acres of low-lying marshland adjacent to Black Creek, which was a navigable waterway. *Id.* at 131. In *Riverside*, the Court held that the Corps’ construction of “waters of the United States” as including adjacent wetlands was not unreasonable and therefore upheld that regulation and the Corps’ assertion of jurisdiction in that case. *Id.* at 134. In particular, the *Riverside* decision read, “We cannot say that the Corps’ conclusion that adjacent wetlands are inseparably bound up with the ‘waters’ of the United States – based as it is on the Corps’ and EPA’s technical expertise – is unreasonable.” *Id.* In *Riverside*, the Supreme Court expressly left open the issue of CWA jurisdiction over isolated wetlands. *See id.* at 131 n.8.

Recently, the United States Supreme Court issued its decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”), 531 U.S. 159 (2001), which revisited some of the issues in *Riverside*. *SWANCC* invalidated the Corps’ “Migratory Bird Rule,” which purportedly was issued under the authority of the CWA and attempted

to “clarify” the Corps’ earlier definition of “waters of the United States” by asserting jurisdiction over intrastate waters

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.

Id. at 163-64, citing 51 Fed. Reg. 41217 (1986).

In *SWANCC*, the Corps sought CWA jurisdiction over an abandoned sand and gravel pit which included a scattering of permanent and seasonal ponds that were not wetlands and were not adjacent to a body of open water. *Id.* at 162, 164, 167-68. The Court refused to grant *Chevron*^{4/} deference to the Corps’ Migratory Bird Rule’s interpretation of “waters of the United States” because its assertion of jurisdiction over non-navigable, isolated, intrastate wetlands would invoke the outer limits of Congress’ power over interstate commerce, impinging over states’ traditional power over intrastate land and water use. *Id.* at 172-73. Determining that Congress did not clearly authorize the jurisdiction over non-navigable, isolated, intrastate wetlands, the Court held that the Migratory Bird Rule’s clarification of “waters of the United States” was an invalid interpretation.^{5/} *Id.* at 174. Thus, the Court in *SWANCC* rejected the extension of its holding in *Riverside* by refusing to include under CWA jurisdiction the isolated, non-navigable, intrastate wetlands claimed by the Migratory Bird Rule.

Several federal courts since *SWANCC* have emphasized that *SWANCC*’s holding is limited to striking down the Migratory Bird Rule.^{6/} In *Headwaters, Inc. v. Talent Irrigation District*, the

^{4/} *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

^{5/} Furthermore, the Court rejected the Corps’ argument that Congress acquiesced to the 1986 Migratory Bird Rule by its 1977 Amendments to the Clean Water Act. See *SWANCC, supra*, at 170.

^{6/} See *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (intermittently flowing canal that directly entered into a navigable body of water qualified as “waters of the United States.”); *United States v. Buday*, 138 F. Supp. 2d 1282, 1284-88 (D. Mont. 2001) (non-navigable tributary of a navigable-in-fact and interstate river qualified as “waters of the United States.”); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 86, 119 (E.D.N.Y. 2001) (pond and stream are “waters of the United States” where pond was flowing into well-defined stream, which was a tributary to a navigable-in-

Ninth Circuit upheld the EPA's determination that irrigation canals were "waters of the United States" because they were connected as tributaries to other "waters of the United States." 243 F.3d 526, 533 (9th Cir. 2001). The irrigation canals were connected to a number of natural streams and at least one lake. *Id.* In *Headwaters*, the Ninth Circuit concluded that *SWANCC*'s holding was limited to isolated bodies of water rather than connected bodies of water. *Id.* Although there were claims in *Headwaters* that the canals were cut off from other bodies of water at times by waste gates and thus technically isolated, the Ninth Circuit concluded, "Even tributaries that flow intermittently are 'waters of the United States.'" *Id.* at 534.^{2/} I would note that tributaries by their very definition are not isolated bodies of water, as they must flow into another body of water in order to qualify as a tributary.^{3/} In contrast, wetlands can either be connected to other bodies of water, as in *Riverside*, or can be isolated, as in *SWANCC*.

Also distinguishing *SWANCC*, is the District Court case *United States v. Buday*, 138 F. Supp. 2d 1282, 1284-88 (D. Mont. 2001). In *Buday*, the defendant was charged with committing unauthorized discharges into navigable waters in violation of the CWA. *Id.* at 1284. The watercourse at issue was Fred Burr Creek, which was not navigable-in-fact. *Id.* at 1288. However, Fred Burr Creek was found to be a *tributary of a tributary* to Clark Fork River, which was found to be both navigable-in-fact and an interstate water. *Id.* The *Buday* court concluded that "Congress intended the Clean Water Act to reach any surface water that contributes to a water that is navigable-in-fact." *Id.* at 1290. Clark Fork River did not become "navigable-in-fact" until 190 miles downstream from the convergence of its tributary, Flint Creek, which was fed by Fred Burr Creek.

fact lake even if the pond and stream were non-navigable); *United States v. Interstate General Company*, 152 F. Supp. 2d 843, 847 (D. Md. 2001) (refusing to extend *SWANCC* to exclude jurisdiction over all waters not adjacent to a navigable-in-fact body of water); *In the Matter of Lawrence John Crescio, III*, 5-CWA-98-004, 2001 EPA ALJ LEXIS 143, at *35-36 n.16 (EPA ALJ, May 17, 2001) (wetlands adjacent to a tributary to a tributary of a navigable body of water are "waters of the United States"). *Cf. Rice v. Harken Oil Exploration Co.*, 250 F.3d 264, 268-70 (5th Cir. 2001) (refusing to classify groundwater and other subsurface bodies of water as "navigable waters").

^{2/} Respondent's post-hearing brief argues that the *Headwaters* decision was premised on the requirement that the intermittent tributary (the canal in that case) actually exchange water with the adjacent body of water rather than merely flow into it. However, the Ninth Circuit's focus was on the fact that the canals were not isolated and emphasized the connection of the canals to the adjacent body of water. *Headwaters*, at 533-34.

^{3/} A "tributary" is a "stream which contributes its flow to a larger stream or other body of water." *Headwaters*, at 533, quoting, RANDOM HOUSE COLLEGE DICTIONARY 1402 (rev. ed. 1980).

Id. at 1283. At that point, Clark Fork River had crossed the Montana state border and thus had become an interstate body of water. *Id.* The *Buday* court noted that Fred Burr Creek was 15-20 miles long and flowed into Flint Creek (another intrastate body of water), which was 30 miles long. *Id.* at 1291. Relying on *Riverside*, the *Buday* court concluded that “[T]ributaries that are distant from but connected to navigable waters are ecologically capable of undermining the quality of the navigable water.” *Id.* It added, “The water quality of tributaries like Fred Burr Creek, distant though the tributaries may be from navigable streams, is vital to the quality of navigable waters. Therefore, Congress must have intended to reach them.” *Id.* at 1291-92. In closing, the *Buday* court explained CWA jurisdiction by stating, “There is no limitation on federal jurisdiction over *open waters that flow into* interstate waters or waters that are navigable-in-fact.” *Id.* at 1295 (emphasis in original). Therefore, a tributary of a tributary of a navigable-in-fact or interstate waterway is part of the “waters of the United States.” *See id.* at 1291-92.

The District Court in *United States v. Interstate General Company* similarly read *SWANCC* as having a narrow holding. 152 F. Supp. 2d 843, 847 (D. Md. 2001). In *Interstate General Company*, the District Court refused to invalidate the Corps’ assertion of CWA jurisdiction over wetlands adjacent to the headwaters of non-navigable creeks where the headwaters were intermittent streams and drainage ditches averaging two feet in width and approximately two feet in depth. *Id.* at 844. In addition, the headwaters were more than ten miles from the Chesapeake Bay and more than six miles from the Potomac River. *Id.* The Government had argued that the headwaters, through a series of culverts and creeks, ultimately flowed into the Potomac River. *Id.* The defendants pled guilty to the CWA charge. *Id.* at 845.^{2/} The defendants subsequently sought a Writ of Error Coram Nobis after the Supreme Court issued its decision in *SWANCC*. The District Court refused to read *SWANCC* broadly as limiting CWA jurisdiction to only (1) traditionally defined navigable waters and (2) wetlands and other waters immediately adjacent to navigable waters. *Id.* at 846. It interpreted *SWANCC* as having the limited holding of invalidating the Migratory Bird Rule. *Id.* at 847. The District Court refused to extend *SWANCC* so as to invalidate the Government’s primary theory: “the adjacent/abutting land theory of tributaries impacting on navigable waters.” *Id.* at 847. The District Court denied the Writ of Error. *Id.* at 847, 849.

Finally, an EPA Administrative Law Judge (“ALJ”) has held that wetlands adjacent to a network of tributaries (specifically, wetlands adjacent to a tributary to a tributary to navigable waters) did qualify as “waters of the United States.” *See In the Matter of Lawrence John Crescio, III*, 5-CWA-98-004, 2001 EPA ALJ LEXIS 143, at *35-36 n.16 (EPA ALJ, May 17, 2001).

^{2/} The guilty plea was made after the Fourth Circuit ordered a new trial for the petitioners in part due to the trial judge’s instruction to the jury that “[W]aters of the United States included adjacent wetlands ‘even without a direct or indirect surface connection to other waters of the United States.’” *See United States v. Wilson*, 133 F.3d 251, 258 (4th Cir. 1997) (emphasis in original). The interpretation of jurisdiction in that jury instruction would have expanded federal jurisdiction over isolated, non-navigable wetlands.

Navigable Waters as to the Oil Discharge Regulation

In the case before me, the EPA's Complaint alleges, "The gully, the unnamed creek and Five Mile Creek" are "navigable waters" and "waters of the United States" within the meaning of Section 502(7) of the CWA. *See* Compl. ¶ 24. Count II of the Complaint charges Respondent with discharging oil into navigable waters in violation of Section 311(b)(6)(A)(i) of the CWA. The implementing regulations as to oil discharges define "navigable waters" as follows:

Navigable Waters means the waters of the United States, including the territorial seas. The term includes:

- (a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
- (b) Interstate waters, including interstate wetlands;
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) That are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
 - (3) That are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as navigable waters under this section;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and
- (f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section

40 C.F.R. §110.1 (1997). In the above-cited regulation, subsection (e), concerning tributaries, is particularly relevant. A "tributary" is a "stream which contributes its flow to a larger stream or other body of water." *Headwaters*, at 533, quoting, RANDOM HOUSE COLLEGE DICTIONARY 1402 (rev. ed. 1980).

The following facts in the case at hand show that the incise channel, the discharge stream, the Unnamed Creek, Blue Draw, Five Mile Creek, and Boysen Reservoir are "navigable waters" within the context of the CWA and its implementing regulations as to oil discharges. First, a description of the Facility's operations is necessary. As part of the oil production process at the Facility, large quantities of water mixed with oil are produced. Tr. at 151 (Nakad). Produced oil, water, and gas are separated in tanks by gravity, heat, and emulsion breaking chemicals. Stip. Ex.

43. Initially, the water and oil are separated utilizing a heater treater and vertical treater. Tr. at 152 (Nakad). The separated oil is stored in tank batteries, which are located uphill from the incise channel, the discharge stream, and the Unnamed Creek. *See* Stip. Ex. 1: Map; Compl. Ex. 21: Video. Oil remaining mixed with the produced water is piped downgradient into two large discharge pits (or “skimming pits”) used by the Facility. Tr. at 248-49 (Harrison), 631 (Calvert); Stip. Ex. 43. Oil, which is lighter than water, rises to the top of the pits, where it is to be removed by skimming or vacuuming by the Facility operator. Tr. at 180 (Nakad); Stip. Ex. 1: SPCC Plan. The water, which is heavier than oil, is discharged from the pits through T-siphons. *See* Stip. Exs. 2 and 7 (photo logs); Compl. Ex. 21: Video. The upper pit discharges into the lower pit, and any remaining oil is to be removed prior to discharge of the produced water through an outfall point. *See* Stip. Exs. 2, 7 (photo logs); Stip. Ex. 43; Compl. Ex. 21. The outfall point is a pipe that discharges into the discharge stream. *See id.*

At the top of hilly terrain, there are several tank batteries, on leases # 7746, 7747, and 7749. *See* Stip. Ex. 1: SPCC Plan – Map; Stip. Exs. 2 and 7; Compl. Ex. 21: Video. The 5,000 barrel slop oil tank is one of the tanks on lease # 7749. *See id.* Downhill from the tank batteries on leases 7747 and 7749 are the two large discharge pits. *See id.* Produced water is discharged out of the large discharge pits pursuant to NPDES permit # WY-0000469. *See* Stip. Ex. 43. That permit authorizes the discharge of produced water from the Facility through an outfall point to the receiving waters designated as: “Blue Draw via unnamed drainage” (a.k.a. the discharge stream and the Unnamed Creek). *See* Joint Stipulations, Fact ¶ 14; Stip. Ex. 1: SPCC Plan; Stip. Ex. 43; Tr. at 178 (Nakad), 431 (Aragon). Discharges at other locations are not authorized by the permit. *See* Stip. Ex. 43, at 5. The Facility’s NPDES permit prohibits either of the following: (a) a 10 mg per liter concentration of oil in the receiving waters and (b) a visible sheen in the receiving water or its shorelines. Stip. Ex. 43; Tr. at 368-69 (Yates). The discharge stream and the Unnamed Creek are the same “unnamed drainage” as described in the Facility’s discharge permit. Joint Stipulations, Fact ¶ 14; Stip. Ex. 43.

At this point, I find it helpful to describe some additional people familiar with the Facility’s characteristics and with the matters charged in the Complaint. Don Aragon is the executive director of the Wind River Environmental Commission for the Shoshoni and Arapahoe tribes, and he has held that post for ten (10) years. Tr. at 407 (Aragon). Jerry Goedert is a contract employee for the EPA through URS Operating Services, where he is a project manager. Tr. at 494 (Goedert); Stip. Ex. 21. Mr. Goedert’s responsibilities include emergency responses and site assessments including those pertaining to oil spills. Tr. at 494-97 (Goedert); Stip. Ex. 21. Steven Hawthorne is an onscene coordinator for the EPA’s Region VIII. Tr. at 442 (Hawthorne). Mr. Hawthorne’s responsibilities include monitoring oil spills and responding to oil spills, which include clean-up oversight. Tr. at 443-44 (Hawthorne). Finally, Lynn Harrison is currently employed by the Wind River Environmental Quality Commission. Tr. at 243 (Harrison). Prior to that, she was an environmental protection specialist for the BLM for 13 years. Tr. at 243-44 (Harrison). While working for the BLM, Ms. Harrison was responsible for permitting of oil and gas operations and for monitoring and compliance of those operations. Tr. at 244 (Harrison).

The Facility is located in an area of rough terrain which is highly susceptible to erosion. Tr. at 408-09 (Aragon). The Facility periodically experiences flash floods, cloudbursts, and snowmelts.

Tr. at 175 (Nakad), 408 (Aragon), 475 (Hawthorne); Stip. Ex. 2 (report). The Facility is situated within a natural drainage system consisting of gullies, natural contours in the land, and a large incise channel, which have been naturally created by rainfall and other precipitation. Tr. at 84 (Nakad), 202 (Litchford), 213 (Litchford), 227-28 (Litchford), 681-84 (Calvert), 715-16 (Calvert); Stip. Ex. 8 at 1. Proceeding downhill from the 5,000 barrel slop oil tank, there are gullies and natural contours in the land that lead to a large incise channel. *See* Stip. Ex. 2 (photo log); Complainant's Exhibit 21: Videotape. The incise channel has been formed by erosion and rain runoff over a period of two to three years. Tr. at 84 (Nakad), 103 (Nakad), 715-16 (Calvert). The incise channel, which is parallel to the discharge pits, is three to five (3-5) feet away from the discharge pits at some points. *See* Stip. Exs. 2, 7 (photo logs); Compl. Ex. 21: Video. The natural drainage system, including the incise channel, is comprised of intermittently flowing water, including natural water seeps. Tr. 176 (Nakad), 409 (Aragon), 544 (Goedert); Stip. Ex. 2. The incise channel ranges from one to five (1-5) feet in depth and is at least two (2) feet wide. *See* Compl. Ex. 21: Video; Stip. Exs. 2, 7, and 8 (photo logs); Tr. at 176 (Nakad). The incise channel is a well-defined water pathway. Tr. at 213 (Litchford). The incise channel carries a large volume of water when there is precipitation. Stip. Exs. 2 and 7; Tr. at 692-95 (Calvert).

Waters from the natural drainage system, including the incise channel, bypass the discharge pits and bypass the outfall point of the lower discharge pit. *See* Compl. Ex. 21: Video; Stip. Ex. 2, 7, and 8 (photo logs). The incise channel then converges with the discharge stream about 30 yards downstream from the outfall point. *See* Tr. at 84 (Nakad), 94-95 (Nakad), 177 (Nakad), 191 (Nakad); 212 (Litchford); Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video. This confluence of the discharge stream and the incise channel forms a creek which is referred to herein as the "Unnamed Creek." During heavy rains, water flows through the incise channel and into the Unnamed Creek. Tr. at 236 (Litchford), 238 (Litchford).

From the Facility's outfall point to the convergence which forms the Unnamed Creek (approximately 30 yards in length) is the discharge stream. The discharge stream consists of a combination of produced waters from the discharge pits, water seeps, and the occasional rainfall and other precipitation. Tr. at 544 (Goedert); Stip. Ex. 2. The discharge stream is an intermittently flowing stream, whose flow depends on produced water and occasionally rainwater and water seeps. Tr. at 83 (Nakad), 293 (Harrison), 451 (Hawthorne), 503 (Goedert), 543 (Goedert), and 692-93 (Calvert). The discharge stream usually had water flowing in it up until at least the end of May 1998 and primarily had carried "produced water" released pursuant to the Facility's NPDES permit. Tr. at 692-94 (Calvert); Stip. Ex. 29. Respondent claims that, during the time the Facility was producing oil, it discharged up to 1.2 million gallons of water per day into the discharge stream and the Unnamed Creek. *See* Resp. Post-Hrg. Response Br. at 6. From just one well on lease #7749 for the month of May 1998, Respondent produced more than 2.9 million gallons (69,447 barrels) of water for eventual discharge and during May 1998 over 14 million gallons (346,158 barrels) of water were produced on lease #7749. *See* Stip. Ex. 29. The discharge stream, after it converges with the incise channel to form the Unnamed Creek, flows through Blue Draw before eventually reaching Five Mile Creek. *See* Tr. at 409-11 (Aragon). Blue Draw is a canyon and a catchment for several discharge streams fed mainly by produced water from several oil fields, and it is a tributary of Five Mile Creek. Tr. at 211-12 (Litchford), 411 (Aragon).

The Unnamed Creek consists of a combination of produced waters, water seeps, and water from precipitation. Tr. at 203 (Litchford), 213 (Litchford), 407-09 (Aragon), 417 (Aragon), 544 (Goedert), 692-93 (Calvert); Stip. Ex. 2. Water is present in the Unnamed Creek even when the Facility is not discharging produced water through the outfall point and at various times the Unnamed Creek carries a large volume of water. Tr. at 177 (Nakad), 503 (Goedert). The Unnamed Creek eventually flows at intermittent times through Blue Draw and into Five Mile Creek, which is approximately one mile south of the outfall point, and is a tributary to Five Mile Creek. Tr. at 83 (Nakad), 94 (Nakad), 103 (Nakad), 212 (Litchford), 227 (Litchford), 409-11 (Aragon), and 693 (Calvert); Stip. Ex. 8. Five Mile Creek flows into Boysen Reservoir. Tr. at 83 (Nakad), 409-10 (Aragon). The Facility's outfall point is no more than 25 miles away from the dam in Boysen Reservoir. Tr. at 410 (Aragon).

