UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Spring Crest Fuel Company, Inc.	)	**DOCKET NO. CWA-3-99-0009**
	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Clean Water Act - - This proceeding is commenced by the U.S. Environmental Protection Agency, pursuant to Section 311(b)(6)(B)(ii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii), for nine counts of alleged violations by Respondent of regulations issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j). The undersigned issued an Order Granting Complainant's Motion for Partial Accelerated Decision on liability for seven of the counts. Complainant withdrew the remaining counts. **Held:** Based on the statutory factors set forth in Section 311(b)(8) of the Clean Water Act, 33 U.S.C. § 1321(b)(8), Respondent is assessed a civil penalty in the total amount of **$20,125.**

Before: Stephen J. McGuire
Administrative Law Judge

Date: February 12, 2001

Appearances:

For Complainant:
Andrew Duchovnay, Esq.
Sr. Assistant Regional Counsel
EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

For Respondent:
James P. Wallbillich, Esq.
Cerullo, Datte & Wallbillich, P.C.
Garfield Square
450 West Market Street
P.O. Box 450
Pottsville, PA 17901

I. Introduction

This is a civil administrative proceeding instituted by issuance of a Complaint, dated December 30, 1998, to Spring Crest Fuel Company, Inc. ("Respondent"), of Ashland, Pennsylvania, by the Director of the Hazardous Site Cleanup Division, United States Environmental Protection Agency ("EPA"), Region III ("Complainant"), under delegation of authority by the Regional Administrator of EPA, Region III, and the Administrator of EPA. The Complainant commenced this action pursuant to Section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6)(B)(ii),[1/] and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and

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[1/] Section 311(b)(6)(B)(ii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii), discusses Class II administrative penalties and 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 II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and Secretary may issue rules for discovery procedures for hearings under this paragraph.

the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

Specifically, the Complaint alleged that Respondent committed nine counts of violations for its failure to comply with regulations issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j). For these alleged violations, Complainant proposed a penalty of $54,207.50. On March 11, 1999, Respondent filed its answer and requested a hearing on the penalty assessment. The undersigned was designated to preside over this matter on August 27, 1999.

On September 1, 1999, the undersigned issued a prehearing order directing both parties to submit their prehearing exchange.[2/] Both parties timely submitted their prehearing exchange. A hearing was scheduled for July 11, 2000, by Order dated May 17, 2000.

On May 19, 2000, Complainant submitted a Pre-Hearing Brief, or in the alternative, Motion for Partial Accelerated Decision in which it

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[2/] The prehearing order directed the parties to file their prehearing exchanges in seriatim fashion, such that: Complainant was required to file its initial prehearing exchange by November 1, 1999; Respondent was required to file its prehearing exchange, including any direct and rebuttal evidence, by December 1, 1999; and then, if necessary, Complainant would have the opportunity to file a rebuttal prehearing exchange by December 23, 1999.

requested that the undersigned find Respondent liable on Counts II, III, IV, VI, VII, VIII, and IX of the Complaint. Respondent did not reply to Complainant's Motion. The undersigned subsequently issued an Order Granting Complainant's Motion for Partial Accelerated Decision, dated June 28, 2000, which is hereby incorporated into this decision. See In re Spring Crest Fuel Co., Inc., Docket No. CWA-3-99-0009, 2000 WL 974337 (EPA ALJ, June 28, 2000). As a result, Respondent was deemed liable on Counts II, III, IV, VI, VII, VIII, and IX of the Complaint.

The hearing was held on July 11, 2000 in Philadelphia, Pennsylvania. Complainant called two witnesses. Respondent did not call any witnesses. Count I was the sole count for which evidence on liability and penalty was presented at the hearing.[3/] (Tr. 4, 21). As a result of the Court's Order, the hearing was limited to the presentation of evidence on penalty only for Counts II, III, IV, VI, VII, VIII, and IX of the Complaint. (Tr. 4). With regard to Count V,

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[3/] Count I of the Complaint alleged a violation of 40 C.F.R. § 112.7(e)(1)(i), which requires:

> [d]rainage from diked storage areas should be restrained by valves or other positive means to prevent a spill or other excessive leakage of oil into the drainage system or inplant effluent treatment system, except where plan systems are designed to handle such leakage. Diked areas may be emptied by pumps or ejectors; however, these should be manually activated and the condition of the accumulation should be examined before starting to be sure no oil will be discharged into the water.