Respondent does not dispute that Boysen Reservoir is a navigable water in the context of the CWA.^{10/} Instead, Respondent focuses on whether the gullies, the incise channel, the discharge stream, and the Unnamed Creek are "navigable waters." See Resp. Post-Hrg. Br. at 15; Tr. at 45 (Fognani). Boysen Reservoir (with its dam) is a large body of water that stores the water for the Wind River Reservation and provides drinking water for the two towns of Thermopolis, Wyoming and Worland, Wyoming. Tr. at 410 (Aragon). Boysen Reservoir is also used for recreational activities, including fishing. *Id.* A body of water is "navigable" within the traditional sense of the word if it is either "navigable-in-fact" or susceptible to being made navigable-in-fact. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940) (the landmark case), cited in *SWANCC*, at 172. I find that Boysen Reservoir is a "navigable water" within the meaning of the CWA.^{11/} Such a large body of water clearly is large enough to afford the passage of at least some

^{10/} In contrast, Respondent characterizes Five Mile Creek as an "arguable navigable water." See Stip. Ex. 42; Resp. Post-Hrg. Response Br. at 5.

^{11/} I also would take official notice of the facts cited in the case, *Environmental Defense Fund, Inc. v. Andrus*. 596 F.2d 848, 849-51 (9th Cir. 1979) (per curiam), *affirming in part and reversing in part*, 420 F. Supp. 1037 (D. Mont. 1976). The Rules of Practice allow an ALJ to take official notice of "[A]ny matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency." 40 C.F.R. § 22.22(f) (1999). Federal Rule of Evidence 201 governs Judicial Notice of Adjudicative Facts. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FRE 201(b). Adjudicative facts

small boats or other waterborne crafts.^{12/} Even assuming *arguendo* that Boysen Reservoir were not navigable-in-fact, it would still at least be susceptible to being made navigable-in-fact.

Respondent challenges the status of the incise channel, the discharge stream, and the Unnamed Creek as “waters of the United States” and “navigable waters” in part because they are intermittently flowing, human-made bodies of water. In addition, Respondent claims that there was no water running in these bodies at the time of the oil spill. In the alternative, Respondent argues that the only water flowing in those bodies was the result of its water pump employed in its cleanup operations. Additionally, Respondent suggests that a network of tributaries does not qualify as

established in prior cases are sources whose accuracy cannot reasonably be questioned. See *United States v. Alvarado*, 519 F.2d 1133, 1135 (5th Cir. 1975)(per curiam), *cert. denied*, 424 U.S. 911 (1976). See also *Central Green Co. v. U.S.*, 531 U.S. 425, 432-34 (2001) (The Supreme Court took judicial notice of the geographical aspects of a water basin, citing in part, facts in one of its prior cases concerning the same water basin). Under FRE 201, judicial notice may be taken “[A]t any stage of the proceeding.” FRE 201(f).

The Boysen Reservoir of Wyoming described in *Environmental Defense Fund v. Andrus* is the same Boysen Reservoir as in the case before me. See 596 F.2d at 849-51 (9th Cir.) and 420 F. Supp at 1040 (D. Mont.). The immense size of Boysen Reservoir, having a capacity of 952,400 acre feet of water, *id.* at 850, speaks to its navigability. Boysen Reservoir is also on the Wind River, which is a tributary to the Bighorn and Yellowstone Rivers. *Id.* Yellowstone River is an interstate body of water, as it flows eastward from Yellowstone National Park across southern Montana to join the Missouri River at the Montana-North Dakota border. *Id.* Additionally, Boysen Reservoir has been traditionally regulated by the Federal Government by laws including the Flood Control Act of 1944. *Id.* at 850-51.

Nevertheless, under the Rules of Practice, “Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.” 40 C.F.R. § 22.22(f). However, as neither party briefed the *Environmental Defense Fund v. Andrus* case and the parties have not as of yet been notified that its facts would be officially noticed, I do not rely on its facts in making my determination of navigability.

^{12/} See *Aiello v. Town of Brookhaven, supra*, at 119, providing the classical definition of “navigable,” which is “[a]dmitting of being navigated, affording passage for ships or boats,” quoting the OXFORD ENGLISH DICTIONARY, vol. X, at 258 (2d ed. 1989).

“waters of the United States.” However, even if I were to assume *arguendo* that Respondent’s factual assertions are true, this does not defeat the EPA’s jurisdiction under the CWA and the oil discharge regulations.

Cases both before and after *SWANCC* establish that intermittently flowing, human-made tributaries are “waters of the United States.” The Tenth Circuit, the circuit in which this matter arises, held in *Quivira Mining Company v. United States Environmental Protection Agency*, that a non-navigable creek and a non-navigable arroyo which were connected by surface water to navigable streams during times of heavy rainfall are “waters of the United States.” 765 F.2d 126, 129-30 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). In *United States v. Texas Pipe Line Company*, an oil pollution case, the Tenth Circuit upheld CWA jurisdiction over a watercourse which was an unnamed tributary to Caney Creek, which emptied into Clear Boggy Creek, which was a tributary to the Red River. 611 F.2d 345 (10th Cir. 1979). Significantly, the Tenth Circuit in *Texas Pipe Line* noted, “It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense.” *Id.* at 347. The Eleventh Circuit, in *United States v. Eidson*, held that an intermittently flowing human-made drainage ditch connecting into a drainage canal, which emptied into Picnic Island Creek, which was a tributary to Tampa Bay, was a “water of the United States.” 108 F.3d 1336, 1342-43 (11th Cir.), *cert. denied*, 522 U.S. 899, 1004 (1997). *Eidson* follows *Riverside*’s focus on whether a body of water can cause ecological damage, stating, “[A]s long as the tributary would flow into the navigable body of water ‘during significant rainfall,’ it is capable of spreading environmental damage and is thus a ‘water of the United States’ under the Act.” *Id.*, citing to *Quivira*.

Perhaps one of the more significant CWA tributary cases is the Sixth Circuit case, *United States v. Ashland Oil & Transportation Company*, 504 F.2d 1317 (6th Cir. 1974). In *Ashland Oil*, the company was indicted for failure to immediately report an oil spill into Little Cypress Creek, which flowed into the Pond River, which flowed into the Green River, which was navigable-in-fact. *Id.* at 1320, 1325-28. In *Ashland*, the Court held that to establish a violation of the CWA it is enough to show that the defendant discharged pollutants into a tributary that is a “water of the United States” and that there was no threshold requirement to prove that the pollutant actually reached and polluted a navigable river. *Id.* at 1329. As to Congress’ power to use its interstate commerce powers to control water pollution, the Sixth Circuit declared,

It would, of course, make a mockery of those powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

Id. at 1326. The Court added, “Pollution control of navigable streams can only be exercised by

controlling pollution of their tributaries.” *Id.* at 1327.^{13/}

The CWA provides jurisdiction over human-made bodies of water. In *Eidson*, the Eleventh Circuit held that an intermittently flowing stormwater runoff system constituted “waters of the United States.” *Eidson, supra*, at 1342-43. *Eidson* explained, “There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes.” *Id.* at 1342. The Ninth Circuit has also upheld CWA jurisdiction over human-made bodies of water. See *Headwaters*, at 533 (upholding CWA jurisdiction over an intermittently flowing human-made canal); *Leslie Salt Co. v. United States*, 896 F.2d 354, 359-61 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (upholding jurisdiction over human-made, seasonal ponds that were dry most of the year). Furthermore, it follows that it makes no difference what the source of the water is, whether it is all “produced waters” (waters used in the oil production process), water from a pumper truck, precipitation, or any combination thereof. As to Section 311 of the CWA, Congress intended it to reach *all* “waters of the United States” and did not impose a limitation on jurisdiction due to the purpose of the water. See CWA § 311(b)(1).^{14/}

As for the post-SWANCC cases, those having facts similar to the case before me generally reinforce the cases cited above. The Ninth Circuit in *Headwaters* concluded, “The Clean Water Act

^{13/} Other cases upholding CWA navigable waters jurisdiction over non-navigable tributaries of navigable waters: *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (upholding CWA jurisdiction over a “small-volume stream that flows only intermittently”); *United States v. TGR Corp.*, 171 F.3d 762, 765 (2d. Cir. 1999) (upholding CWA jurisdiction over a tributary to a navigable water).

^{14/} I also observe that the EPA’s oil discharge regulation defining “navigable waters” asserts jurisdiction over:

(c) . . . intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: . . . (3) That are used or could be used for industrial purposes by industries in interstate commerce

40 C.F.R. 110.1 (1997). In the case before me, the discharge stream, the Unnamed Creek, and Blue Draw are all used for the discharge of produced water employed in the production of oil to be sold in interstate commerce. See *Stip. Exs.* 29 and 43; *Compl. Ex.* 21; *Tr.* at 358-59 (Yates), 411 (Aragon), 659-60 (Calvert).

is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and ‘it is incontestable that substantial pollution of one not only may but very probably will affect the other.’” *Headwaters*, at 534 (quoting *Ashland*). In *Buday*, *supra*, the district court for Montana concluded that distance was not a factor as to whether a tributary to a tributary of a navigable or interstate water constitutes “waters of the United States.” *Buday*, at 1288-90. Admittedly, the facts in *Buday* do not involve intermittently flowing tributaries but that court makes no indication that this would have changed its holding. *See id.* at 1283.

Respondent places much emphasis on a recent Fifth Circuit case, *Rice v. Harken Exploration Company*, 250 F.3d 265 (5th Cir. 2001).^{15/} In *Rice*, which was an OPA case involving pollution of “navigable waters,” the Fifth Circuit determined that the term “navigable waters” in the OPA and the CWA have the same meaning. *Id.* at 267-68. *Rice* involved discharges of oil and other pollutants into Big Creek, which was a seasonal creek that often had no running water and when water did flow *all of it was underground*. *Id.* at 270. Its waters, which I again note were underground, fed into the Canadian River, which was admitted to be a navigable water. *Id.* at 271-72. The *Rice* decision focused on the Fifth Circuit’s case law which has held that groundwater pollution by itself was not intended to have been regulated by the CWA (and by extension the OPA). *Id.* at 269-70. The court in *Rice* concluded that the CWA was not intended to have regulated groundwater at all. *Id.* at 271. In *Rice*,

there [was] no evidence of any oil discharge directly into Big Creek or any other intermittent creek containing above ground water on the ranch; only that there were oil discharges into the ground, some part of which may have, over some undetermined period of time, seeped through the ground into ground water and thence into Big Creek or other intermittent creek (either as an underground or surface body of water).

Id. Under *Rice*, *underground*, intermittent streams do not qualify as “navigable waters.”

In contrast to the facts in *Rice*, the discharges in the case before me are directly into surface waterways rather than underground waterways. Tr. at 267 (Harrison), 415-18 (Aragon), 450-52 (Hawthorne), 474-75 (Hawthorne), 515 (Goedert), 664-65 (Calvert), 692 (Calvert), 733-34 (Calvert). The Unnamed Creek has natural water seeps in addition to any produced water that may enter it. Tr. at 409 (Aragon), 544 (Goedert); Stip. Ex. 2. Natural water seeps and rainfall also create flows of water in the incise channel, which joins with the discharge stream to form the Unnamed Creek. Tr. at 103 (Nakad), 409 (Aragon), 715-16 (Calvert). Furthermore, water was flowing in the incise

^{15/} First, I observe that the case before me arises within the jurisdiction of the Tenth Circuit.

channel and in the Unnamed Creek at times during the oil spill.^{16/} Additionally, water was flowing in the natural drainage system, including the incise channel, near the discharge pits. Tr. at 736 (Calvert). At the time of the oil discharge, rainwater and water seeps were present in the Unnamed Creek. Tr. at 293 (Harrison), 417-18 (Aragon), 451-53 (Hawthorne), 503-04 (Goedert), 543 (Goedert). In addition, water was flowing under the T-siphon dam and towards Five Mile Creek at the time of the oil discharge. Tr. at 536 (Goedert); Stip. Ex. 2: Black and White Photo # 1. Rainwater came into contact with the spilled oil in the Unnamed Creek when the lower dam, the T-siphon dam, washed out during heavy rains. Tr. at 692 (Calvert).

I find that the non-navigable incise channel and Unnamed Creek, which are part of the network of tributaries flowing into the navigable-in-fact Boysen Reservoir, are “waters of the United States” and thus “navigable waters” within the context of the CWA and its implementing oil discharge regulations. Specifically, I find the following bodies of water to be “waters of the United States” and thus “navigable waters” under the CWA and the oil discharge regulations: (1) the incise channel, which is a tributary to (2) the Unnamed Creek, which is a tributary to (2) Blue Draw, which is as a tributary to (3) Five Mile Creek, which is a tributary to (4) Boysen Reservoir, which is navigable-in-fact.^{17/} In addition, the discharge stream, which is a tributary to the Unnamed Creek,

^{16/} Even if water were not flowing at the time of the oil discharge to connect the Unnamed Creek and the incise channel to the network of tributaries that connect to Boysen Reservoir, there would still be CWA jurisdiction. See *Texas Pipe Line Co., supra*, at 347. In *Texas Pipe Line*, the Tenth Circuit upheld CWA jurisdiction over a stream which was a tributary to a tributary to a tributary to a navigable river, although there was only a small amount of water in the stream at the time of the oil discharge. *Id.* The court held that as the stream would flow to the river during significant rainfall, it did not matter whether that stream was or was not at the time of the oil spill discharging water continuously into a river navigable in the traditional sense. *Id.*

^{17/} However, as to the status of the small gullies and small natural land contours in the immediate vicinity of the 5,000 barrel slop oil tank, they appear to carry only an insignificant amount of water. See Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video. These small gullies appear to be rather shallow and narrow. See *id.* Additionally, they also do not appear to be part of the “established” drainage system claimed by one of Respondent’s witnesses to be “waters of the United States.” See Tr. at 202 (Litchford). There is no substantial indication that Congress would intend such insignificant waterbodies to qualify as waters of the United States. Otherwise, virtually any minor gullies and land contours upgradient of an open body of water would qualify as “waters of the United States.” I read the term “tributary” within the regulation as referring to a more substantial waterway than the

is one of the “waters of the United States.”

Additionally, as I read the EPA’s oil discharge regulation concerning tributaries, which are connected bodies of water rather than isolated bodies of water, I conclude that such regulation should be accorded administrative deference. *See Chevron v. NRDC, supra*. In contrast to *SWANCC*, the EPA’s regulation concerning tributaries does not attempt to assume jurisdiction over isolated bodies of water having no connection whatsoever to a navigable body of water. The EPA’s oil discharge regulation’s subsection clarifying “navigable waters” to include non-navigable tributaries to “navigable waters” does provide a clear connection (or nexus) between non-navigable bodies of water and navigable bodies of water. As opposed to the isolated wetlands in *SWANCC*, this network of tributaries does provide a significant nexus to a navigable-in-fact water. As there is no comparable impingement of States’ rights, the EPA’s interpretation is entitled to deference under *Chevron v. NRDC* as it was in *Riverside*. *See Riverside, supra*, at 134. As an observation, I would add that Respondent’s Facility, which includes the Unnamed Creek, the discharge stream, and the incise channel,^{18/} is on federally owned property on an Indian Reservation. *See Stip. Ex. 40*. The potential impingement of States’ rights is negligible in this case.^{19/}

Navigable Waters Within the Meaning of the SPCC Regulations

Count I of the Complaint charges Respondent with failure to implement a Spill Prevention Control and Countermeasure (“SPCC”) Plan in accordance with the requirements of the SPCC regulation at 40 C.F.R. §112.7 (1997-99), which was promulgated pursuant to Section 311 of the CWA. The definition of “navigable waters” within the context of the Oil Pollution Prevention regulations, which includes SPCC Plans, is as follows:

The term *navigable waters* of the United States means *navigable waters* as defined in section 502(7) of the FWPCA, and includes:
 (1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA

very small gullies and small natural land contours within the immediate vicinity of the 5,000 barrel tank. In contrast, the incise channel is one to five feet deep and at least a few feet wide and carries a large volume of water during heavy precipitation. *See Compl. Ex. 21: Video; Stip. Exs. 2, 7, and 8 (photo logs)*.

^{18/} *See Stip. Ex. 1: SPCC Plan.*

^{19/} Moreover, the recent acts of terrorism, including bio-terrorism readily illustrate the necessary role of the Federal Government in events that occur locally. Interpretation of the term “waters of the United States” should be informed by such role.

- (Pub. L. 92-500), and tributaries of such waters;
- (2) Interstate waters;
 - (3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and
 - (4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

40 C.F.R. § 112.2.

The SPCC definition of “navigable waters” appears slightly narrower than that in the oil discharge regulations as to some waters.^{20/} For instance, the SPCC definition fails to expressly assume jurisdiction over wetlands. *Compare* 40 C.F.R. § 110.1. It also fails to expressly assume jurisdiction over tributaries to non-traditionally defined waters and fails to expressly assume jurisdiction over tributaries to interstate waters. Nevertheless, a straight-forward reading of subsection (1) of the above-cited regulation grants jurisdiction to the EPA over non-navigable tributaries to navigable-in-fact waters. The traditional, pre-1972 definition of “navigable” includes waters that are either “navigable-in-fact” or readily susceptible to being made so. *See Appalachian Electric Power Co., supra*, at 407-08 (1940) (the landmark case), cited in *SWANCC*, at 172. It is significant that subsection (1) of the regulation does not place a navigability or other traditional limit on the *tributaries* of traditionally-defined waters of the United States. The regulation could have easily limited federal jurisdiction to only those waters that were traditionally defined as “navigable waters.” Thus, I conclude that the SPCC regulations at 40 C.F.R. Part 112 confer jurisdiction over non-navigable tributaries to navigable-in-fact waters. As with the Oil Discharge regulation, the incise channel, the discharge stream, the Unnamed Creek, Blue Draw, and Five Mile Creek are “waters of the United States” as they are tributaries to the navigable-in-fact Boysen Reservoir.

Additionally, as with the Oil Discharge regulations, the SPCC regulation’s subsection defining non-navigable tributaries as “navigable waters” is entitled to administrative deference pursuant to *Chevron v. NRDC*. In contrast to the isolated bodies of water and the Migratory Bird Rule in *SWANCC*, there is a significant nexus between non-navigable tributaries in the case before me and the navigable-in-fact Boysen Reservoir to which the tributaries connect. In *Riverside*, the Supreme Court deferred to the Corps’ expertise in determining the ecological nexus between non-navigable bodies of water and traditionally-defined navigable waters (which includes navigable-in-fact and susceptible-to-being-made-navigable bodies of water). *Riverside*, at 134. Applying such deference, it is logical for the EPA to assume CWA jurisdiction over this network of tributaries

^{20/} Alternatively, the SPCC regulation’s definition of “navigable waters” could be read as broadly as the regulatory definition of “navigable waters” in 40 C.F.R. Part 110, as it begins the definition by reference to Section 502(7) of the CWA and then includes the narrower subsections. *See* 40 C.F.R. § 112.2. Under such alternative interpretation, the incise channel, the discharge stream, and the Unnamed Creek would still meet the definition of “navigable waters.”

which connect to the navigable-in-fact Boysen Reservoir.

II. COUNT I: THE SPCC VIOLATION

SPCC Jurisdiction Over Respondent's Facility

Count I of EPA's Complaint charges Respondent with failure to implement an SPCC Plan at its Facility in accordance with the Oil SPCC regulations set forth at 40 C.F.R. § 112.7. Compl. ¶ 36. Count I further alleges that failure to implement the SPCC Plan in accordance with 40 C.F.R. § 112.7 constitutes a violation of 40 C.F.R. § 112.3 and Section 311(b)(6)(A)(ii) of the CWA, which is part of the civil administrative penalty provision for Section 311 of the CWA. *Id.* ¶ 37.