Counsel for Complainant noted that it had been withdrawn. (*Id*., C's Closing Statement at 1). Accordingly, Complainant lowered its original penalty figure to $48,858.75. (C's Closing Statement at 1).

On September 22, 2000, Complainant filed its Closing Statement. Respondent submitted its Post-Hearing Closing Statement on October 31, 2000. However, based upon information that Complainant provided Respondent on November 14, 2000, a conference call between the parties and the undersigned was held in which Respondent was granted a 10-day extension to submit a supplemental brief. On November 27, 2000, Respondent filed its Augmented Post-Hearing Closing Statement. Complainant submitted its Reply Brief on December 20, 2000 ("C's Reply Br.") .

Complainant filed a Motion for Leave to Withdraw Count I of the Complaint on December 19, 2000, because it determined that the requirements of 40 C.F.R. § 112.7(e)(1)(i) do not apply to Respondent's diked storage area. By letter dated December 29, 2000, Respondent stated that it did not oppose EPA's Motion. On January 17, 2001, the Presiding Officer issued an Order Granting Complainant's Motion for Leave to Withdraw Count I of the Complaint. Accordingly, Complainant lowered the proposed penalty figure to $38,216.25 to reflect the amount for Counts II, III, IV, VI, VII, VIII, and IX, for which the

undersigned has determined that liability exists. (C's Reply Br. at 8).

II. Discussion

Section 311(b)(6)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(A), authorizes the Administrator to assess a class II civil penalty against an owner of an onshore facility: "(i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or (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." The CWA further provides that 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 II civil penalty under this subparagraph shall not exceed $125,000."[4/] CWA § 311(b)(6)(B)(ii), 33 U.S.C. § 1321(b)(6)(B)(ii).

[4/] The Complaint specifies that the Administrator may assess a penalty of up to $11,000 per day for each day during which the violation continues, up to a maximum of $137,500. (Complaint ¶¶ 23, 27, 31, 35, 39, 43, 48, 52, 56). These civil penalty amounts reflect the 10% increase mandated by the Debt Collection Improvement Act of 1996. See 40 C.F.R. Part 19.

In determining the amount of the administrative penalty, Congress has established certain statutory criteria that are set forth in CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8), which provides:

> . . . the Administrator, Secretary, or the court, as the case may be, shall consider [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 calculating the penalty in this case, Complainant asserts that the proposed penalty amount was calculated upon consideration of the eight factors listed above. (Complaint at 16, C's Reply Br. at 3). Complainant points to the testimony of its witness, Regina Starkey, to support its assertion. (Tr. at 70-176). Specifically, Complainant notes that Ms. Starkey, EPA's Spill Prevention Control and Countermeasure Coordinator, testified:

> ...as to the facts of the case and their relationship to the statutory penalty factors set forth in Section 311(b)(8) of the Clean Water Act. Ms. Starkey testified about the meaning of the statutory penalty factors of Section 311(b)(8) of the Clean Water Act . . . and about her evaluation of the facts as they related to each statutory factor. (C's Closing Statement at 2).

Although Ms. Starkey did address the statutory criteria, her testimony reveals that she primarily relied on the guidelines set forth in EPA's "August 1998 Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act." ("Penalty Policy"). Specifically, Ms. Starkey testified that she used a worksheet (C's Ex. C-10) to come up with the penalty amount (Tr. at 104). According to Complainant's counsel Andrew Duchovnay, the worksheet related to Penalty Policy discussions. (Tr. at 107). The Penalty Policy provides:

> This civil penalty policy is provided for the use of EPA litigation teams in establishing appropriate penalties in settlement of civil administrative and judicial actions for violations of Sections 311(b)(3) and 311(j) of the Clean Water Act. . . . This policy is intended as **guidance**, and is

> not final agency action. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. Penalty Policy at 1 (Emphasis added).

Section 22.27(b) of the Consolidated Rules, 40 C.F.R. § 22.27(b), *Amount of Civil Penalty*, provides in part that "[t]he Presiding Officer shall consider any civil penalty guidelines issued under 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." The Environmental Appeals Board ("Board") has commented that the criteria set forth in Section 311(b)(8) of the Clean Water Act, 33 U.S.C. 1321(b)(8), "prescribe no precise formula by which these factors must be computed." In re Pepperell Assocs., CWA Appeal Nos. 99-1 & 99-2, slip op. at 36 (EAB May 10, 2000)). Accordingly, the Board 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 EAD 184, 189 (EAB Sept. 27, 1995)(Emphasis in Original).