Section 311(j)(1)(C) of the CWA directs the President, *inter alia*, to establish "[P]rocedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges . . ." Additionally, Section 311(j)(5)(A) provides that "[t]he President shall issue regulations which require an owner or operator of a tank vessel or facility . . . to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance." The facilities mentioned include "[a]n onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone." CWA § 311(j)(5)(B)(iii). Pursuant to Section 311(j) of the CWA, the EPA first promulgated the "Oil Pollution Prevention" regulations at 40 C.F.R. Part 112 in 1973. The SPCC regulation with which Respondent is charged as violating, 40 C.F.R. § 112.3(a), reads as follows:

[o]wners or operators of onshore and offshore facilities in operation on or before the effective date of this part that have discharged or, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in 40 CFR part 110, into or upon the navigable waters of the United States or adjoining shorelines, shall prepare a Spill Prevention Control and Countermeasure Plan (hereinafter "SPCC Plan"), in writing and in accordance with § 112.7 . . . such SPCC Plan shall be prepared within six months after the effective date of this part and shall be *fully implemented* as soon as possible, but not later than one year after the effective date of this part.

(Emphasis supplied.)

Initially, it must be determined whether the SPCC regulation at issue assumes jurisdiction

over Respondent.^{21/} 40 C.F.R. Part 112.1(b) provides:

[e]xcept as provided in paragraph (d) of this section, this part applies to owners or operators of non-transportation-related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines.

Respondent admits that its Facility is a non-transportation related “onshore facility” that at least stored oil during the relevant period. Resp. Post-Hrg. Br. at 9. My review of the record confirms this. See Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video; CWA § 311(a)(10); 40 C.F.R. § 112.2. I also find that all of Respondent’s Facility is one “onshore facility” and not three separate and independent facilities. See Stip. Ex. 1: SPCC Plan; Stip. Ex. 43. It is in a single geographical oil field operated by a single operator. See *id.*; 40 C.F.R. § 112.7(e)(5)(i).^{22/} Respondent’s Facility is an oil production facility. Stip. Exs. 29, 43, and 44. At least from the EPA’s inspection of March 25, 1998 to May 28, 1998, Respondent had engaged in oil production with one or more wells on the Facility. Stip. Ex. 29.

Respondent argues that it stopped becoming an oil production facility in late May 1998 when it stopped production activities. Tr. at 348-49 (Yates), 632-33 (Calvert). However, up to the date of the hearing, some of the wells had been plugged and abandoned but others had only been “shut in.” Tr. at 348-49 (Yates), 356-57 (Yates), 362 (Yates). “Shut-in” wells are capable of producing oil. Tr. at 356-57 (Yates). Shutting-in a well is a temporary method of stopping oil production and can be done merely by turning off a valve or pump. Tr. at 362 (Yates), 634 (Calvert). “Plugged and abandoned” wells are not capable of producing oil. Tr. at 356-57 (Yates). To plug and abandon a well, cement is filled in the well, equipment is removed, and a metal plate is welded into the ground. Tr. at 362-63 (Yates), 634-635 (Calvert). After the shut-in of some of the wells at Respondent’s Facility, oil continued to be stored, transferred or treated for sale at the Facility. Tr. at 385-89 (Yates); Stip. Ex. 29.

Contrary to Respondent’s suggestion, SPCC jurisdiction cannot be cut off as easily as

^{21/} Although Respondent has prepared an SPCC Plan pursuant to 40 C.F.R. § 112.3, I do not find that fact to be persuasive as to the issue of jurisdiction, as argued by the EPA.

^{22/} “An onshore production facility may include all wells, flowlines, separation equipment, storage facilities, gathering lines, and auxiliary non-transportation-related equipment and facilities in a single geographical oil or gas field operated by a single operator.” 40 C.F.R. § 112.7(e)(5)(i).

ceasing operations at a facility or merely shutting-in oil wells. The First Circuit's decision in *Pepperell Associates v. United States Environmental Protection Agency* is instructive on this matter, 246 F.3d 15 (1st Cir. 2001). In *Pepperell* a facility operator originally qualified to be regulated by SPCC regulations in part because the storage capacity at its facility met the oil volume capacity threshold. *Id.* at 20-21. Later, the operator disconnected tanks from its facility and tried to avoid liability for violations that occurred after the disconnection. *Id.* In *Pepperell*, the First Circuit denied the petition for review of an Environmental Appeals Board ("EAB") holding that disconnecting oil storage tanks did not defeat SPCC jurisdiction. *Id.* at 26-27. The First Circuit reasoned that allowing for such an easy manipulation of SPCC jurisdiction would impede the proper assessment of SPCC jurisdiction whereas a more stable process would aid administrative continuity. *Id.* at 26. I conclude that once SPCC jurisdiction attaches, it cannot be thwarted by a mere temporary disablement of the ability to use the storage tanks at a Facility for oil production and storage purposes or any other purpose listed in the regulations. Respondent did not plug and abandon all of the wells so as to preclude them from being able to produce oil, and oil continued to be present in tanks and elsewhere at the Facility at all relevant times. Tr. at 348-49 (Yates), 356-57 (Yates), 362 (Yates), 385-89 (Yates); Stip. Exs. 2, 7, 8, and 29; Compl. Ex. 21.^{23/}

Additionally, I find that Respondent had storage tanks at its Facility, including but not limited to a 5,000 barrel slop oil tank. Tr. at 385-89 (Yates); Stip. Exs. 1, 2, 7, and 8. The SPCC regulations clearly include any such storage tanks as being part of the "production facility" rather than being a separate bulk oil storage facility. *See* 40 C.F.R. § 112.7(e)(5)(i). There is insufficient credible evidence that Respondent ever used more than temporary means to prevent its storage tanks, including the 5,000 barrel tank, from being able to be used for oil storage. *See* Stip. Exs. 1, 2, 7, and 8; Compl. Ex. 21: Video. Alternatively, if Respondent had been successful in its argument that the Facility was not a production facility, it would then qualify as a bulk storage facility and still be considered a facility within the jurisdiction of the SPCC regulations. I find that Respondent's Facility was an oil production facility at least from March 25, 1998, the date of the first inspection, through October 21, 1999, the date of the last inspection. Stip. Exs. 7 and 8.

As to whether Respondent is an owner or operator of the Facility, Respondent must be a person who owns or operates a facility. *See* CWA § 311(a)(6); 40 C.F.R. § 112.2. Respondent admitted to being a corporation and does not dispute that it is a "person." *See* Joint Stipulations,

^{23/} In my opinion, an instance in which a facility might cease becoming a production facility in accordance with *Pepperell* would be if all wells throughout a facility were "plugged and abandoned" and all storage tanks and equipment throughout the entire facility were removed. Nevertheless, by the time of the hearing of May 16, 2001, Respondent had performed the aforementioned activities as to only two of the three leases of its Facility. Tr. at 338-39 (Yates). Furthermore, from March 25, 1998 through October 21, 1999, oil was still present at the Facility and in storage tanks at lease numbers 7747 and 7749. *See* Stip. Exs. 2, 7, and 8; Compl. Ex. 21: Video.

Fact ¶ 1; CWA § 311(a)(7); 40 C.F.R. § 112.2. Respondent does not own its Facility but rather the Federal Government owns the Facility, and Respondent operates and has operated the Facility for many years. *See* Joint Stipulations, Fact ¶¶ 17 and 2; Stip. Ex. 43. Respondent had production leases with the Federal Government regarding the Facility which expired on May 28, 1998, when it ceased production activities. Tr. at 348-49 (Yates), 632-33 (Calvert). However, Respondent did stipulate that it was the “operator of the facility.” *See* Joint Stipulations, Fact ¶ 2.

Additionally, I found several instances in the record supporting the fact that Respondent was operating the Facility both to produce oil and to store oil. Answer ¶ 21; Tr. at 659-60 (Calvert); Stip. Exs. 2 and 8 (Photo Logs); Stip. Ex. 40. For instance, Respondent was actively producing oil at the Facility at least from March 1998 through May 1998. Stip. Exs. 29 and 44. At the time of the oil spill in June 1998, Respondent was transferring oil from its 5,000 barrel bulk storage tank to another tank for eventual sale. Answer ¶ 21; Tr. at 288 (Harrison), 659-60 (Calvert); Stip. Ex. 2. I find that Respondent was an operator of the Facility at least from March 25, 1998 until October 21, 1999. Although Respondent had tried to terminate its responsibility over the property as far back as a few years prior to the time alleged in the Complaint, this did not terminate its status as an operator. Section 311(b)(6) of the CWA provides for strict liability. *See U.S. v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1127 (5th Cir., Unit A), *cert. denied*, 454 U.S. 835 (1981); *U.S. v. Tex-Tow, Inc.*, 589 F.2d 1310, 1312-13 (7th Cir. 1978); *U.S. v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1306-07 (7th Cir. 1978); *In the Matter of Aldi, Inc., Kansas*, CWA-7-2000-0015, 2001 EPA ALJ LEXIS 21, at *8 (EPA ALJ, Feb. 7, 2001) (Order on Motions).

The SPCC regulations exempt facilities whose above-ground storage capacity is 1,320 gallons or less of oil, provided that no single container has a capacity in excess of 660 gallons and if the buried storage capacity is no more than 42,000 gallons of oil. 40 C.F.R. § 112.1(d)(2). Respondent’s Facility has an estimated oil storage capacity of approximately 462,000 gallons. Tr. at 568-69 (Nakad), 617 (Nakad). The largest tank at the Facility at least from March 25, 1998 through October 21, 1999 was a 5,000 barrel slop oil tank located on lease number 7749, which has a storage capacity of approximately 210,000 gallons. Tr. at 570 (Nakad). The above-ground 5,000 barrel slop oil tank’s capacity, at 42 gallons per barrel, amounting to 210,000 gallons, easily satisfies the capacity requirement of the regulations. Additionally, there were other oil tanks on Respondent’s site during the duration of the alleged SPCC violation, including 1,000 and 2,000 barrel oil tanks. *See* Stip. Exs. 2, 7, and 8. At the very least, the 5,000 barrel tank continued to be used throughout the duration of the alleged SPCC violations. *See* Stip. Exs. 1, 2, 7, 8, 29, and 44; Compl. Ex. 21: Video. Thus, I find that Respondent’s Facility has an unburied storage capacity greater than 1,320 gallons of oil and has at least one single container with a storage capacity greater than 660 gallons of oil. *See* Answer ¶ 9.

In addition to the tank capacity requirement, in order for there to be 40 C.F.R. Part 112 SPCC jurisdiction, a facility must be reasonably expected to discharge oil into or upon the navigable waters of the United States or adjoining shorelines in “harmful quantities” as defined in 40 C.F.R. Part 110. 40 C.F.R. §§ 112.1(b), 112.1(d)(1)(i). By “harmful quantities,” the regulations mean discharges of oil that either “(a) Violate applicable water quality standards; or (b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines

or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.” *Id.* § 110.3. Further, the regulations define “sheen” as “an iridescent appearance on the surface of water.” *Id.* § 110.1.^{24/} A “sheen” may be caused by just a few drops of oil. Tr. at 486-87 (Hawthorne). Although Respondent was issued a permit for discharges into the receiving waters “Blue Draw via unnamed drainage” (the discharge stream and the Unnamed Creek), that permit provides effluent limitations including: “[t]he concentration of oil and grease in any single sample shall not exceed 10 mg/L *nor* shall there be any visible sheen in the receiving water or adjoining shoreline.” Stip. Ex. 43 at 5-6 (emphasis supplied). Therefore, Respondent’s permit is not any more lenient than the regulations defining “harmful quantities” of oil.

In determining whether there is a reasonable expectation of discharge, the determination is based

[S]olely upon a consideration of the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) and shall exclude consideration of manmade features such as dikes, equipment or other structures which may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters of the United States or adjoining shorelines

40 C.F.R. § 112.1(d)(1)(i). By itself, proximity of the facility to navigable waters is not sufficient to provide a reasonable expectation of discharge (at least where the facility is 100 yards from the navigable water).^{25/} However, the exact path of the discharge does not have to be foreseeable.^{26/}

In the case before me, I have already found the incise channel, the discharge stream, the Unnamed Creek, Blue Draw, Five Mile Creek, and Boysen Reservoir to be “waters of the United States” and thus “navigable waters” within the context of the CWA and the SPCC regulations at 40 C.F.R. Part 112. As to Respondent’s Facility, its geographical and locational aspects particularly provide easy access for discharges of oil into those waters. At the top of hilly terrain, are the three tank batteries, on leases # 7746, 7747, and 7749. *See* Stip. Ex. 1: SPCC Plan – Map; Stip. Exs. 2 and 7; Compl. Ex. 21: Video. The 5,000 barrel slop oil tank is one of the tanks in the tank battery on lease # 7749. *See id.* The Facility is situated within a natural drainage system consisting of gullies and natural contours in the land that lead to a large incise channel. Tr. at 84 (Nakad), 202 (Litchford), 213 (Litchford), 227-28 (Litchford), 681-84 (Calvert); Stip. Ex. 8 at 1.

^{24/} The “sheen test” is a valid test for Section 311(b)(6) violations. *See e.g. Chevron, U.S.A., Inc. v. Yost*, 919 F.2d 27, 30-31 (5th Cir. 1990).

^{25/} *See In the Matter of City of Akron*, 1 E.A.D. 442, 446 (EPA JO, March 20, 1978).

^{26/} *See Pepperell, supra*, at 23-24 (1st Cir.).

The incise channel is a well-defined water pathway that converges with the discharge stream to form the Unnamed Creek. *See* Tr. at 84 (Nakad), 94-95 (Nakad), 177 (Nakad), 191 (Nakad); 212-13 (Litchford); Stip. Exs., 2, 7, and 8 (photo logs); Compl. Ex. 21: Video. Oil, just like water, follows natural pathways. Just as water at the Facility follows the natural contours of the land and gravitates downgradient to the incise channel, which empties into the Unnamed Creek, the oil from the storage tanks would also be expected to follow this same pathway.

Moreover, any quantity of water will facilitate the movement of any spilled oil towards Five Mile Creek and Boysen Reservoir. The natural drainage system, including the incise channel, carries water when there is precipitation. Tr. at 692-95 (Calvert). Large amounts of produced water entered the discharge stream and the Unnamed Creek up until May 28 of 1998. *See* Stip. Exs. 29 and 44; Tr. at 692-94 (Calvert).

The question is whether an oil discharge in “harmful quantities” could reasonably be expected to reach Boysen Reservoir or any of its tributaries: Five Mile Creek, Blue Draw, the Unnamed Creek, the discharge stream, and the incise channel. That question is answered in the affirmative. A discharge in “harmful quantities” is one that would cause a “sheen” on a body of water. 40 C.F.R. § 110.3. The Facility has a storage capacity of 462,000 gallons. Tr. at 568-69 (Nakad), 617 (Nakad). Very small quantities of oil can cause a sheen on the surface of water. Tr. at 486-87 (Hawthorne). The Facility’s largest tank alone, which is the 5,000 barrel tank, has a storage capacity of 210,000 gallons and has actually stored at least 46,000 gallons of oil (1,100 barrels) at times including June 1998. Tr. at 570 (Nakad), 658-59 (Calvert).

Furthermore, discharges can be reasonably expected when considering the weather patterns of an area. *See Pepperell, supra*, at 24-25 (1st Cir.). As previously discussed, cloudbursts, flash floods, and snowmelts occur periodically at the Facility, causing water to flow in the incise channel, the discharge stream, and the Unnamed Creek. Tr. at 293 (Harrison), 408-09 (Aragon), 417-17 (Aragon), 451-53 (Hawthorne), 503-04 (Goedert), 536 (Goedert), 543 (Goedert), 692 (Calvert), 735 (Calvert); Stip. Ex. 2. During heavy rains, water flows through the incise channel and into the Unnamed Creek. Tr. at 236 (Litchford), 238 (Litchford). Precipitation carries any oil that reaches the incise channel into the Unnamed Creek and on to Blue Draw and Five Mile Creek. There is almost a certainty that an oil spill will reach the incise channel and the Unnamed Creek.

In addition, the SPCC regulations are designed to protect against a “worst case discharge.” *See* 40 C.F.R. § 112.2; 40 C.F.R. §§ 112.20(d)(1), (h)(3)(i), (h)(5)(i); 40 C.F.R. Part 112: Appendix D. The SPCC regulations define a “worst case discharge” as “the largest foreseeable discharge in adverse weather conditions as determined using the worksheets in Appendix D to this part.” 40 C.F.R. § 112.2. As to above-ground multiple-tank facilities, such as Respondent’s, Appendix D first asks if all aboveground oil storage tanks or groups of oil storage tanks at the facility are without “adequate” secondary containment. 40 C.F.R. Part 112, App. D, at B.2. If so, the “worst case volume equals the total aboveground oil storage capacity without adequate secondary containment plus the production volume of the well with the highest output at the facility.” *Id.*, at B.2 and B.2.1.

From at least March 25, 1998 until July 9, 1998, when Respondent finally built a berm around one of its tanks, all of its tanks and tank groups at the Facility lacked “adequate secondary containment.” See Stip. Exs. 2, 7, and 8 (photo logs); Stip. Ex. 38; Tr. at 315 (Harrison), 462 (Hawthorne). The Facility’s total storage capacity is 462,000 gallons. Tr. at 568-69 (Nakad), 617 (Nakad). Based on a total Facility storage capacity of 462,000 gallons, the “Final Worst Case Volume” is at least 462,000 gallons. 40 C.F.R. Part 112: Appendix D at B.2.1 and B.2.1(3)(A). I find that in adverse weather, a reasonable operator of the facility would have a reasonable expectation that a “worst case discharge” would create a sheen on waters as far away as Five Mile Creek and possibly Boysen Reservoir.

Alternatively, subsection B.2.2. of Appendix D provides that if not all of the tanks lack adequate secondary containment, the initial “worst case volume” is determined based on the “total aboveground oil storage capacity of tanks without adequate secondary containment.” 40 C.F.R. Part 112, App. D at B.2.2. Next, to arrive at the “Final Worst Case Volume” one must

[c]alculate the capacity of the largest single aboveground oil storage tank within an adequate secondary containment area or the combined capacity of a group of above-ground oil storage tanks permanently manifolded together, whichever is greater, plus the production volume of the well with the highest output, PLUS THE VOLUME FROM QUESTION B.2.2. [the total aboveground storage capacity of tanks without adequate secondary containment].

Id. at B.2.3. Even under this formula, the worst case volume would amount to at least 210,000 gallons of oil, as the capacity of the largest tank is 5,000 barrels. Tr. at 570 (Nakad). As in the above formulation, I find that a discharge of 210,000 gallons of oil at the Facility in adverse weather, such as a cloudburst, would create a discharge sufficient to create a sheen on the waters of Five Mile Creek, Blue Draw, and possibly Boysen Reservoir, in addition to the incise channel and the Unnamed Creek.

Accordingly, I conclude that based solely upon a consideration of the geographical and locational aspects of Respondent’s Facility, the Facility could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States. Therefore, Respondent’s Facility is subject to the SPCC regulations.

Respondent’s Failure to Implement its SPCC Plan

Now I turn to the question of whether Respondent failed to implement an SPCC Plan, as charged in the Complaint. Count I of EPA’s Complaint charges Respondent with failure to implement an SPCC Plan at its Facility in accordance with the SPCC regulations set forth at 40 C.F.R. § 112.7 (1997-99). Compl. ¶ 36. Count I further alleges that failure to implement the SPCC Plan in accordance with 40 C.F.R. § 112.7 constitutes a violation of 40 C.F.R. § 112.3 and Section 311(b)(6) of the CWA. *Id.* ¶ 37. Section 112.3(a) of 40 C.F.R. requires that an SPCC

Plan must be “fully implemented.” The word “implement” means “to carry out” or “accomplish” and especially “to give practical effect to and ensure actual fulfillment by concrete measures.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 583 (10th ed. 1997). The EPA did not specify in the Complaint the meaning of failure to implement a plan in accordance with the regulations, although it seems that this at least includes failure to implement the plan Respondent prepared. Therefore, my analysis is two-pronged. First, I determine whether Respondent fully implemented its SPCC Plan as written. Next, I will determine whether Respondent fully implemented an SPCC Plan in accordance with the SPCC regulations. I note that the EPA did not charge Respondent with failure to prepare a carefully thought-out plan that is in accordance with good engineering practices. *See* Compl. ¶¶ 36-37.

As to whether Respondent failed to fully implement its SPCC Plan as written, I first turn to the specific provisions of the Plan itself. Respondent’s Plan, which is dated January 15, 1992, generally imposes the same requirements as to all three leases comprising the Facility. *See* Stip. Ex. 1, Attachment: Maverick Springs Facility SPCC Plan. In its Plan, Respondent acknowledges that “[c]ontainment or diversionary structures or equipment to prevent oil from reaching navigable waters are practicable” as to the tank batteries. *Id.* As for the secondary containment contemplated in the Plan, it states, “Tank Battery is located up hill of a disposal pit where any oil can be skimmed. There are *trenches* adjacent to the skim system *which will catch a spill and direct it to the disposal pits* where the oil can be skimmed.” *Id.* (emphasis supplied). As to Spill Control Methods, the plan provides that: (1) the leases are constantly supervised, (2) produced water is collected in two skimming pits with dikes and discharges into “unnamed drainage” (i.e. the discharge stream and the Unnamed Creek) to Blue Draw, (3) discharges are pursuant to Permit WY0000469, and (4) if a spill should occur, oil would be collected in the pits and pumped back into the tanks and all necessary manpower and equipment would be used to pick up oil to prevent runoff. *Id.* However, the Plan states that as to the “[f]low lines, because of the distance they cover, secondary containment cannot be practically justified” and “[f]or occasions when a reportable oil spill might occur, an oil spill contingency plan has been prepared to control and remove any harmful discharge.” *Id.* As to the discharge permit, it provides effluent limitations including: “[t]he concentration of oil and grease in any single sample shall not exceed 10 mg/L nor shall there be any visible sheen in the receiving water or adjoining shoreline.” Stip. Ex. 43 at 5-6.

Additionally, the Plan requires that “there are company personnel on lease at all times,” and “[a]ll oil is skimmed off disposal pits and removed by vacuum trucks.” Stip. Ex. 1: SPCC Plan. The Plan mandates that “drainage ditches, road ditches, and oil traps, sumps, or skimmers, if such exist, are inspected at regularly scheduled intervals for accumulations of oil.” *Id.* It further requires: “[d]isposal pits are inspected daily by field personnel. Oil is collected off the top of the pit by skimmers and is removed by vacuum trucks” *Id.* The Plan requires, “All tanks containing oil are examined by competent personnel for condition and maintenance. If repairs are required, they are handled according to good oil field practice.” *Id.*

Jane Nakad of the EPA conducted an inspection of Respondent’s Maverick Springs Facility on March 25, 1998. Tr. at 82 (Nakad). In her inspection report, she cited the following SPCC

violations: (1) no secondary containment, (2) tanks not engineered to prevent oil spills, (3) oil traps/sumps allowed to overflow, (4) pooling oil or oil-saturated ground, (5) pipe supports inadequate, (6) open leaking valves and pipes. *See* Tr. at 91 (Nakad); Stip. Ex. 7. The photographs from the inspection and the video corroborate Ms. Nakad's report from that day. *See* Stip. Ex. 7 (photo log); Compl. Ex. 21: Video. Specifically, the record reflects the absence of secondary containment as specified by Respondent in its SPCC Plan. *See id.* The use of adequate containment structures to retain oil spills, thereby preventing a release of oil spills to navigable waters, is one of the "key elements" of the oil SPCC requirements. *See In re Industrial Chemicals Corporation*, CWA Appeal No. 00-7, slip op. at 5 (EAB, October 15, 2001), 10 E.A.D. _____. At the inspection, there was an absence of trenches to catch and direct an oil spill to the discharge pits. *See* Stip. Ex. 7 (photo log); Compl. Ex. 21: Video. The discharge pits, which were intended as secondary containment, had inadequate freeboard with oil overtopping the pits and thus did not have sufficient capacity for any oil discharge should there be a significant spill from the tanks. *See id.*

Further corroboration of Ms. Nakad's inspection report is provided by the testimony of Ms. Harrison, who also conducted an inspection of Respondent's Facility on March 25, 1998 on behalf of the BLM,^{27/} and by the findings of her inspection contained in the BLM's April 2, 1998 and April 8, 1998 Orders to Respondent. *See* Stip. Exs. 26 and 27. The BLM found, *inter alia*, that Respondent's secondary containment pits (discharge pits) were filled to such a point as to be unstable and in danger of breaching. Tr. at 254-55 (Harrison); Stip. Exs. 26 and 27. BLM's Orders, which report the overtopping of the secondary containment pits, is corroborated by the EPA's March 25, 1998 inspection report and the video. *See* Stip. Ex. 2; Compl. Ex. 21: Video.

The absence of trenches and the almost complete usage of the discharge pits' capacity shows that Respondent did not adequately "implement" its Plan so as to give it practical effect. Although the use of trenches and discharge pits as a form of secondary containment may not be favored by the EPA, such was the prevention standard chosen by Respondent and cited in its Plan. *See* 40 C.F.R. 112.7(c) (providing a list of containment systems); *see Industrial Chemicals, supra*, (EAB). However, the Plan has no value if a spill is not directed to the secondary containment and the secondary containment lacks the capacity to contain a spill. Respondent's witness asserts that

^{27/} There is some discrepancy in the record as to whether the BLM's inspection took place on March 25, 1998 or March 26, 1998. Ms. Harrison of the BLM testified that she inspected the Facility on March 26, 1998. Tr. at 275 (Harrison). However, Ms. Nakad testified that both she and the BLM inspected the Facility together on March 25, 1998. Tr. at 86 (Nakad). Ms. Nakad's inspection report also indicates that the inspection took place on March 25, 1998. *See* Stip. Ex. 7. The video of the March 1998 inspection corroborates Ms. Nakad's recollection. *See* Compl. Ex. 21. The difference between the two dates is immaterial. Nevertheless, I find that the inspection by the EPA and the BLM took place on March 25, 1998.

if additional oil were added to the discharge pits, the water in those pits would be discharged out of the pits due to a T-siphon. Tr. at 718-20 (Calvert). However, the clear overtopping of the pit by oil demonstrates the failure of Respondent to implement the use of the pit so as to actually work as secondary containment. See Stip. Ex. 7 (photo log); Compl. Ex. 21: Video. Moreover, there is an absence of dikes or trenches directing potential oil spills from the tanks to the discharge pits, as is required in Respondent's Plan. See *id.* The natural drainage system, which includes the incise channel, actually flows *past* the discharge pits meant for secondary containment (and then into the Unnamed Creek). See *id.* The photos and the video show oil seepage downhill from the tank battery not directed into the secondary containment pits (or discharge pits) by trenches, in violation of the Plan. See *id.* Instead, the oil seepage flows down the hill merely by force of gravity, taking the path of the natural drainage system, which flows into the incise channel, which then converges with the discharge stream to form the Unnamed Creek. See *id.* The photographs and video also show in several instances that oil has leaked from the pipes and that the pipes are merely lying on the ground rather than having adequate support, as is required in Respondent's Plan. See *id.* I find both Ms. Nakad's report and the accompanying photographic logs to be credible and probative evidence of the condition of the Facility. I find that Respondent had not fully implemented the requirements of its SPCC Plan as of March 1998.

In June of 1998, an oil spill occurred at the Facility from the 5,000 barrel slop oil tank on lease #7749. Joint Stipulations, Fact ¶7. Respondent concedes that it did not have secondary containment implemented at the Facility at the time of the spill: "[T]here can be no denying that secondary containment did not exist at the time of the spill, and we're not refuting that." Tr. at 46 (Fognani). On review of the record, I also conclude that at the time of the spill Respondent lacked the secondary containment provided for in its SPCC Plan. During the course of that oil spill, Respondent still lacked trenches directing oil spills from the tanks to the secondary containment discharge pits. See Stip. Ex. 2 (photo log). Therefore, I find that Respondent was still not in compliance with its SPCC Plan in June of 1998. See *id.* After the spill, after being instructed to do so, Respondent built adequate secondary containment for part of its Facility in the form an six-foot high berm around the 5,000 barrel tank and two large storage tanks, and that construction was finished by July 14, 1998. Stip. Ex. 38; Tr. at 316 (Harrison).

An inspection of Respondent's Facility was conducted by Bob Litchford, a contract employee for the EPA, on October 21, 1999. See Stip. Ex. 8. At that inspection, he cited Respondent with SPCC violations including the following: (1) lack of secondary containment for the heater-treater or for a group of four oil storage tanks located north of the heater-treater, (2) pooled oil and oil-saturated ground around the heater-treater, and (3) inadequate inspection and maintenance of heater-treater that is leaking oil onto the ground.^{28/} See *id.* The photograph log

^{28/} Additionally, Mr. Litchford cited Respondent because the oil skim pits contained oil. See Stip. Ex. 8. However, this, per se, is not a violation of Respondent's Plan, as it expressly contemplates that the skimming pits will accumulate some oil as part of the process of separating oil from water. See Stip. Ex. 1: SPCC Plan. This process was approved in the Plan, provided that

from the inspection corroborates Mr. Litchford's report and shows oil leakage from the heater treater and shows the lack of trenches directing potential oil spills from the tanks to the discharge pits (secondary containment pits) in violation of the Plan. *See id.* (photo log). I find that on October 21, 1999, Respondent was still in violation of its SPCC Plan as written. Finally, I conclude that Respondent was in violation of its SPCC Plan as written at least from March 25, 1998 through October 21, 1999.

Respondent's Failure to Implement an SPCC Plan in Accordance with the Regulations

As for the SPCC regulations from which a Plan is to be devised, those regulations require "a carefully thought-out plan, prepared in accordance with good engineering practices . . ." 40 C.F.R. § 112.7. Additionally, as to facilities of all types, the regulations require:

(c) *Appropriate* containment and/or diversionary structures or equipment to prevent discharged oil from reaching a navigable water course should be provided. One of the following preventive systems or its equivalent should be used as a minimum: (1) Onshore facilities: (i) Dikes, berms or retaining walls sufficiently impervious to contain spilled oil; (ii) Curbing; (iii) Culverting, gutters or other drainage systems; (iv) Weirs, booms or other barriers; (v) Spill diversion ponds; (vi) Retention ponds; (vii) Sorbent materials . . .

40 C.F.R. § 112.7(c) (emphasis supplied). In addition to these minimal prevention standards, the regulations impose additional secondary containment standards as to onshore production facilities, such as Respondent's. *See* 40 C.F.R. §§ 112.7(e), 112.7(e)(5). Specifically, as to the bulk storage tanks at production facilities, the applicable regulations require,

All tank battery and central treating plant installations should be provided with a secondary means of containment for the entire contents of the largest single tank if feasible, or alternate systems such as those outlined in § 112.7(c)(1). Drainage from undiked areas should be safely confined in a catchment basin or holding pond.

Respondent regularly skim off oil accumulated in those pits. *See id.* Nevertheless, the recovery at the inspection of three to four (3-4) dead birds from those pits shows that Respondent was not regularly skimming the pits as required by its SPCC Plan. *See* Stip. Ex. 8. This is reinforced by the fact that a dead bird was also recovered from the discharge pits at the March 25, 1998 inspection. Tr. at 256 (Harrison).

40 C.F.R. § 112.7(e)(5)(iii)(B).

In construing the secondary containment regulations, the EAB's recently decided case, *Industrial Chemicals*, at 14-17, is instructive. Although *Industrial Chemicals* concerned a bulk storage facility, the secondary containment requirements for both bulk storage facilities and production facilities are very similar.^{29/} The EAB held, *inter alia*, that the SPCC regulations do not require an operator to go so far as building a separate secondary containment system around each individual tank. *Id.* at 15-16. Instead, the list of different containment systems allows for facility-wide secondary containment for storage tanks. *Id.* at 16. For instance, the regulations allow for secondary containment systems such as containment ponds or catchment basins. *See* 40 C.F.R. §§ 112.7(c)(v), (c)(vi), and (e)(5)(iii)(B).

To "implement" the SPCC regulations means to employ the regulations in such a manner so they will have practical effect.^{30/} The regulations require *appropriate* secondary containment designed to prevent oil discharges from reaching navigable waters. *See* 40 C.F.R. § 112.7(c). In *Industrial Chemicals*, the EAB held that the sole reliance on gravity to direct an oil discharge into a secondary containment pond was a violation of the SPCC regulations. *Industrial Chemicals*, at 17. Although not requiring a specific containment structure, such as a berm completely surrounding a tank, the regulations do at least require diversion of spills by means of engineered structures. *Id.* In order for a containment system to be put into practical effect, it must be designed to be effective.

As to Respondent's Facility, Respondent lacked appropriate secondary containment designed to prevent a discharge into navigable waters. *See* Tr. at 89 (Nakad), 177 (Nakad), 190 (Nakad), 229-30 (Litchford), 447-48 (Hawthorne); Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video. For instance, Respondent had small emergency pits nearly full with oil, and a very short berm only a few inches high around a tank with a storage capacity of hundreds of gallons of oil. *See* Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video. The inadequacy of these secondary containments can also be seen by the persistent evidence that oil had passed those barriers and found its way into the natural drainage system of the Facility. *See* Stip. Ex. 7 (photo log); Compl. Ex. 21: Video. Spills are also not directed into these containment systems by engineered devices. *See id.*

^{29/} For instance, the same minimal prevention standards of 40 C.F.R. § 112.7(c) apply to both types of facilities. The more specific regulations applicable to each type of facility are also similar. *Compare* 40 C.F.R. § 112.7(e)(2)(ii) to 40 C.F.R. § 112.7(e)(5)(iii)(B).

^{30/} *See* definition of "implement" at MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 583 (10th ed. 1997): "to carry out" or "accomplish" and especially "to give practical effect to and ensure actual fulfillment by concrete measures."

The BLM's inspection on March 25, 1998 also revealed that Respondent's secondary containment pits (discharge pits) were filled to such a point as to be unstable and in danger of breaching. Tr. at 254-55 (Harrison); Stip. Ex. 27. At one point, the incise channel was dangerously close to the lower discharge pit. See Stip. Ex. 7 (photo log); Compl. Ex. 21: Video. I find that such an unstable secondary containment pit is not an appropriate secondary containment system and in violation of the SPCC regulations. Moreover, besides the lack of trenches directing an oil discharge into the pits, the record also shows the absence of any other engineered structure to divert spills into the pits. See Stip. Exs. 2, 7, and 8 (photo logs); Compl. Ex. 21: Video. Although some minor natural drainage did flow into the pits in March 1998, Stip. Exs. 26 and 27, such drainage was not engineered in such a way as to direct oil spills from the tank batteries (or even the 5,000 barrel tank) into the discharge pits and was woefully inadequate to carry a major oil spill. See Stip. Ex. 7; Compl. Ex. 21. On May 5, 1998, Respondent then wrote to the BLM, explaining that it had diverted all surface runoff of water (and thus any spilled oil) away from the skimming pits. Stip. Ex. 28. Definitely, at that point, Respondent had completely disabled the discharge pits from use as secondary containment. Respondent concedes that it did not have secondary containment implemented at the Facility at the time of the June 1998 oil spill: "[T]here can be no denying that secondary containment did not exist at the time of the spill, and we're not refuting that." Tr. at 46 (Fognani). On review of the record, I also conclude that at the time of the spill Respondent lacked any appropriate secondary containment allowed by the SPCC regulations. See Stip. Ex. 2 (photo log).

After the June 1998 oil spill and by July 14, 1998, Respondent complied with the BLM's order to build containment berms for the 5,000 barrel slop oil tank and two other large tanks at the Facility. Stip. Ex. 38; Tr. at 315-16 (Harrison), 462 (Hawthorne). Although the containment for these particular tanks was adequate, Respondent still had not provided appropriate secondary containment for the rest of the Facility by October 21, 1999. See Stip. Ex. 8. Although the regulations do not require tank-by-tank individualized containment,^{31/} they still require a facility to have "appropriate containment and/or diversionary structures or equipment to prevent discharged oil from reaching a navigable water." 40 C.F.R. § 112.7(c). As shown in Mr. Litchford's report and photograph log regarding his October 21, 1999 inspection, the heater treater and a grouping of four tanks were not served by any appropriate secondary containment. See Stip. Ex. 8, including Photographs 20-21. This report also describes the closest body of water as "unnamed drainage" (which herein is the discharge stream and the Unnamed Creek) and that the heater-treater and tanks appear uphill of that body of water. *Id.* I have already found the discharge stream and the Unnamed Creek (a.k.a. "unnamed drainage") to be a "navigable waters" within the context of the Clean Water Act and the SPCC regulations. The lack of any appropriate secondary containment whatsoever for this tank battery shows that even after July 14, 1998, Respondent had not fully implemented secondary containment for its Facility. Respondent's failure to provide not only the secondary containment in its Plan but also its failure to provide *any* appropriate secondary containment allowed by the regulations constitutes an egregious violation

^{31/} See *In re Industrial Chemicals Corporation*, at 16 (EAB) (construing the regulations to allow for facility-wide secondary containment).

of the SPCC regulations.

The SPCC regulations also mandate certain applicable non-secondary containment requirements as to non-transportation related onshore production facilities such as Respondent's. The following regulation requires the periodic removal of oil that accumulates in secondary containment systems, which would include in this case Respondent's discharge pits:

[a]t tank batteries and central treating stations where an accidental discharge of oil would have a reasonable possibility of reaching navigable waters, the dikes or equivalent required under § 112.7(c)(1) should have drains closed and sealed at all times except when rainwater is being drained. Prior to drainage, the diked area should be inspected as provided in paragraphs (e)(2)(iii) (B), (C), and (D). Accumulated oil on the rainwater should be picked up and returned to storage or disposed of in accordance with approved methods.

40 C.F.R. § 112.7(e)(5)(ii). The presence of *three to four* dead birds stuck in the oil of Respondent's discharge pits at the October 21, 1999 inspection indicates that Respondent has not been regularly removing the oil, as is required by the regulations. *See* Stip. Ex. 8. Furthermore, "Field drainage ditches, road ditches, and oil traps, sumps or skimmers, if such exist, should be inspected at regularly scheduled intervals for accumulation of oil that may have escaped from small leaks. Any such accumulations should be removed." 40 C.F.R. § 112.7(e)(5)(ii)(B). Such drainage ditches would include the small emergency pits at Respondent's Facility. At the March 25, 1998 inspection, several of these pits were filled with more than a foot deep of oil. *See* Stip. Ex. 7 (photo log); Compl. Ex. 21: Video. Both inspections support the finding that Respondent in fact had not been regularly removing accumulated oil, as is required by the SPCC regulations.^{32/} Respondent was in violation of these non-secondary containment SPCC

^{32/} However, I reject the EPA's argument that Respondent's discharge permit for its Facility prohibited the use of the discharge pits as secondary containment. *See* Compl. Post-Hrg. Reply Br. at 6; Stip. Ex. 8 (report) (citing Respondent for presence of oil in the pit). The regulations specifically contemplate that some oil will accumulate in secondary containment systems with the oil to be later removed on a periodic basis. *See* 40 C.F.R. § 112.7(e)(5)(ii), (iii). Additionally, Respondent's SPCC Plan calls for the skimming of oil off the discharge pits. *See* Stip. Ex. 1: SPCC Plan. In fact, the discharge pits are designed to separate oil from water. Tr. at 289 (Harrison), 631 (Calvert), 652 (Calvert). As to the discharge permit, its limits on discharge concern the receiving waters designated as "unnamed drainage" (i.e. the Unnamed Creek and the discharge stream) and Blue Draw, but does not expressly limit the presence of oil in the

requirements at least from March 25, 1998 through October 21, 1999.