The Board's holding is consistent with the holdings of the federal courts. For instance, the Supreme Court found that the "legislative history of the 1977 Amendments to the Clean Water Act shows, however,

that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found." Tull v. United States, 481 U.S. 412, 425, 107 S.Ct.1831, 95 L.Ed. 2d 365 (1987) (citing 123 Cong. Rec. 39,190-91 (1977) (remarks of Sen. Muskie)). In addition, the Court noted that the legislative history also indicates that Congress intended for trial judges to consider the need for retribution and deterrence, in addition to restitution, in calculating and imposing such penalties. Id. at 422. Accordingly, the Court held that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges." Id. at 427.

Similarly, the Third Circuit has held that "[b]ecause of the difficulty of determining the appropriate penalty under the Clean Water Act, the court will accord the [trial court's] award of a penalty wide discretion, even though it represents an approximation." United States v. Municipal Auth. Of Union Township, 150 F.3d 259, 264 (3rd Cir. 1998). Further, the Fourth Circuit has commented that it continuously gives the trial judges's civil penalty determinations "wide deference" and will review these determinations only for an abuse of discretion. United States v. Smithfield Foods, Inc., 191 F.3d 516, 529 (4th Cir.

1999). In addition, the Eleventh Circuit has noted that "the amount of penalty to be levied is discretionary with the [trial court]." Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990). See also Sierra Club v. Cedar Point Oil Co. Inc., 73 F.3d 546, 576 (5th Cir. 1996) ("a court need only make a 'reasonable approximation' of economic benefit when calculating a penalty under the CWA); and Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 970 F. Supp. 363, 364 (D.N.J. 1997) ("In assessing a penalty under the Clean Water Act, a district court has a great amount of discretion.").

As mentioned above, Complainant proposed a total penalty of $38,216.25, which Complainant calculated after combining the original nine violations into six penalty groups.[5/] (C's Closing Statement at 2). Complainant asserts that it developed its proposed penalty

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[5/] The penalty groups consist of: (1) Penalty Group 1, which proposes a penalty of $7,095.00 for alleged violations under Counts VII, VIII, and two violations under Count IX; (2) Penalty Group 2, which proposes a penalty of $10,642.50 for the violation alleged in Count I; (3) Penalty Group 3, which proposes a penalty of $11,126.25 for the violation alleged in Count II; (4) Penalty Group 4, which proposes a penalty of $11,126.25 for the violation alleged in Count III; (5) Penalty Group 5, which proposes a penalty of $3,547.50 for the violation alleged in Count VI; and (6) Penalty Group 6, which proposes a penalty of $10,642.50 for the alleged violations under Counts IV and V. As noted in the Introduction, Counts I and V were withdrawn such that the proposed penalty amount in Penalty Group 2 was eliminated and Penalty Group 6 was adjusted.

amount employing what is known as the "bottom-up" approach to penalty assessment, instead of its counter-part "top down" approach.[6/] The ALJ notes that no specific formula exists for

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[6/] In its Reply Brief, Complainant states: "[w]here as the 'top-down' approach starts with the statutory maximum and adjusts down, through the consideration of the statutory factors and the facts of the case, the 'bottom-up' approach starts with a base-penalty figure and adjusts it." (C's Reply Br. at 3).

As noted in United States v. Gulf Park Water Co., Inc., 14 F. Supp.2d 854, 858 (S.D. Miss. 1998):

> [federal] courts are split, however, on which methodology to use in assessing an appropriate civil penalty. Some courts use the "top-down" method of penalty calculation, in which the court begins the penalty calculation at the statutory maximum and adjusts downward . . . [o]ther courts use the "bottom-up" method of penalty calculation, in which the court begins the penalty calculation using the defendants' economic benefit of noncompliance, and adjusts upward or downward considering the [factors].

Compare Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990) ("the district court should first determine the maximum fine . . . [I]f it chooses not to impose the maximum, it must reduce the fine in accordance with the factors"), United States v. Marine Shale Processors, 81 F.3d 1329, 1327 (5th Cir. 1996) ("courts often begin by calculating the maximum possible penalty, then reducing that penalty only if mitigating circumstances are found to exist"); Gulf Park Water, 14 F. Supp.2d at 858 ("[i]nasmuch as the statute does not require either method, this Court exercises its discretion and elects to use the 'top-down' method when calculating the appropriate penalty"); with United States v. Municipal Auth. Of Union Township, 929 F. Supp. 800, 806 (M.D. Pa. 1996) ("[the court] prefers instead to begin with economic gain and add a sum to that figure guided by the other . . . factors and the need for punishment and deterrence"), aff'd 150 F.3d 259, 266-67 (3d Cir. 1998) ("[t]he approach adopted by the district court is not in conflict with the CWA . . . [W]e conclude that the district court's method of calculation of the penalty was within its