Respondent's Arguments Concerning its Failure to Implement its SPCC Plan and the SPCC Regulations

Respondent claims that prior to the March 25, 1998 inspection, its Facility had natural land contours and a "very small dike" to direct oil discharges into the lower discharge pit. Tr. at 637 (Calvert). Respondent claims that this system was washed out by a flash flood shortly before the March 1998 inspection. *Id.* However, the record shows an absence of vestiges of any such containment system. Tr. at 88-90 (Nakad), 109-110 (Nakad), 136-37 (Nakad), 229-30 (Litchford); Compl. Ex. 21: Video. Respondent did not present any weather reports or other documentary evidence of such a flood. Tr. at 723-25 (Calvert). Finally, Respondent still had not implemented the alleged dike by the time of the June 1998 oil spill. I find that Respondent's claim that it had built the small dike is not credible. Additionally, I reiterate that Section 311(b)(6) of the CWA, under which Respondent is charged, provides for strict liability.^{33/} I also note that Respondent's

discharge pits. See Stip. Ex. 43. I also note that one of the EPA's own witnesses admitted that it was not unusual for oil to accumulate on oil production discharge pits, such as Respondent's. Tr. at 153 (Nakad).

^{33/} See *U.S. v. Coastal States Crude Gathering Co.*, *supra*, at 1127; *U.S. v. Tex-Tow, Inc.*, *supra*, at 1312-13; *U.S. v. Marathon Pipe Line Co.*, *supra*, at 1306-07; *In the Matter of Aldi, Inc.*, *Kansas*, *supra*, at *8. The text of Section 311(b)(6) of the CWA, with which Respondent is charged, reads as follows:

Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility . . . (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty

Besides failing to list any state of mind requirement for this civil administrative penalty, Section 311(b)(6) also fails to list any defenses. In contrast to Section 311(b)(6) administrative penalties, Congress does provide defenses for an owner or operator's Section 311(f) liability for removal costs incurred by the U.S. Government due to oil and hazardous waste discharges. Section 311(f) of the CWA grants the following defenses:

own witness stated that the alleged dike was not built to withstand flash floods. Tr. at 636-37 (Calvert). Even if Respondent had built such a dike, it would not be “appropriate” secondary containment for the Facility, as the Facility is known to experience flash floods. Tr. at 408 (Aragon).

Respondent further suggests that it was impracticable for it to have built secondary containment after the alleged wash-out and that it was in compliance with the SPCC regulations because of its “strong oil spill contingency plan.” Impracticability is an exception to providing for the secondary containment normally required by the regulations to be in the SPCC Plan. See 40 C.F.R. § 112.7(d). However, the impracticability exception is more appropriately raised as a defense to improper preparation of the Plan rather than failure to properly implement a Plan. The impracticability exception is mentioned in the context of Plan preparation: “The complete SPCC Plan shall follow the sequence outlined below, and include a discussion of the facility’s conformance with the appropriate guidelines listed: . . . (c) Appropriate containment and/or diversionary structures or equipment to prevent discharged oil from reaching a navigable water course” 40 C.F.R. § 112.7. Immediately thereafter, the regulations provide for the following impracticability exception:

When it is determined that the installation of structures or equipment listed in § 112.7(c) to prevent discharged oil from reaching the navigable waters is not practicable from any onshore or offshore facility, the owner or operator should *clearly demonstrate such impracticability and provide the following:*

- (1) A strong oil spill contingency plan following the provision of 40 CFR part 109.
- (2) A written commitment of manpower, equipment and materials

. . . where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses

Nevertheless, as Respondent is charged pursuant to Section 311(b)(6) administrative penalties instead of Section 311(f) removal liability, those defenses do not apply to Respondent. See *U.S. v. Coastal States Crude Gathering Co.*, *supra*, at 1127; *U.S. v. Tex-Tow, Inc.*, *supra*, at 1312-13; *U.S. v. Marathon Pipe Line Co.*, *supra*, at 1306-07; *In the Matter of Aldi, Inc., Kansas*, *supra*, at *8.

required to expeditiously control and remove any harmful quantity of oil discharged.

40 C.F.R. § 112.7(d) (emphasis supplied).

Respondent fails to qualify for the “impracticability” exception for several reasons. First, in its SPCC Plan, Respondent admitted that secondary “containment or diversionary structures or equipment to prevent oil from reaching navigable waters are practicable.” *See* Stip. Ex. 1: SPCC Plan, Part II, Alternate B, page 3 of 3. In contrast, Respondent stated that secondary containment was impracticable as to the flowlines because of the distance they cover. *See* Stip. Ex. 1: SPCC Plan, Attachment #2, “Oil Spill Contingency Plans and Written Commitment of Manpower”; Tr. at 376 (Yates). Moreover, Respondent has not demonstrated the impracticability of constructing appropriate secondary containment as to its storage tanks and heater treater. It was practicable for Respondent to have secondary containment implemented as to the storage tanks and heater treater and such is demonstrated by the July 1998 construction of a berm below the tank battery. *See* Tr. at 315-16 (Harrison); Stip. Ex. 38.

Second, as to the flowlines, for which Respondent claimed secondary containment was impracticable, Respondent failed to provide a “written commitment of manpower,” which is required by the SPCC regulations. *See* 40 C.F.R. §§ 112.7(d), 112.7(d)(2). Respondent admits that it did not have a written commitment of manpower and my review of the Plan has verified this,^{34/} and I find that there was no such written commitment. *See* Stip. Ex. 1: SPCC Plan; Resp. Post-Hrg. Br. at 14. This is no mere technical violation, as exemplified by the June 1998 oil discharge, in which Respondent had difficulties obtaining the equipment and personnel it needed in order to clean up the spill in a timely manner. Tr. at 638-40 (Calvert). The written commitment of manpower is of particular importance in this case, as Respondent has claimed difficulties in obtaining tribe-certified personnel as is required on this Facility, which is located on an Indian reservation. *Id.*; Resp. Post-Hrg. Br. at 38. A written commitment of manpower would have avoided contingencies such as difficulties in obtaining certified personnel.

Third, as to the flowlines for which secondary containment was claimed to be “impracticable,” Respondent also failed to have a proper “strong oil spill contingency plan.”^{35/} The regulations that Respondent is charged with violating, at 40 C.F.R. § 112.7, require a Strong Oil Spill Contingency Plan in compliance with 40 C.F.R. Part 109 when the owner or operator is

^{34/} Instead, Respondent’s Plan merely had a list of potential people who it could contact in attempting to procure their assistance. *See* Stip. Ex. 1: Attachment.

^{35/} The parties’ Stipulations provide that Respondent had an “Oil Spill Contingency Plan,” which was attached to the SPCC Plan, but do not state whether Respondent had a “Strong Oil Spill Contingency Plan” or one in compliance with 40 C.F.R. Part 109. *See* Stip. Ex. 1: Attachment; Joint Stipulations, Fact ¶ 5.

claiming the impracticability exception. *See* 40 C.F.R. §§ 112.7(d), 112.7(d)(1). Respondent, in its SPCC Plan, claimed that it had such a plan. *See* Stip. Ex. 1: SPCC Plan, Attachment #2, “Oil Spill Contingency Plans and Written Commitment of Manpower.” However, a review of 40 C.F.R. Part 109 shows Respondent was clearly not in compliance. Those regulations require, *inter alia*,

Provisions to assure that full resource capability is known and can be committed during an oil discharge situation including:

- (1) The identification and inventory of applicable equipment, materials and supplies which are available locally and regionally.
- (2) An estimate of the equipment, materials and supplies which would be required to remove the maximum oil discharge to be anticipated.
- (3) Development of agreements and arrangements in advance of an oil discharge for the acquisition of equipment, materials and supplies to be used in responding to such a discharge.

40 C.F.R. § 109.5(c).

A review of Respondent’s oil spill contingency plan reveals that Respondent lacked the above-cited “provisions to assure that the full resource capability is known and can be committed during an oil discharge.” *See* Stip. Ex. 1: SPCC Plan, Attachment #2: “Oil Spill Contingency Plan for Maverick Springs Field.” Instead, Respondent’s oil spill contingency plan merely had a list of contact names and of those who might provide equipment or services, which is another requirement of Part 109.^{36/} *Id.* Respondent failed to have a Strong Oil Spill Contingency Plan in compliance with 40 C.F.R. Part 109. The failure of Respondent to have a Strong Oil Spill Contingency Plan is particularly salient in light of Respondent’s difficulties in obtaining equipment and manpower in cleaning up the June 1998 oil spill. *See* Tr. at 295 (Harrison), 423 (Aragon), 449 (Hawthorne), 505 (Goedert); Stip. Ex. 30. Accordingly, I conclude that Respondent was in violation of the following: the SPCC secondary containment requirements, and alternatively the requirement for a written commitment of manpower and equipment and for a strong oil spill contingency plan.

Besides Respondent’s above-cited complaints about Government requirements such as tribe-certified employees, Respondent seeks to avoid liability by attempting to cast blame on the Federal Government. For instance, Respondent blames its failure to have implemented secondary containment on the BLM. In particular, Respondent blames the BLM for orders it issued contemporaneous with its March 25, 1998 inspection of the Facility. *See* Stip. Exs. 26 and 27. While inspecting Respondent’s discharge pits, which were part of Respondent’s planned secondary containment system, the BLM found the pits to be unstable and in danger of breaching.

^{36/} These listing requirements are found at 40 C.F.R. § 109.5(b)(2).

Id. The BLM ordered that the pits be “maintained to prevent entrance of surface water by providing adequate surface drainage away from the pit.” Stip. Ex. 26 (April 2, 1998). Although this order would technically prohibit implementation of Respondent’s trench-to-discharge pits secondary containment system for oil,^{37/} it did not prohibit the implementation of the many other containment devices allowed by the SPCC regulations. *See* 40 C.F.R. § 112.7(c) (listing a wide variety of different secondary containment systems and/or diversionary structures or equipment). Respondent is at fault for failing to implement any appropriate secondary containment system allowed by the SPCC regulations.

Respondent is responsible for any conflict between the BLM order and Respondent’s SPCC Plan. Respondent originally submitted its SPCC Plan in 1992. *See* Stip. Ex. 1: SPCC Plan. The BLM issued Onshore Oil and Gas Order Number 7 in 1993, which was originally proposed in 1990. *See* 58 Fed. Reg. 47354 (Sept. 8, 1993) (Final Rule), *amended by*, 58 Fed. Reg. 58505 (Nov. 2, 1993); *see also* 55 Fed. Reg. 1837 (January 19, 1990) (proposed rule). Onshore Order Number 7, provides *inter alia*,: “The pit shall be maintained as designed to prevent entrance of surface water by providing adequate surface drainage away from the pit.” 58 Fed. Reg. at 47365; *see* Tr. at 309 (Harrison). The SPCC regulations provide ample flexibility for an operator to avoid such conflicts.^{38/} For instance, those regulations allow an operator to amend its Plan to provide for alternate secondary containment systems. *See* 40 C.F.R. §§ 112.5 (amendments) and 112.7(c) (alternative secondary containment systems). Nevertheless, Respondent failed to amend its Plan to avoid such a conflict. Exacerbating the culpability of Respondent is the fact that it was *required* to review its SPCC Plan every three years, which would surely have provided Respondent with additional prompting to avoid such a conflict between Onshore Order Number 7, which went into effect more than four (4) years prior to the March 1998 inspection. *See* 40 C.F.R. § 112.5(b) (requiring tri-annual plan review). Additionally, the BLM order issued to Respondent allowed for an appeal. At the least, Respondent could have notified either or both agencies as to any alleged conflict. Respondent is responsible for the conflict between its SPCC Plan and the BLM order and may not use such alleged conflict to avoid liability.

Affirmative Defenses

Now that the EPA has established its *prima facie* case by a preponderance of the evidence, Respondent has the burden of proving its defenses:

^{37/} *See* Tr. at 309 (Harrison): recognizing that an oil spill would be considered the equivalent of surface water for the purposes of Onshore Order Number 7.

^{38/} *See United States v. Murphy Oil, USA, Inc.*, 155 F. Supp. 2d 1117, 1148 (W.D. Wis. 2001) (denying a similar claim of conflict in an oil SPCC case because the flexibility of the regulations allows an owner-operator to avoid such conflicts).

Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a) (1999). Respondent's proof of its defenses shall be decided based on a "preponderance of the evidence" standard. *Id.* § 22.24(b).

Respondent's Answer asserted the affirmative defenses of statute of limitations and laches. *See* Answer at 9, ¶¶ 49-50. The statute of limitations applicable to the Clean Water Act is five (5) years. *See* 28 U.S.C. § 2462; *United States v. Banks*, 115 F.3d 916, 918 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Telluride Co.*, 146 F.3d 1241, 1244-45 (10th Cir. 1998). The earliest violation alleged is for the date of March 25, 1998. As the EPA's Complaint was filed March 31, 2000, the statute of limitations is not applicable. As for the laches defense, it does not apply to the EPA. As held by the Tenth Circuit in the Clean Water Act case, *Telluride, supra*, at 1246 n.7, the doctrine of laches does not apply to the Federal Government:

For the same reason the doctrine of laches does not apply to the government, *Nevada v. United States*, 463 U.S. 110, 141, 103 S. Ct. 2906, 77 L. Ed.2d 509 (1983), we interpret time limitations against the government narrowly to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interests, unless Congress clearly allows those claims to be barred, *see, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-33, 58 S. Ct. 785, 82 L. Ed. 1224 (1938).

Even assuming *arguendo* that laches does apply to the EPA, it does not in the case before me. Laches is an equitable defense to equitable actions. *See e.g. Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 477-78 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980). Section 311(b)(6) seeks monetary relief rather than equitable relief. Nevertheless, even if Section 311(b)(6) did provide for non-monetary relief, Respondent cannot fulfill the requirements of the laches defense. One test for laches requires the defendant to show: "(a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay." *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982). The D.C. Circuit test requires a showing of both "inexcusable delay and undue prejudice." *See Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990), *cert. denied sub nom. Richmond, Fredericksburg & Potomac R. Co. v. Daingerfield Island Protective Soc.*, 502 U.S. 809 (1991). The application of laches in environmental litigation is disfavored. *See Jicarilla Apache Tribe*, at 1338; *Daingerfield Island*, at 37.

In the instant case, the EPA failed to notify Respondent of the results of its March 25, 1998 inspection of the Facility and the accompanying violations it found. *See* Tr. at 166-67 (Nakad). The EPA did not file its Complaint until March 31, 2000. It would have behooved the EPA to

have notified Respondent of the SPCC violations prior to the June 1998 oil spill. Nevertheless, the EPA's delay in filing its Complaint against Respondent is not unreasonable. Respondent is a sophisticated company which was aware or at the very least had a duty to be aware that it needed appropriate secondary containment. *See* Tr. at 573 (Nakad); Stip. Exs. 21 and 43. Even if the delay were unreasonable, Respondent has not fulfilled its burden to show undue prejudice. Respondent did not put forward sufficient credible evidence to show that the delay caused it to incur substantial costs. Respondent would argue that it suffered expenses due to the BLM's orders to divert water runoff away from Respondent's secondary containment pits. However, as I have previously found, the flexibility in the regulations allows for the avoidance of conflicts. Accordingly, the laches defense is denied.

In conclusion, I find that Respondent had not fully implemented its SPCC Plan at least from March 25, 1998 through October 21, 1999 in violation of 40 C.F.R. § 112.3 and its implementing regulations at 40 C.F.R. § 112.7.

III. THE SPCC PENALTY

As to the amount of the penalty for an SPCC violation, Section 311(b)(8) of the CWA sets forth various factors that the EPA and the Administrative Law Judge ("ALJ") must consider in determining the appropriate amount of the civil administrative penalty under Section 311(b)(6)(B)(ii) of the CWA. The statutory factors in determining the amount of the penalty under Section 311(b)(8) of the CWA are as follows:

- (1) the seriousness of the violation or violations,
- (2) the economic benefit to the violator, if any, resulting from the violation,
- (3) the degree of culpability involved,
- (4) any other penalty for the same incident,
- (5) any history of prior violations,
- (6) the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge,
- (7) the economic impact of the penalty on the violator, and
- (8) any other matters as justice may require.

In addition to consideration of the statutory penalty criteria, the ALJ must also consider any applicable EPA penalty policy. Section 22.27(b) of the Rules of Practice, concerning the ALJ's initial decision provides:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any

civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. 22.27(b).

However, as shown by the EAB's case *In re Employer's Insurance of Wausau and Group Eight Technology, Inc.*, one cannot apply the penalty policy unquestionably as if the policy were a rule with binding effect, because such policy has not been issued in accordance with the Administrative Procedure Act ("APA") procedures for rulemaking. 6 E.A.D. 735, 761 (EAB, Feb. 11, 1997). Furthermore, the EAB has held that the ALJ has "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB, Sep. 27, 1995). Although the EAB in *Wausau* ultimately upheld the use of the PCB Penalty Policy in assessing a civil administrative penalty in that case, the EAB readily recognized the limitations of the role and application of the various EPA Penalty Policies. In discussing these limitations, the EAB noted that the relevant penalty Policy must not be treated as a rule and that in any case where the basic propositions on which the Policy is based are genuinely placed at issue, adjudicative officers "must be prepared 'to re-examine [those] basic propositions.'" *Wausau*, at 761, quoting *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

The EPA issued a Penalty Policy, dated August 1998, for violations of Sections 311(j) and 311(b)(3) of the CWA, which it employed in calculating the penalty proposed in the Complaint. See Compl. Ex. 28: "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act" at 9 (hereinafter, referred to as "Penalty Policy").^{39/} I note that the aforementioned Penalty Policy generally touches on all statutory factors listed in Section 311(b)(8) of the CWA.

In its Complaint, the EPA proposed a civil administrative penalty in the amount of \$63,050 for Respondent's violation of the SPCC regulations at 40 C.F.R. § 112.3 and Section 311(j) of the CWA as alleged in Count I of the Complaint. Section 311(b)(6)(B)(ii) of the CWA provides, "The amount of a class II civil penalty under subparagraph (A) may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class

^{39/} The "Penalty Policy" specifies that it is to be implemented no later than thirty (30) days after its issuance and that it applies to actions filed after its implementation. "Penalty Policy" at 2. It further specifies that it applies to all cases that are pending when it is implemented if the parties have not reached an agreement in principle as to the amount of the penalty. *Id.*

II civil penalty under this subparagraph shall not exceed \$125,000.” As modified by the Debt Collection Improvement Act of 1996, violations committed after January 31, 1997 carry a maximum overall penalty of \$137,500 with a daily maximum of \$11,000 thereafter. *See* 31 U.S.C. § 3701; 61 Fed. Reg. 69359 (Dec. 31, 1996).

First, I correct Respondent’s incorrect assumption as to what the maximum penalty can be. Respondent assumes that \$137,500 is the maximum overall penalty that could have been assessed in this case, thus putting EPA’s assessment of a combined \$137,300 for Counts I and II just a couple of hundred dollars less than the maximum. However, the statute’s limitations apply to each individual count alleged in the Complaint rather than acting as an overall limitation of penalties for various violations committed at a Facility. The language of the statute is instructive as it sets a limit as to singular, individual violations. For example, “the amount of a class II civil penalty . . . during which *the* violation continues.” CWA § 311(b)(6)(B)(ii) (emphasis supplied). The overall maximum assessable penalty in this case is \$275,000, which is slightly more than twice what the EPA proposed.

I now consider the factors that the EPA used in setting the SPCC penalty. The EPA’s Penalty Policy addresses, *inter alia*: (I) gravity, (II) economic benefit, and (III) settlement adjustment factors. *See* “Penalty Policy” at 6-10 and 15-16. The Gravity component for 311(j) violations is determined by a four-step process concerning: (1) seriousness, (2) culpability, (3) mitigation, and (4) history of prior violations. *Id.* at 6-10. The Seriousness step is determined initially by reference to a matrix, which is based on the storage capacity of the Facility and the degree of noncompliance. *Id.* at 7.

Respondent argues that the EPA cannot take into account storage capacity in determining the penalty for an SPCC implementation violation. Instead, Respondent would have the Court calculate the penalty based on the actual storage used at the time of the violation. The recent case, *Pepperell*, is instructive, as the Section 311(b)(6) penalties were calculated without reference to the Penalty Policy. *See Pepperell*, CWA-2-I-97-1088, 1999 EPA ALJ LEXIS 16, at *76 (EPA ALJ, Feb. 26, 1999), *rev’d in part by*, 2000 EPA App. LEXIS 14, at *62-63 n.22 (EAB, May 10, 2000), 9 E.A.D. ____, *review denied*, 246 F.3d 15 (1st Cir. 2001). In *Pepperell*, the oil storage capacity of the Facility rather than actual usage of that capacity was used to calculate the penalty. *See* 1999 EPA ALJ LEXIS 16, *supra*, at *76; 2000 EPA App. Lexis 14, *supra*, at *64-69. In *Pepperell*, the EAB held that it is error to fail to take into account the storage capacity of the facility. 2000 EPA LEXIS 16, at *64-65, 67. Furthermore, the EAB held that it was error to fail to take into account even the capacity of tanks not in use. *Id.* at *37-43, 64-65, and 67. Finally, the EAB assessed the penalty for the SPCC violation by calculating the storage capacity of the Facility, *including disconnected tanks not in use*. *Id.* at *64-69.

In challenging the use of storage capacity in the penalty calculation, Respondent relies heavily on the case, *In the Matter of Brewer Chemical Company*, 1 E.A.D. 247 (EPA Adm’r, May 19, 1976). In *Brewer*, the EPA Administrator concluded that the ALJ’s penalty determination was too restrictive in that it failed to take into account the size of the facility’s storage tanks in determining the “gravity” of the violation. *Id.* at 249-50. This conclusion was reached in the

context that “the extent of environmental threat [posed by a violation] may also make a violation less grave.” *Id.* at 250. The Administrator also concluded that the typical actual storage amounts are relevant to gravity. *See id.* However, this 1976 case was issued prior to the overhaul of Section 311 of the CWA by the OPA. *See* OPA., Pub. L. 101-380, § 4301(b), 104 Stat. 484 (1990). The 1972 version of the civil administrative penalty factors under Section 311 of the CWA only took into account the following three factors: “[T]he appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator’s ability to continue in business, and the gravity of the violation . . .” CWA § 311(b)(6) (1972), Pub. L. 92-500, 86 Stat. 816. Through the OPA, in 1990 Congress overhauled the penalty provisions for Section 311(b)(6) violations and greatly expanded the factors to be considered, adding factors that can soften the penalty such as mitigation success and “other matters as justice may require.” *See* OPA, *supra*, at § 4301(b); CWA § 311(b)(8) (1997-2000).

Much more instructive than *Brewer* is the EAB’s recent decision in *Pepperell*, in which the EAB applied the new statutory penalty factors for Section 311(b)(6) violations. Although the EAB did not expressly consider *Brewer*, the EAB in *Pepperell* upheld the EPA’s use of storage capacity in the gravity determination as to the base penalty amount. *See* 2000 EPA App. LEXIS 14, *supra*, at *64-69, *review denied*, 246 F.3d 15 (1st Cir.). Most significant is that the EAB increased the penalty assessed by the ALJ by including the storage capacity of tanks not in use. *See id.* I conclude that it is proper to consider storage capacity in calculating the penalty for an SPCC violation, at least under the facts of this case. The EPA’s 1998 Penalty Policy is instructive as to how to implement the statutory penalty factors. *See* “Penalty Policy” at 14. I conclude that consideration of storage capacity in the matrix of the SPCC Penalty Policy is appropriate.

Applying the matrix, at Respondent’s Facility the 5,000 barrel slop oil tank alone has a storage capacity of 210,000 gallons, at 42 gallons per barrel. Tr. at 570 (Nakad). Additionally, the Facility’s total storage capacity is approximately 462,000 gallons. Tr. at 568-69 (Nakad), 617 (Nakad).^{40/} Thus, I agree with the EPA’s finding that Respondent’s Facility falls within the

^{40/} Respondent’s argument that the EPA’s (here, Jane Nakad’s) calculation of the total facility storage capacity included water tanks lacks merit. Respondent cites to this portion of the record in its cross-examination of Ms. Nakad:

Q: So you calculated the capacity based - or you calculated your total gallon number based on the total number of tanks without regard to whether there was oil in the tanks; is that correct?

A: [by Ms. Nakad] No. There were some tanks that were obviously, I believe, water tanks.

Tr. at 618 (Fognani, Nakad). I read this testimony to show that Ms. Nakad did not calculate the total storage capacity without

200,001 to 1 million gallon category on the matrix. See “Penalty Policy” at 7. Furthermore, in this case, the significance of the environmental threat is not lessened merely because Respondent was not using all of its storage capacity. As of the June 1998 oil spill, just in one of its many storage tanks alone, Respondent was storing at least 46,000 gallons of oil (i.e. 1,100 barrels). Tr. at 658-59 (Calvert). Inspections from March 25, 1998 through October 21, 1999 also show leakage of oil out of storage tanks at tanks other than the 5,000 barrel slop oil tank. See e.g. Stip. Exs. 2, 7, and 8; Compl. Ex. 21: Video. This indicates that some oil was also being stored in those tanks. Therefore, overall, Respondent was storing a significant amount of oil, and I have previously found that the drainage characteristics of Respondent’s Facility provide particularly easy access to navigable waters. Similarly, in *Industrial Chemicals*, *supra*, at 25, in which the EAB did consider *Brewer*, the EAB concluded that if an SPCC Plan’s shortcomings are significant then they warrant a significant penalty. In contrast, in *Brewer*, *supra* at 249-50, the facility in question only stored 800 gallons of oil out of a total oil storage capacity of 20,000 gallons.

Next, in applying the matrix, the EPA determined Respondent to be in “major noncompliance,” which means: “Cumulatively, the violations essentially undermine the ability of the respondent to prevent or respond to worst case spills through the development and implementation of a plan.” *Id.* at 8. As illustrations, the Penalty Policy describes a major SPCC violation as: “No SPCC plan and no secondary containment; failure to implement SPCC plan; inadequate or incomplete plan implementation resulting in (1) grossly inadequate or no secondary containment or (2) hazardous site conditions.” *Id.*

I easily find that the secondary containment at the facility from March 1998 to October 1999 was at least grossly inadequate in light of Respondent’s persistent failure to implement appropriate secondary containment. See e.g. Stip. Exs. 2, 7, and 8; Compl. Ex. 21: Video.; Tr. at 101 (Nakad), 106 (Nakad), 109 (Nakad); 148 (Nakad), 310 (Harrison), 448 (Hawthorne), 475 (Hawthorne), 488-89 (Hawthorne), 507 (Goedert), 528 (Goedert), and *especially* 656 (Calvert) (admitting that Respondent did not do anything about the lack of secondary containment after a claimed wash-out of a dike). In addition, Respondent’s SPCC violations undermined its ability to prevent or respond to oil spills. The grossly inadequate secondary containment coupled with failure to adequately maintain the facility in good repair, see e.g. Stip. Exs. 2, 7, and 8, undermines its ability to prevent oil spills. Respondent’s numerous historic oil spills demonstrate this fact. See Stip. Exs. 2, 18, 23, and 24 (documenting oil spills in 1983, 1994, 1997, and 1998). Therefore, I agree with the EPA’s determination that Respondent was in “major noncompliance” from at least March 25, 1998 through October 21, 1999. Applying the matrix, the base penalty range of \$25,000 to \$60,000 was appropriate. See “Penalty Policy” at 7. The EPA chose a base

regard as to the purposes to which the tanks were put to use. Instead, the testimony shows that Ms. Nakad *did* take into account tanks solely used to store water and excluded those tanks’ capacity in her calculations of the total oil storage capacity of the Facility.

penalty of \$ 35,500 based on Ms. Nakad's reasoning that 462,000 gallons is within the mid-range of 200,001 to 1,000,000 gallons of oil, thus calling for a base penalty within the mid-range of \$25,000 to \$60,000. Tr. at 569-70 (Nakad); Stip. Ex. 20 at 2. This base penalty assessment is appropriate.

The second step in determining the gravity of the SPCC violation, calls for an upwards adjustment (or no adjustment) in the initial penalty amount based on the potential environmental impact of a worst case discharge. See "Penalty Policy" at 9. Here, the EPA determined there would be a "moderate impact." Tr. at 570 (Nakad); Stip. Ex. 20 at 2. A "major impact" requires a discharge that would "likely have a significant effect on human health, an actual or potential drinking water supply, a sensitive ecosystem, or wildlife (especially endangered species), due to factors such as proximity to water or adequacy of containment." "Penalty Policy" at 9. A "moderate impact" requires a discharge that would "likely have a significant affect on navigable waters (other than a drinking water supply), adjoining shorelines, or vegetation (other than a sensitive ecosystem) due to factors such as proximity to water or adequacy of containment." *Id.* When the potential environmental impact of a worst case discharge is assessed as "moderate," an upward adjustment of up to twenty-five (25) percent may be applied. *Id.*

The Penalty Policy does not define "worst case discharge" but the SPCC regulations define it as "the largest foreseeable discharge in adverse weather conditions as determined using the worksheets in Appendix D to this part." 40 C.F.R. § 112.2 (1997-99). As I have previously determined in this opinion, the worst case discharge would consist of at least 462,000 gallons of oil, at least for the period from March 25, 1998 until July 9, 1998. I further determined that from July 9, 1998 through at least October 21, 1999, a worst case discharge would consist of at least 210,000 gallons of oil. As I have previously determined, based on the geographical and locational aspects of the Facility in adverse weather, such as heavy rains, it is likely that a worst case discharge would cause large quantities of oil to enter the incise channel and then the Unnamed Creek and then discharge into Five Mile Creek. Thus, a worst case discharge would have a significant effect on navigable waters. However, as these bodies of water do not supply drinking water for humans, see Stip. Ex. 43, the "major impact" category listed in the Penalty Policy is inapplicable. See "Penalty Policy" at 8. I find that the determination of a "moderate impact" was appropriate. A "moderate impact" calls for an upward adjustment as high as 25% above the initial penalty determination. Stip. Ex. 20 at 2; "Penalty Policy" at 9. The EPA enhanced the initial penalty of \$35,500 by 15%. Stip. Ex. 20 at 2; Tr. at 570 (Nakad). The 15% enhancement, which resulted in a \$40,825 penalty at this second stage of the gravity assessment, is appropriate.

The final stage in the Gravity determination calls for an adjustment to the enhanced penalty amount to account for the Duration of the violation. "Penalty Policy" at 9. The duration is based on the number of months that the violation continues and calls for a 1/2 percent increase for each month. *Id.* The beginning date of the violation was March 25, 1998, and the EPA chose July 31, 1999 as the cutoff date for the duration. Tr. at 571 (Nakad). As such, the EPA enhanced the penalty by 8%, due to the 16 month duration. Tr. at 571 (Nakad), 600 (Nakad).

Respondent challenges the EPA's use of the July 31, 1999 date as the cut-off date. If the

EPA's use of the July 30, 1999 date was used solely to show the duration of the violation and thus the duration of liability, it would be an improper use of information obtained at the parties' settlement conference because admissions of liability at the Rule 408 settlement conference cannot be used against a party to that conference. *See* F.R.E. 408. However, use of that date for an "other matter" is admissible under Rule 408.^{41/} In applying the Penalty Policy, use of the October 21, 1999 date would have resulted in an enhancement of the penalty by as much as 9.5% instead of 8%. Mr. Litchford's report and testimony provide credible evidence that the SPCC violations continued through October 21, 1999. *See* Tr. at 206-29 (Litchford); Stip. Ex. 8. The record supports that there were egregious violations of the SPCC requirements throughout a period from at least March 25, 1998 through October 21, 1999.^{42/} I find that the EPA's use of the July 1999 date rather than the October 1999 date is a reasonable use of its discretion in arriving at a slightly more lenient penalty. Moreover, Respondent has not been afforded an opportunity to respond to extending the period of violation to October 1999. As such, in order to avoid any due process concerns, the earlier date of July 30, 1999, is used to calculate the duration of the penalty.

Respondent also argues that Mr. Litchford's October 21, 1999 inspection of the Facility is irrelevant to the duration of the SPCC violations because it does not cite the exact same violations as found in the March 25, 1998 inspection. *See* Resp. Post-Hr. Br. at 30-31. However, both inspection reports refer to violations of 40 C.F.R. Part 112 for failure to implement an SPCC Plan. *Compare* Stip. Ex. 7 to Stip. Ex. 8. Although not necessary to a determination of liability, I also find that both inspections cite several identical violations, such as inadequate maintenance and the lack of appropriate secondary containment. Thus, the SPCC violation is found to have continued until October 21, 1999, but the shorter period of July 1999 will be used for calculating the duration component. The additional enhancement of the penalty of \$40,825 by 8%, results in a penalty of \$44,091. *See* Stip. Ex. 20 at 2. The 8% penalty enhancement for the duration of the violation is appropriate. The \$44,091 is an appropriate penalty amount at the Seriousness stage of the Gravity determination in the case before me.

Under the applicable Penalty Policy, Step Two of the Gravity determination is "Culpability." *See* "Penalty Policy" at 9. "Culpability" is determined by considering "[T]he

^{41/} *See* FRE 408. Instances in which otherwise excludable settlement conference information was admitted as an "other matter" include: *In the Matter of Wego Chemical & Mineral Corp.*, *supra*, at 529-31 (holding that it was an error to exclude evidence of equitable estoppel revealed in settlement discussions); *In the Matter of United States Air Force, Tinker Air Force Base*, *supra*, at *6-10 (ruling allowed rebuttal evidence from settlement discussions to be used but excluded evidence of a settlement offer).

^{42/} *See e.g.* Stip. Exs. 2, 7, and 8; Compl. Ex. 21: Video.; Tr. at 101 (Nakad), 106 (Nakad), 109 (Nakad), 148 (Nakad), 310 (Harrison), 448 (Hawthorne), 475 (Hawthorne), 488-89 (Hawthorne), 507 (Goedert), 528 (Goedert), and *especially* 656 (Calvert).

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.” *Id.* Concerning Respondent’s level of sophistication in dealing with SPCC Plans and regulatory requirements, the EPA independently verified that Respondent is a large company with in-house legal staff. Tr. at 573 (Nakad). It is also credible that Jane Nakad, who prepared the penalty assessment, *see* Stip. Ex. 20, knew that Respondent was a sophisticated oil business and that it was knowledgeable or should have been knowledgeable about oil regulations. Ms. Nakad has extensive experience in the field of oil regulatory compliance for at least seven years. *See* Tr. at 71-75 (Nakad), 81 (Nakad), 151 (Nakad), 573 (Nakad); Stip. Ex. 21. Respondent’s discharge and Facility permit also shows that Respondent has in-house legal staff. *See* Stip. Ex. 43. I have previously found the SPCC violations to be egregious from at least March 25, 1998 through October 21, 1999. The above-cited facts show that Respondent was sophisticated enough to avoid such egregious violations.

In some situations, the severe weather conditions that impair implementation of SPCC requirements may be relevant to Culpability, depending on the promptness with which an owner or operator finally complies. *See e.g. In the Matter of Industrial Chemicals Corp.*, CWA-02-99-3803, 2000 EPA ALJ LEXIS 84, at *21-23 (EPA ALJ, Sept. 22, 2000), *modified on other grounds by*, slip op., *supra*, at 22, 24 (EAB). In the case before me, Respondent Crown claimed that severe weather prior to March 25, 1998 washed out a dike, which it claimed to be part of its secondary containment system. Nevertheless, I previously found that Respondent did not have such a dike. *See also* Tr. at 88-90 (Nakad), 109-110 (Nakad), 136-37 (Nakad), 229-30 (Litchford); Compl. Ex. 21: Video; Joint Stipulations, Fact ¶ 24. Furthermore, even if Respondent had ever had such a dike, Respondent’s own witness admitted that after the claimed wash-out it did not do anything about the lack of secondary containment. Tr. at 656 (Calvert). In fact, Respondent did not build appropriate secondary containment for any part of the Facility until ordered to build berms in July 1998, after the June 1998 oil spill. Tr. at 462 (Hawthorne). The “Culpability” stage allows for an upward adjustment of the penalty as high as 75%. *See* “Penalty Policy” at 9. Here, the EPA increased the penalty by 30%. Tr. at 573 (Nakad); Stip. Ex. 20 at 2. I find that the EPA’s 30% increase of the penalty was quite reasonable, which raised the penalty to \$ 57,318.

Consideration of “Mitigation” is the third step in determining the Gravity component of the calculation for an SPCC violation. *See* “Penalty Policy” at 10. Mitigation calls for a consideration of how quickly the violator comes into compliance, thus mitigating the threat of a discharge due to SPCC violations. *See id.* I previously found that Respondent did not have any appropriate secondary containment for any part of its Facility until after the June 1998 oil spill, when the EPA ordered Respondent to build berms around three of its largest tanks. I also previously found that even after those berms were completed by July 14, 1998, Respondent failed to implement an appropriate secondary containment system for the rest of the Facility. *See* Stip. Ex. 8 (report and photo log); Tr. at 229-30 (Litchford). I have also previously found that other SPCC violations, such as maintenance violations, continued from March 1998 through October 1999. *See also* Stip. Ex. 8 (report and photo log); Tr. at 208 (Litchford), 231 (Litchford). I conclude that Respondent’s conduct does not merit a downward adjustment in its penalty as to the

Mitigation factor. *See* “Penalty Policy” at 10.

An adjustment for “History of Prior Violations” is the fourth step in the SPCC violation gravity determination. *See id.* at 10. The Penalty Policy calls for an adjustment “[I]f the respondent has a relevant history of violations within the past five years.” *Id.* It further calls for consideration of violations of “SPCC and facility response plan regulations, discharges in violation of Section 311(b)(3), and any violation of an environmental statute that relates to the respondent’s ability to prevent or mitigate a discharge in violation of Section 311(b)(3).” *Id.* A history of violations may include findings of related violations cited by agencies other than the EPA and at any of Respondent’s facilities. *See* “Penalty Policy” at 10. By “prior violations,” I read the Policy to call for violations that occurred prior to the duration of time charged in the Complaint. The Complaint charges that SPCC violations occurred beginning in March 1998. The EPA relied in part on the BLM’s undesirable event reports from 1994 and 1997 in finding a history of violations. *See* Tr. at 573-73 (Nakad); Stip. Exs. 20, 23, and 24.

The February 13, 1994 spill cited by the BLM occurred more than five years prior to the filing of the Complaint, so it is excluded from consideration as to this factor under the Penalty Policy.^{43/} *See* Stip. Ex. 24; “Penalty Policy” at 10. However, the February 4, 1997 discharge cited in the 1997 BLM report, is within the five year history contemplated by the Penalty Policy. *See* Stip. Ex. 23. On that date, a possibly broken 3” valve in an oil tank precipitated a spill of five barrels (i.e. approximately 210 gallons) of oil, of which no amount was recovered. *Id.* The BLM report indicated that the spill went down a ditch about 75 yards but that sparse description provides insufficient information to determine whether there was a Section 311(b)(3) discharge into navigable waters, such as the incise channel or the Unnamed Creek, or any waterbody for that matter. *See id.* The BLM’s report also cited that “the existing ditches along the road has no diversion points, into the existing two evaporation ponds below the two tank batteries.” *Id.* The latter observance shows that Respondent had not implemented the secondary containment system provided for in its SPCC Plan. The Penalty Policy allows for an upwards adjustment in the penalty as high as 100% “[D]epending on the frequency and severity of such past violations.” *See* “Penalty Policy” at 10. Here, the EPA chose a 10% increase in the penalty based on the history of prior violations. *See* Tr. at 573-74 (Nakad); Stip. Ex. 20 at 2. This resulted in a penalty of \$63,050 at the conclusion of the Gravity stage of the penalty determination. The EPA’s 10% increase based on the history of prior violations is reasonable.