(continued...)

determining a penalty under the Clean Water Act. United States v. Gulf Park Water Co., Inc., 14 F.Supp.2d 854, 868-69 (S.D. Miss. 1998). See also, United States v. Marine Shale Processors, Inc., 81 F.3d 1329, 1338 (5th Cir. 1996) ("calculation of discretionary penalties is not an exact science"). However, Complainant's approach in developing the proposed penalty amount satisfies this Court because, as stated in In re Pleasant Hills Authority, Docket No. CWA-III-210, 1999 EPA ALJ LEXIS 87, at *37 (EPA Nov. 19, 1999), the undersigned prefers to assess an administrative penalty by applying the "bottom-up" methodology.

1. Penalty Group 1

As noted in its Closing Statement, Complainant "consolidated four different violations together for one penalty calculation." (C's Closing Statement at 3). Specifically, Complainant alleges violations of 40 C.F.R. Sections 112.5(a) (Count VII), 112.5(b) (Count VIII), 112.7(b) (Count IX), and 112.20(e) (Count IX), which Ms. Starkey

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[6/] (...continued)
discretion."); United States v. Smithfield Foods, Inc., 972 F. Supp. 338, 354 (E.D. Va. 1997) ("[a]s the statute does not require either the 'top-down' or the 'bottom-up' method, the court exercises its discretion and elects to use the 'bottom-up' method").

categorizes as "comparable" violations stemming from inadequacies of Respondent's SPCC plan.[7/] (Tr. at 138).

A. Seriousness of Violation

In calculating the seriousness of all the violations alleged in the Complaint, Ms. Starkey noted that the seriousness of a violation pertains to the potential "risk posed on the environment from the violation." (Tr. at 82). Further, in considering the seriousness of a violation, Ms. Starkey asserted that the Agency considers: the type of violation; the storage capacity of the facility; the extent of noncompliance; the environmental impact; and the duration of the violation. (Id.).

[7/] Ms. Starkey summarized the violations in her testimony. Count VII, an alleged violation of 40 C.F.R. § 112.5(a), stemmed from "[t]he failure to complete and review an evaluation plan at least every three years." (Tr. at 140). Count VIII, an alleged violation of 40 C.F.R. § 112.5(b), stemmed from "[f]ailure to amend within six months the SPCC Plan whenever there is a change in the proposed design, construction, operation or maintenance." (Id.). The first allegation under Count IX, an alleged violation of 112.7(b), stemmed from "[f]ailure to predict the direction rate and flow and total quantity of oil, which could be discharged from the facility as a result of each major type of equipment failure." (Id.). The second allegation under Count IX, an alleged violation of 112.20(e), stemmed from "the failure to complete, maintain the Facility Response Certification Form with the SPCC plan." (Id. at 141).

With regard to the violations alleged in Penalty Group I, Ms. Starkey stated that she "looked at capacity, 71,000 gallons of storage capacity. The extent of noncompliance is minor. [Due to] multiple violations . . ., I could go between a range of $2,000 and $6,000, so I didn't remain at the lowest, I did go a little higher and assessed $4,000." (Tr. at 141). Ms. Starkey's calculations under the gravity component closely adhere to EPA's Penalty Policy. (See Penalty Policy at 7-9). As mentioned above, however, the undersigned has the discretion to deviate from the Penalty Policy as appropriate.

The undersigned takes issue with the Complainant's rationale to base its penalty calculation at $4,000. As highlighted in the Record, the undersigned was concerned "as to how [Complainant] arrived at the total penalty for all of those counts . . . there was no real indication to me as to how each of those counts had been calculated." (Tr. at 137-38). Although four violations are alleged under Penalty Group I, the violations all relate to deficiencies in Respondent's SPCC Plan. Therefore, it is reasonable to consolidate the multiple violations into one violation: that Respondent had an inadequate SPCC Plan.

In light of the foregoing discussion, the imposition of a base penalty of $4,000 for an inadequate SPCC Plan seems unduly harsh. While it is understood that Complainant attempts to be reasonable, particularly in light of the fact that multiple violations allegedly exist, the undersigned believes that an inadequate SPCC Plan is not as egregious a violation as the failure to have an SPCC Plan, which is a very serious violation because the facility is unprepared to deal with an oil spill or prevent the spill from having potentially serious consequences. Therefore, the base penalty amount shall be reduced to $2,500.