As to economic factors contemplated by the Penalty Policy, there is insufficient credible evidence to show that Respondent enjoyed an economic benefit from its SPCC violation. *See* Stip. Ex. 20; Tr. at 574-55 (Nakad) (showing that the EPA failed to conduct an economic analysis). The EPA did not make any adjustments to the penalty as to economic benefit. *Id.* Furthermore, there is insufficient evidence showing that the penalty should be adjusted due to the economic

^{43/} This spill is also cited by the EPA. *See* Stip. Ex. 19. Similarly, the 1983 spill cited by the EPA exceeds the five-year limit for consideration of historical oil spills. *See* Stip. Ex. 18.

impact on Respondent. As to the economic impact factor, Respondent did not claim inability to pay the assessed penalty, and Respondent failed to submit financial documentation as to inability to pay. Finally, Respondent does not attempt to claim that the penalty should be adjusted due to either economic benefit or economic impact. *See e.g.* Stip. Ex. 42. Accordingly, I make no adjustment to the penalty for either economic benefit to or economic impact on the Respondent.

Finally, both the Penalty Policy and Section 311 of the CWA allow for consideration of “other matters as justice may require.” *See id.*; CWA § 311(b)(8). In the case *In re Spang & Company*, the EAB described “other matters as justice requires” as a “[J]ustice factor, which is essentially to operate as a safety mechanism when necessary to prevent an injustice.” 6 E.A.D. 226, 250 (EAB, Oct. 20, 1995). Additionally, “It further suggests that use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just.” *Id.* Furthermore, “[I]t also suggests that evidence of creditable projects should be sufficiently clear that the proceeding will not get bogged down in a time-consuming analysis of collateral matters that are, in reality, commonplace, and thus do not rise to the level where justice *requires* their consideration.” *Id.* (emphasis in original).

Respondent suggests that the conduct of Governmental agencies was at part to blame for its violations and thus it deserves an adjustment to its penalty for “other matters as justice may require.” *See* Resp. Post-Hrg. Br. at 44-45. In particular, Respondent cites the fact that it attempted to surrender its leases for the Facility to the BIA prior to 1998 and as early as 1994. *See* Tr. at 342-49 (Yates). Respondent suggests that if the BIA had accepted the lease surrender, it would never have been in a position to have committed the SPCC violation alleged in the Complaint. *See* Resp. Post-Hrg. Br. at 44-45. Although any inquiry into such matter is beyond the scope of this decision, I observe that Respondent appears to be at least partly responsible for the delay in the lease surrender due to Respondent’s failure to comply with BLM regulations. The BLM will not recommend that the BIA approve the surrender of oil facility leases, such as Respondent’s, until Respondent is in compliance with BLM regulations. Tr. at 323-24 (Harrison). At least at the time of the March 25, 1998 inspection, Respondent was cited by the BLM for failure to comply with its regulations. *See* Tr. at 254-55 (Harrison); Stip. Exs. 26 and 27. Furthermore, as of the date of the hearing, Respondent had not obtained BLM approval to plug and abandon sixteen (16) wells at Respondent’s Facility. Tr. at 341 (Yates).

Additionally, I note that Respondent was still reaping the benefits of its Facility during at least some of the time period alleged in the Complaint. For instance, as late of May of 1998, wells were still producing oil at the Facility. Tr. at 87-88 (Nakad), 358 (Yates). At the time of the June 1998 oil spill, Respondent was transferring oil from the 5,000 barrel slop oil tank in an attempt to sell the oil. Tr. at 386 (Yates), 389 (Yates), 659-60 (Calvert). I also previously found that the regulations allow ample flexibility to avoid conflicts with BLM, BIA, and tribal regulations.^{44/}

^{44/} *See also* *Murphy Oil, supra*, at 1148 (denying a similar claim of conflict in an oil SPCC case because the flexibility of the regulations allows an owner-operator to avoid such conflicts).

Respondent's situation does not merit a penalty adjustment for "other matters as justice may require."

Accordingly, I assess a penalty of \$ 63,050 for Count I.

IV. COUNT II: THE SECTION 311(b)(3) OIL DISCHARGE

Count II of the Complaint charges,

Respondent's discharge of approximately 285 to 300 barrels (11,970 to 12,600 gallons @ 42 gallons per barrel) of oil from the Maverick Spring Field facility into or upon the navigable waters of the U.S. on or about June 4, 1998, constitutes a violation of Section 311(b)(6)(A)(i) of the Act, 33 U.S.C. § 1321(b)(6)(A)(i), and is subject to a maximum penalty of \$11,000 per day of violation for the period June 4 through June 12, 1998, and continuing thereafter.

Compl. at 7-8.

Section 311(b)(6)(A)(i) of the CWA is the administrative civil penalty provision for enforcing Section 311(b)(3) of the CWA, which prohibits "[D]ischarge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines . . . in such quantities as may be harmful as determined by the President." The Discharge of Oil regulations define "harmful quantities" as those that either "[v]iolate applicable water quality standards" or "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. §§ 110.3(a), (b). A "sheen" is "an iridescent appearance on the surface of water." 40 C.F.R. § 110.1. Just a few drops of oil can create a sheen on water. Tr. 486-87 (Hawthorne). The regulation defining "harmful quantities" with the sheen test has been held valid. *See e.g. Chevron, U.S.A., Inc. v. Yost*, 919 F.2d 27, 30-31 (5th Cir. 1990). A "sludge" is "an aggregate of oil or oil and other matter of any kind in any form other than dredged spoil having a combined specific gravity equivalent to or greater than water." *Id.* I find that the EPA's Complaint did charge Respondent with a discharge of oil in harmful quantities, contrary to Respondent's suggestion otherwise. Its allegation of a discharge of 285-300 barrels of oil into navigable water combined with its allegation of violation of Section 311(b)(6)(A)(i) of the CWA, which enforces Section 311(b)(3) (discharge of oil in harmful quantities), does sufficiently allege a discharge of oil in harmful quantities. *See* Compl. ¶ 38.

The issue is whether the EPA has proved by a preponderance of the evidence that

Respondent discharged oil in harmful quantities into navigable waters.^{45/} As discussed above, I have found the following bodies of water to be “waters of the United States” and thus “navigable waters” within the context of the CWA and the Discharge of Oil regulations: (1) the incise channel, (2) the discharge stream, (3) the Unnamed Creek, (4) Blue Draw, (5) Five Mile Creek, and (6) Boysen Reservoir. I also earlier found that Respondent was the operator of the Facility at all relevant times, which includes June 1998. *See e.g.* Stip. Ex. 40. Respondent admits that on or about June 4, 1998, a 5,000 barrel slop oil tank at its Facility spilled. Joint Stipulations, Fact ¶ 7; Answer ¶ 20. Thus, the remaining question is whether the EPA has shown that the spilled oil reached navigable waters in harmful quantities.

The record reflects the following. On or about June 4, 1998, a 5,000 barrel slop oil tank at Respondent’s Facility spilled, discharging approximately 285 to 300 barrels of crude oil. Joint Stipulations, Fact ¶¶ 7, 14. Respondent stipulated that the spill was discovered on the morning of June 5, 1998. *Id.* ¶ 11. On June 4, 1998, a field pumper for Nucor opened a small valve to allow the transfer of waste oil from the 5,000 barrel slop oil tank into a process tank using a pump. Answer ¶ 21; Tr. at 659-60 (Calvert); Stip. Ex. 2. The spill occurred due to the breaking of that 2-3" valve. *See* Stip. Ex. 23; Stip. Exs. 4, 5, 6, and 11; Tr. at 478-79 (Hawthorne), 501-02 (Goedert); Answer ¶ 22. The oil spill discharged at least 290 barrels (approximately 12,180 gallons at 42 gallons per barrel) of crude oil. Stip. Exs. 30 and 34; Tr. at 263 (Harrison), 660-61 (Calvert), 665 (Calvert). At the time of the oil spill, there was at least 1,100 barrels of oil in the 5,000 barrel tank. Tr. at 658-59 (Calvert). The slop oil was accumulated over a period of several years by skimming the discharge pits. Stip. Ex. 2.

The EPA’s stipulation as to the volume of the spill appears to have been liberal in that the oil spill may have been appreciably larger. Mr. Aragon testified that the spill may have been as large as 1,100 barrels. *See* Tr. at 413 (Aragon). In addition to Mr. Aragon’s testimony about the volume of oil spilled, Respondent claimed to have initially recovered 200 barrels of oil by vacuuming. Tr. at 668 (Calvert). Additional oil was recovered by later vacuuming, and Respondent estimated that about 250 to 275 barrels of oil were returned to the 5,000 barrel tank. Tr. at 669 (Calvert); Stip. Ex. 13. Then, Respondent excavated a very large volume of soil, in attempting to recover the remaining barrels absorbed by the soil. *See* Stip. Ex. 13. At the upgradient portion of the spill, four to eight inches of recently oil stained soil were removed. In the Unnamed Creek, the bed excavation reached two to three feet in depth and included recently oil stained soil and historic oil staining. Stip. Ex. 2. Ultimately, approximately 2,800 cubic yards of soil were excavated. *Id.* Such excavation, even when allocating an amount for historical spills, indicates a significant amount of oil was spilled and absorbed in the soil. I further note that Respondent’s estimate of the spill was based on its reading of the slop oil tank gauge and Mr. Calvert acknowledged that such estimates can be somewhat inaccurate. Stip. Exs. 2 and 11; Tr.

^{45/} Section 311(a)(2) of the CWA defines “discharge” as “including, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title”

at 665 (Calvert), 675 (Calvert).

The oil spill flowed down the hill from the 5,000 barrel slop oil tank into an eroded gully, then into the incise channel, and eventually flowed past the discharge pits and into the Unnamed Creek at the point where the Unnamed Creek converges with the discharge stream about 30 yards downstream from the outfall point. Tr. at 267-69 (Harrison), 415-18 (Aragon), 440 (Aragon), 450-52 (Hawthorne), 474-75 (Hawthorne), 518 (Goedert), 664-65 (Calvert), 692 (Calvert), 733-34 (Calvert). The slop oil that spilled is a rather viscous substance. Before reaching the Unnamed Creek, the oil traveled for a distance of about 300 yards at a width ranging from 2 feet to 20 feet and then flowed through the Unnamed Creek for at least another 200 yards in the direction towards Five Mile Creek. Stip. Ex. 11; Tr. at 450 (Hawthorne), 474-75 (Hawthorne), 664-65 (Calvert), 692 (Calvert). The spill flowed to a point at least 250 yards downstream from the outfall point into the Unnamed Creek. Stip. Exs. 11 and 30.^{46/}

Based on the foregoing evidence, I find that the EPA has adequately proved by a preponderance of the evidence its allegation that the oil spill commenced on the night of June 4, 1998. The large volume of oil spilled, the small size of the ruptured pipe involved, the extent of the soil saturated, and the long distance the oil progressed in order to reach the Unnamed Creek are factors in making this determination. The fact that the oil spill was not discovered until the morning of June 5, 1998 is not persuasive as to the date of the spill, as Respondent did not have personnel on site when the spill commenced. See Tr. at 413-14 (Aragon).^{47/}

On June 5, 1998, water from a spring and natural water seeps was seen running in the incise channel and in the Unnamed Creek. Tr. at 417-18 (Aragon), 543 (Goedert); Stip. Ex. 2. Furthermore, immediately after the spill began, water was present in the Unnamed Creek. Tr. at 736 (Calvert). Rainwater and water seeps were present in the Unnamed Creek at various times during the oil discharge. Tr. at 293 (Harrison), 417-18 (Aragon), 451-53 (Hawthorne), 503-04 (Goedert), 543 (Goedert). In addition, after heavy rains water was flowing under and past the T-siphon dam in the Unnamed Creek and towards Five Mile Creek at the time of the oil discharge. Tr. at 507-08 (Goedert), 536 (Goedert); Stip. Ex. 2, Black and White Photo 1. Respondent has

^{46/} However, the oil discharge did not reach Five Mile Creek, which is approximately one mile downstream from the Facility. See Tr. at 354 (Yates), 539 (Goedert), 593 (Nakad), 672-65 (Calvert), 691 (Calvert). As the oil discharge did not reach Five Mile Creek, it also could not have reached Boysen Reservoir.

^{47/} Assumptions by a couple of the EPA's witnesses that the spill began on June 5, 1998 were based on assumptions made by others. See e.g. Tr. at 262 (Ms. Harrison states that she received the call that the spill occurred on June 5, 1998 and then used that date in her report); Tr. at 505-06 (Mr. Goedert assumes that the spill commenced on June 5, 1998 based on the recollections of other people).

emphasized that no produced water was being discharged into the incise channel, the discharge stream, the Unnamed Creek, or Blue Draw at the time of the oil spill. Tr. at 632-33 (Calvert), 678-79 (Calvert); Stip. Ex. 29. Contrary to Respondent's assertions, there is no probative evidence that prior to June 12, 1998 the water in the incise channel or the Unnamed Creek was from water being pumped into these bodies of water from water/vacuum trucks as part of the clean-up process. Tr. at 739 (Calvert).

The following facts describing the oil spill show that a sheen was observed several times throughout the month of June 1998. These facts also show the effectiveness of Respondent's clean-up efforts. Visible oil was seen in and upon flowing water in the incise channel and the Unnamed Creek on June 5 and 12, 1998. Tr. at 263 (Harrison), 417-18 (Aragon), 452 (Hawthorne); Stip. Ex. 2 (photo log). On June 5, 1998, Nucor mobilized a backhoe to the spill site and constructed two earthen containment dams in the Unnamed Creek to contain the flow of the oil. Joint Stipulations, Fact ¶ 11; Stip. Ex. 11; Tr. at 450-51 (Hawthorne). The second earthen dam, which was about 200 yards downstream from the first dam, utilized a T-siphon to discharge water after it was separated from spilled oil. See Stip. Ex. 2. The oil spill was not completely contained by the earthen dams and visible oil flowed on the water in the Unnamed Creek past the lower earthen containment dam. Tr. at 266 (Harrison), 417-19 (Aragon), 452 (Hawthorne); Stip. Ex. 11. The BLM expressed concerns to Respondent on June 5, 1998 that the earthen dams would be washed away by rain. Tr. at 265 (Harrison), 323 (Harrison).

According to Respondent, approximately 200 barrels of oil were recovered by vacuum on or about June 6 and 7, 1998. Tr. at 667-68 (Calvert); Stip. Ex. 34; *see also* Tr. at 263-64 (Harrison), 266 (Harrison). After June 7, 1998, Respondent did not further remove any oil until June 12, 1998, when the EPA arrived at the Facility. Tr. at 419-23 (Aragon), 451 (Hawthorne), 506-07 (Goedert). Fresh oil was seen pooled behind the lower earthen dam in the Unnamed Creek from June 5 through June 12 of 1998. Tr. at 266 (Harrison), 417 (Aragon), 419-21 (Aragon), 423 (Aragon). Respondent had difficulties obtaining the equipment and personnel it needed in order to clean up the spill in a timely manner. Tr. at 638-40 (Calvert). I earlier found that Respondent failed to have written commitments of manpower and the required agreements for personnel and equipment. Rain and muddy conditions on June 9, 1998 complicated efforts to get heavy equipment into the area to clean up the oil on that day. Tr. at 295 (Harrison), 423-24 (Aragon), 449 (Hawthorne), 505 (Goedert); Stip. Ex. 30. The roads to the Facility were passable after the June 9, 1998 cloudburst no later than June 11, 1998. Tr. at 424 (Aragon).

Respondent's further removal of the spilled oil after June 7, 1998 required prompting by the EPA. Tr. at 425 (Aragon). When the EPA arrived at the Facility on June 12, 1998, the EPA threatened to clean up the oil spill itself at Respondent's expense. Tr. at 448 (Hawthorne); Stip. Ex. 32. Respondent did not have a contractor employed to clean up the oil spill when the EPA arrived at the Facility on June 12, 1998. Tr. at 421-22 (Aragon). On June 11 and 12 of 1998, pooled oil and oil-stained soil were still present behind the T-siphon dam (lower dam) in the Unnamed Creek. Joint Stipulations, Fact ¶ 12; Tr. at 423 (Aragon); Stip. Ex. 2. Respondent did not introduce water into the incise channel or the Unnamed Creek to assist in the removal of oil until June 12, 1998. See Tr. at 422 (Aragon), 469-70 (Hawthorne), 544-45 (Goedert), and

especially Calvert (739). On June 13, 1998, Respondent began excavation of soil in the Unnamed Creek upgradient from the lower containment dam where the fresh oil had stained the watercourse. Stip. Ex. 13.

The earthen dams built to stop the oil spill from reaching Five Mile Creek were washed out by heavy rains and by a water seep from the incise channel from June 18 through June 26, 1998, resulting in a restaining of the cleaned portion of the Unnamed Creek. Tr. at 426 (Aragon), 522-24 (Goedert), 540 (Goedert), 544 (Goedert); Stip. Ex. 2 (black and white photo #17). On June 18 and June 26, 1998, oil and oil sheens were seen on the Unnamed Creek. Tr. at 524 (Goedert), 580 (Nakad). The lowest dam constructed to contain the oil spill was 550 yards away from the 5,000 barrel oil tank, or approximately three-fourths of a mile away from Five Mile Creek. Tr. at 693 (Calvert). By June 26, 1998, Respondent had not completed its excavation of the bottom of Unnamed Creek. Tr. at 526-27 (Goedert).

No oil in the incise channel or the Unnamed Creek is shown to be the result of any natural oil seep as suggested by Respondent. No oil or sheen is shown to be the result of any discharge of oil which is authorized by Respondent's NPDES permit for the Facility. In fact, Respondent had stopped producing oil by May 1998. Tr. at 348-49 (Yates), 632-33 (Calvert). Respondent claims that at the time of the oil spill, no produced water or any other substance was being discharged from the Facility's outfall point into the incise channel, the discharge stream, the Unnamed Creek, or Blue Draw. *See* Stip. Ex. 29; Tr. at 348-49 (Yates), 536-37 (Goedert), 632-33 (Calvert).^{48/} Moreover, Respondent's discharge permit for the Facility provides, "The concentration of oil and grease in any single sample shall not exceed 10 mg/L *nor* shall there be any visible sheen in the receiving water or adjoining shoreline." Stip. Ex. 43, Permit # WY-0000469, at 5-6 (emphasis supplied). As with the discharge regulation, the permit incorporates the sheen test.

In conclusion, I find that there was a discharge of oil in harmful quantities into navigable waters (i.e. waters of the United States), namely the incise channel and the Unnamed Creek. Respondent discharged oil in violation of Section 311(b)(6)(A)(i) the CWA and the Discharge of Oil regulations. Furthermore, that violation continued at least from June 4, 1998 through June 26, 1998.

^{48/} Although Respondent stresses that no produced water was being discharged at the time of the June 1998 oil spill, this fact is not dispositive of the issues in this case. However, I note that I have already found that Respondent's Facility was discharging produced water at least through May 28, 1998. *See e.g.* Tr. at 633 (Calvert), 696 (Calvert). It is quite possible that some produced water from the oil production process was being discharged into the discharge pits and then into the discharge stream and the Unnamed Creek just seven (7) days later, when the oil spill began on June 4, 1998.

Respondent's Arguments Against Liability

Section 311(b)(6) of the CWA provides for strict liability.^{49/} Nevertheless, Respondent attempts to cast blame for the oil spill and the quality of its clean-up efforts on other federal agencies and tribal requirements. One of Respondent's defenses to discharge liability under Section 311(b)(6) of the CWA is that its SPCC Plan conflicts with orders issued by the BLM. In particular, Respondent implies that if BLM's April 2 and 8, 1998 orders had not commanded it to direct rainwater away from the pit that a spill into the incise channels and Unnamed Creek would not have occurred.

I earlier found that although the BLM orders might have encouraged Respondent not to implement the particular SPCC Plan prepared by Respondent, it did not preclude any other form of appropriate secondary containment.^{50/} The record is clear that Respondent did not attempt to build secondary containment after the April 1998 BLM orders, and that it did not have any appropriate secondary containment at the time of the June 1998 oil spill. *See e.g.* Stip. Ex. 2 (report and photo logs); Tr. at 56 (Fognani) (Respondent's counsel concedes the lack of secondary containment at the time of the oil spill), 656 (Calvert) (Respondent's witness agrees that Respondent did not build (or rebuild) secondary containment after the BLM orders were issued). Similarly, the BLM orders did not prohibit Respondent from the ability to use effective clean-up methods. *See* Stip. Exs. 26 and 27.

Respondent also attempts to blame the deficiencies in the effectiveness and promptness of its clean-up efforts on requirements to employ tribe-certified workers. Tr. at 638-40 (Calvert); Resp. Post-Hrg. Br. at 38. Respondent's need to comply with such requirements is beyond the scope of this decision. Moreover, I note that tribe-certification of contractors in the case before me appears to be a relatively quick and simple process. *See* Tr. at 436-37 (Aragon). Due to Respondent's 50-year plus operation of the Facility,^{51/} it was reasonable for Respondent to have foreseen difficulties in obtaining labor and equipment, and it should have planned accordingly to avoid delay. Additionally, in lieu of secondary containment, the SPCC regulations require both (1) a written commitment of manpower and (2) a strong oil spill contingency plan in compliance with 40 C.F.R. Part 109. *See* 40 C.F.R. § 112.7(d). I previously found that the written commitment and the strong oil spill contingency plan are required for the Facility, as Respondent's SPCC Plan claims that secondary containment is impracticable as to the Facility's

^{49/} *See United States v. Coastal States Crude Gathering Co.*, *supra*, at 1127; *United States v. Tex-Tow, Inc.*, *supra*, at 1312-13; *United States v. Marathon Pipe Line Co.*, *supra*, at 1306-07; *In the Matter of Aldi, Inc.*, *supra*, at *8.

^{50/} *See also Murphy Oil*, *supra*, at 1148 (denying a similar claim of regulatory conflict in an oil SPCC case).

^{51/} *See* Stip. Ex. 2 (report).

flowlines. *See* Stip. Ex. 1: SPCC Plan, Attachment #2, “Oil Spill Contingency Plans and Written Commitment of Manpower.” The above-cited SPCC regulations are designed to help Respondent avoid eventualities such as difficulties in obtaining labor and equipment when there is an oil spill. I previously found that Respondent had not prepared a written commitment of manpower at the time of the spill. I further found that Respondent’s oil spill contingency plan did not have agreements for equipment and materials as required by 40 C.F.R. Part 109 (specifically § 109.5(c)). Respondent’s failure to have a written commitment of manpower and a strong oil spill contingency plan contributed towards Respondent’s failure to promptly obtain necessary labor and equipment in order to quickly clean up the oil spill.

Affirmative Defenses

Finally, Respondent’s Answer asserted as affirmative defenses the statute of limitations and the laches. *See* Answer at 11, ¶¶ 56-57. As previously discussed, the burden is on Respondent to prove its affirmative defenses by a preponderance of the evidence. As discussed previously as to Count I, the statute of limitations applicable to the CWA is five (5) years.^{52/} I have already found that Respondent’s discharge violation began on June 4, 1998 and continued at least through June 26, 1998. As the EPA’s Complaint was filed March 31, 2000, the statute of limitations does not bar this action.

As previously discussed, the laches defense does not apply to the EPA.^{53/} Even assuming *arguendo* that laches did apply to the Government, it does not in the instant case. Laches is an equitable defense to equitable actions.^{54/} Section 311(b)(6) of the CWA seeks monetary relief rather than equitable relief. As with Count I, even if Section 311(b)(6) did provide for non-monetary relief, Respondent cannot fulfill the requirements of the laches defense. I find that Respondent did not fulfill its burden to show that the EPA’s delay in filing the case against it resulted in undue prejudice. I also find that Respondent failed to produce any credible evidence to that effect. Additionally, under the circumstances, I find that EPA’s delay in filing suit (less than two years) in this environmental case was not unreasonable. Respondent’s doctrine of laches defense fails.

V. THE OIL DISCHARGE PENALTY

As in my discussion as to the penalty for Count I of the Complaint, the same statutory

^{52/} *See* 28 U.S.C. § 2462; *United States v. Banks, supra*, at 918; *United States v. Telluride Co., supra*, at 1244-45.

^{53/} *See e.g., Telluride, supra*, at 1246 n.7.

^{54/} *See e.g. Environmental Defense Fund, Inc. v. Alexander, supra*, at 477-78.

factors apply to Count II, the oil discharge violation. *See* CWA § 311(b)(8). Furthermore, as I previously discussed, the maximum penalty for each count in the Complaint is capped at an overall penalty of \$137,500 with a daily maximum of \$11,000. In August 1998, the EPA promulgated the Penalty Policy for violations of Section 311(j), which is charged in Count I, and for 311(b)(3), which is charged in Count II. *See* “Penalty Policy.” As in Count I, the EPA used the Penalty Policy in calculating the penalty amount for the discharge of oil violation charged in Count II. *See* Stip. Ex. 20. As I have previously explained, Penalty Policies must be considered but an ALJ is not bound to apply such a policy as a rule.

I now consider the factors that the EPA used in setting the discharge penalty. The Penalty Policy addresses, *inter alia*: (I) gravity, (II) economic benefit, and (III) settlement adjustment factors. Compl. Ex. 28, at 11-16. Although the same Penalty Policy applies to both Counts of the Complaint, that Policy differs in the calculation of the Gravity for a Section 311(b)(3) oil discharge violation. *Compare* “Penalty Policy” at 6-10 to 11-14. The Gravity component for Section 311(b)(3) violations is determined by a four-step process concerning: (1) seriousness, (2) culpability, (3) mitigation, and (4) history of prior violations. *Id.* at 11-14. Under the Penalty Policy, the “Seriousness” factor can be based on either (1) the quantity of barrels discharged indexed with the potential impact of the spill, or in the alternative (2) the duration of the spill. *See id.* at 11-12. In the instant case, the EPA used the duration approach and chose a duration of nine days, from June 4, 1998 until June 12, 1998, when effective measures began to be employed to remove the oil from the water. *See* Tr. at 578-79 (Nakad). Based on this nine day period, the EPA assessed a penalty based on “moderate duration” which calls for a range from \$25,000 to \$100,000. *See* “Penalty Policy” at 12. Ms. Nakad of the EPA calculated the initial penalty, in part, based on \$7,500 per day times nine days. *See* Tr. at 579, 591 (Nakad). Ms. Nakad appropriately selected the \$7,500 per day amount because it falls within the mid-range of zero to \$11,000 per day (the latter of which I have already concluded is the daily maximum statutory penalty). *Id.* This resulted in a base penalty of \$67,500. *Id.* I note that this base penalty amount falls within the mid-range of \$25,000 to \$100,000, which is penalty amount range for a discharge of moderate duration. *See id.*

Respondent argues that the duration of the discharge should be limited to the actual number of days the oil was spilled out of its tank and related equipment. I previously found that a spill of at least 290 barrels occurred and that the discharge of oil continued from June 4, 1998 at least through June 26, 1998. Under Respondent’s approach, the duration of the oil spill would be no more than two days, from June 4, 1998 to June 5, 1998. However, such a restrictive definition as to what constitutes a discharge or a continuing discharge is not taken under the CWA. As has been held in other cases, a discharge is a continuing violation until the pollutant is removed. *See Sasser v. Administrator, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993); *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff’d*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); *In the Matter of Slinger Drainage, Inc.*, 5-CWA-97-022, 1998 EPA ALJ LEXIS 133, at *17-18 (EPA ALJ, Sept. 14, 1998), *aff’d*, 1999 EPA App. LEXIS 30 (EAB, Sept. 29, 1999), 8 E.A.D. ____, *appeal dismissed for lack of jurisdiction*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 122 S. Ct. 394 (2001); *In the Matter of Lawrence John Crescio, III, supra*, at *79-82. Although I have found that a discharge occurred at least from June

4, 1998 through June 26, 1998, the EPA took into account adverse weather conditions in calculating the duration of the oil spill to be only nine (9) days. *See* Tr. at 580 (Nakad). As such, I do not increase the EPA's proposed assessment of the base penalty.

Moreover, under the Penalty Policy, based on the nine day duration, the discharge properly falls under the "moderate impact" category. Under the Penalty Policy, a continuous or intermittent discharge of four to fourteen (4-14) days qualifies as a "moderate impact." "Penalty Policy" at 12. The EPA's designation of the spill as being of "moderate impact" takes into account impediments to the clean-up that may have been caused by adverse weather events. *See* Tr. at 580 (Nakad). Furthermore, as noted by the EPA, the discharge did not pose a significant threat to human health or a drinking water supply. *See* Stip. Ex. 20 at 1. I previously found that the June 1998 oil spill did not reach Boysen Reservoir, which is the closest source of drinking water for humans. Tr. at 410 (Aragon).

Additionally, the alternative method of determining seriousness describes "moderate impact" as a discharge posing a "significant threat to navigable waters (other than an actual or potential drinking water supply) . . ." "Penalty Policy" at 12. I observe that had the penalty been calculated using the method based on quantity, the penalty range for this spill would have been much higher, at \$72,500 to \$145,000 (for 290 barrels of oil). *See id.* at 11. I also note that the Policy allows use of the duration approach *only* if it leads to a higher amount than established under the quantity approach. *See id.* at 12. The base penalty of \$67,500 for the discharge violation is, therefore, reasonable.

"Culpability" is the second step of the gravity determination. *See* Tr. at 581 (Nakad); "Penalty Policy" at 12-13. Culpable conduct can be gross negligence or willful misconduct, which would call for a significant increase in the base penalty, or acts of commission (e.g. setting a valve in the wrong position) or acts of omission (e.g. failing to check a pipeline for corrosion). *See* "Penalty Policy" at 12-13. As to what caused the spill, the EPA claims that the spill occurred due to operator error, such as leaving a pipe valve open on the night of June 4, 1998, when Respondent's contractor was transferring oil from the 5,000 barrel slop oil tank. In contrast, Respondent claims that the spill occurred due to equipment failure. The initial reports of the spill assigns the blame to operator error. *See* Stip. Exs. 3 and 4. However, later reports of the oil spill indicate that equipment failure precipitated the spill. *See* Stip. Exs. 5, 6, and 11. Additionally, two of the EPA's own witnesses agree that the spill occurred due to equipment failure. *See* Tr. at 478-79 (Hawthorne), 501-02 (Goedert). Accordingly, it is determined that the June 1998 oil spill was precipitated by equipment failure. Nevertheless, Respondent's persistent SPCC violations, including maintenance and secondary containment violations, indicate a higher than ordinary level of culpability. However, the EPA chose not to increase the base penalty due to culpability. Tr. at 581-82 (Nakad). In light of the overall penalty assessed, I do not find an adjustment for this factor to be necessary.

"Mitigation" is the third step in determining the gravity of a discharge violation. "Penalty Policy" at 13. The Mitigation step takes into account the degree of success of an owner-operator's efforts to mitigate the effects of a discharge. *Id.* A few of its categories include "best and most

prompt response possible” (5% to 40% reduction of the penalty), adequate response (no adjustment), and inadequate response (increase up to 25%). *Id.* The EPA determined that the Respondent’s response to the discharge was “adequate,” Tr. at 582 (Nakad), whereas Respondent argues that its response was the best and most prompt response possible under the circumstances.

As to the effectiveness of Respondent’s mitigation efforts, I conclude that Respondent’s clean-up efforts were no more than “adequate.” It is true that shortly after learning of the oil spill on June 5, 1998, Respondent built two earthen containment dams in the Unnamed Creek to contain the flow of oil. Joint Stipulations, Fact ¶ 11; Stip. Ex. 11; Tr. at 450-51 (Hawthorne). However, the oil spill was not completely contained by the earthen dams and visible oil flowed on the water in the Unnamed Creek past the lower earthen containment dam. Tr. at 266 (Harrison), 417-19 (Aragon), 452 (Hawthorne); *see* Stip. Ex. 11. Respondent recovered some oil by vacuum June 7, 1998. Tr. at 263-64 (Harrison), 266 (Harrison). However, I have determined that after June 7, 1998, Respondent did not further remove the oil until June 12, 1998, when the EPA arrived at the Facility. Tr. at 419-23 (Aragon), 451 (Hawthorne), 506-07 (Goedert). Particularly persuasive is the testimony of Mr. Aragon, who was at the site almost every day for four to six (4-6) hours and noticed no noticeable change in the removal of oil. Tr. at 435 (Aragon), 439 (Aragon).

Respondent’s further removal of the spilled oil on June 12, 1998, required prompting by the EPA. Tr. at 425 (Aragon). Respondent did not have a contractor employed to clean up the oil spill until June 12, 1998, when the EPA arrived at the Facility. Tr. at 421-22 (Aragon). On June 12, 1998, pooled oil and oil-stained soil were still present behind the T-siphon dam (lower dam) in the Unnamed Creek. Joint Stipulations, Fact ¶ 12; Tr. at 423 (Aragon); Stip. Ex. 2. Respondent did not introduce water into the incise channel or the Unnamed Creek to assist in the removal of oil until June 12, 1998. *See* Tr. at 422 (Aragon), 469-70 (Hawthorne), 544-45 (Goedert), and *especially* 739 (Calvert). On June 13, 1998, Respondent finally began excavation of soil in the Unnamed Creek upgradient from the lower containment dam where the fresh oil had stained the watercourse. Stip. Ex. 13.

Respondent asserts that weather conditions impeded its clean up efforts and that under the weather conditions it conducted “the best and most prompt response possible.” It is true that rain and muddy conditions on June 9, 1998 complicated efforts to get heavy equipment into the area to clean up the oil on that day. Tr. at 295 (Harrison), 423-24 (Aragon), 449 (Hawthorne), 505 (Goedert); Stip. Ex. 30. However, Mr. Aragon’s testimony shows that the roads to the Facility were passable by no later than June 11, 1998. Tr. at 424 (Aragon). Furthermore, the weather patterns in the area indicate that the Facility experiences cloudbursts of rain of short duration, following by periods of dryness, which is the condition throughout most of the year. *See* Tr. at 408 (Aragon). I previously found that Respondent failed to remove oil from June 8 through June 11, 1998. The impassable roads on June 9 and possibly June 10 did not preclude clean-up efforts from being conducted at least on June 8 and 11.

Further on the issue of weather, it is also true that sometime between June 18, 1998 and June 26, 1998, heavy rains and a water seep washed out the earthen containment dams in the

Unnamed Creek. Tr. at 426 (Aragon), 522-24 (Goedert), 540 (Goedert), 544 (Goedert); Stip. Ex. 2 (black and white photo #17). The wash-out precipitated a discharge of oil in harmful quantities. Tr. at 524 (Goedert), 580 (Nakad). However, even as early as June 5, 1998, the BLM expressed concerns to Respondent that the earthen dams would be washed away by rain. Tr. at 265 (Harrison), 323 (Harrison). I agree with the EPA that Respondent's mitigation efforts were adequate, at best. Under the Penalty Policy, adequate mitigation does not call for an adjustment to the penalty, and I do not make any adjustment. See "Penalty Policy" at 13.

"History of Prior Violations" is step 4 in the gravity determination. See "Penalty Policy" at 14. The history factor allows consideration of not only prior oil discharge violations but also violations relating to the respondent's ability to prevent or mitigate a discharge violation of Section 311(b)(3) of the CWA, which would include SPCC violations. See *id.* It may also include findings of related violations made by other agencies that have not been withdrawn or overturned by a reviewing authority. See *id.* Respondent did commit SPCC violations prior to the June 1998 oil spill. I have already found SPCC violations to have occurred on March 25, 1998. See *e.g.* Stip. Ex. 2. In addition, a BLM report shows that on February 4, 1997, Respondent had not implemented the secondary containment system provided for in its SPCC Plan. See Stip. Ex. 23. In particular, that report cites that "the existing ditches along the road has no diversion points, into the existing two evaporation ponds below the two tank batteries." *Id.* The EPA assessed a 10% increase in the base penalty based on Respondent's history of prior violations. See Tr. at 584 (Nakad). I conclude that the 10% increase was appropriate, which led to a penalty of \$74,250.

As to economic factors, there is insufficient credible evidence to show that Respondent enjoyed an economic benefit. See Stip. Ex. 20; Tr. at 574-55 (Nakad) (showing that the EPA failed to conduct an economic analysis). In fact, Respondent spent approximately \$54,000 in its clean up efforts. Stip. Ex. 41; Tr. at 351 (Yates), 691 (Calvert). The EPA did not make any adjustments to the penalty as to economic benefit. *Id.* Furthermore, there is insufficient evidence showing that the penalty should be adjusted due to the economic impact on Respondent. Respondent did not claim inability to pay the assessed penalty, and Respondent did not submit financial documentation as to inability to pay. Finally, Respondent does not attempt to claim that the penalty should be adjusted due to either economic benefit or economic impact. See *e.g.* Stip. Ex. 42. The penalty should not be adjusted for economic benefit or economic impact factors.

Finally, Respondent would have me make an adjustment to the penalty in its favor as an "other matter as justice may require." As I have already discussed, the justice factor is a safety mechanism to be used in extraordinary circumstances. See *e.g. Spang & Company, supra*, at 250. Respondent suggests that the oil discharge of June 1998 would never have occurred had the BIA approved the surrender of its leases. See Resp. Post-Hrg. Br. at 44-45. It is true that Respondent attempted to surrender its leases for the Facility to the BIA prior to 1998 and as early as 1994. See Tr. at 342-49 (Yates). However, the BLM will not recommend that the BIA approve the surrender of oil Facility leases, such as Respondent's, until Respondent is in compliance with BLM regulations. Tr. at 323-24 (Harrison). As I have earlier found, at the time of the March 25, 1998 inspection, Respondent was cited by the BLM for failure to comply with its regulations. See Tr. at 254-55 (Harrison); Stip. Exs. 26 and 27. As of the date of the hearing, Respondent had not

obtained BLM approval to plug and abandon sixteen (16) wells at Respondent's Facility. Tr. at 341 (Yates). I also previously found that the regulations allow ample flexibility to avoid conflicts with BLM, BIA, and tribal regulations. Finally, Respondent's argument concerning this matter goes beyond the scope of this decision.

In conclusion, the Penalty Policy as applied to Respondent's oil discharge is just and fair. The circumstances surrounding Respondent's violation do not merit a penalty adjustment for "other matters as justice may require." The EPA took into account adverse weather conditions in calculating a duration of the oil spill of only nine (9) days, Tr. at 580 (Nakad), although as I previously found, the record shows a discharge violation of at least twenty-two (22) days. Additionally, the EPA leniently applied the culpability factor despite Respondent's persistent violations of the SPCC requirements. As I previously found, delays in obtaining equipment and manpower could have been avoided by Respondent's careful planning ahead for such eventualities. The assessment of a penalty in the amount of \$74,250 for the discharge violation is reasonable and appropriate.

ORDER

1. The Respondent, Crown Central Petroleum Corporation, is assessed a civil administrative penalty in the amount of \$137,300.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the final order by submitting a certified or cashier's check in the amount of \$137,300, payable to the Treasurer, United States of America, and mailed to:

Commander, National Pollution Funds Center
U.S. Coast Guard
The Ballston Common Office Building
Suite 1000
4200 Wilson Boulevard
Arlington, Virginia 22203

3. A transmittal letter identifying the case title and EPA docket number, and the Respondent's name and address, must accompany the check.

4. If the Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

Appeal Rights

Pursuant to 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects to review this decision *sua sponte*.

Barbara A. Gunning
Administrative Law Judge

Dated: January 8, 2002
Washington, DC

In the Matter of Crown Central Petroleum Corporation, Respondent
Docket No. CWA-08-2000-06

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated January 8, 2002, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: January 8, 2002

Original and one copy by Pouch Mail to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA
999 18th Street, Suite 300
Denver, CO 80202-2466

Copy by Certified Mail Return Receipt:

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