In its original penalty assessment in this Penalty Group, Complainant assessed a 25% increase to the penalty figure due to environmental impact. Ms. Starkey assessed this penalty amount due to the fact that the facility is 150 feet from Mahoney Creek, and "as such could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shoreline." (C's Reply Br. at 2, Tr. at 108-09). Although Ms. Starkey interpreted this as a "major" violation, this categorization "is not currently described in the Penalty Policy, [and] this is more of a custom of the Agency and how they interpret their own Penalty Policy." (Tr. at 112).

Complainant's imposition of a 25% increase based on Ms. Starkey's own interpretation that the 150 foot distance between the facility and the waterway constituted a major violation troubles the Court. The absence of any regulatory guidelines on the issue, combined with a lack of case-specific factual determinations, opens the door to overly-broad, if not capricious, penalty assessments by the Agency. Ms. Starkey claims that the major categorization for such proximity issues is based on her experience, contact with different regions, and work through the Penalty Policy Work Group (Tr. at 111-12). Such factors, standing alone, however, do not provide a sufficient basis to demonstrate that the major categorization is appropriate.

As Respondent argues in its Post-Hearing Closing Statement, there is no conclusive evidence that oil spilled from a distance of 150 feet will make it to the navigable waterway. (R's Closing Statement at 8). See In re Pepperell Assocs., CWA Appeal Nos. 99-1 & 99-2, slip op. at 16 (EAB May 10, 2000) ("proximity alone . . . may not be sufficient in all circumstances to create a reasonable expectation of a discharge to navigable waters"); In re City of Akron, 1 EAD 442, 446 (EAB Mar. 20, 1978) ("the witness appears to have been acting on a presumption that spills can reasonably be expected from any

tank located 100 feet from a river. In the absence of such a presumption in the regulations, the witness should have described what it was about this particular piece of property that made him conclude that a spill to a navigable water could reasonably be expected to occur"); In re NPDES Permit Louisville Gas & Elec. Co., Trimble County Power Plant, 1980 WL 131158 (EAB Dec. 8, 1980) ("Because no exact data exists until a spill occurs at a given location, any analysis of future oil spillage involves a degree of speculation. Therefore, every attempt to select quantitative values will be to some extent arbitrary." (quoting Sierra Club v. Morton, 510 F.2d 813, 822 (5th Cir. 1975)). Here, the Agency has not made a sufficient demonstration to support its penalty assessment. Accordingly, the undersigned allows a 10% downward adjustment for environmental impact. Therefore, a 15% increase shall be imposed for the environmental impact of Respondent's violation.

Complainant also assessed a 29% penalty increase for the duration of Respondent's penalty. According to Ms. Starkey, duration is calculated under the presumption that the facility has been in violation for five years prior to and including the date of the inspection, and the facility bears the responsibility to prove that it had not been in violation during that period. (Tr. 113-15). Thirty percent represents the maximum increase that can be imposed due to the

duration of the violation. Here, Ms. Starkey states that the Agency sought to increase the penalty by 29% because Complainant experienced a one month Information Collection Request Lapse. (Tr. at 114).

Placing the onus on Respondent to inform Complainant that no violation existed five years prior to the inspection again troubles the undersigned. Complainant's argument that "Respondent had the opportunity to challenge the 'duration' component of the penalty calculation by putting on positive evidence of its compliance with each violation for the preceding 5 year period, but it failed to present any testimony or evidence at the hearing," does not persuade the Court. (C's Reply Br. at 4). It would be difficult, however, for Respondent to maintain any evidence that no such violation existed, particularly if Respondent is unaware of any duty to do so. Further, the fact that no problem was discovered until the time of the inspection indicates that the duration requirement does not contribute to the seriousness of the violation in this proceeding. Therefore, the undersigned rejects the imposition of a 29% increase for the duration of the penalty. The duration component shall be disregarded in calculating the seriousness component for Penalty Group I and all subsequent Penalty Groups. Accordingly, the base penalty amount for the seriousness of the violations under Penalty Group 1 is $2,875 ($2,500 + $375 ($2,500 X 10%) = $2,875).

B. Economic Benefit

Ms. Starkey testified that Complainant did not compute an economic benefit component, which refers to the benefit that the violator accrued by not implementing prevention measures. (Tr. 87-88). As Complainant correctly points out, the fact that Complainant did not calculate the amount of money that Respondent saved benefits Respondent, because the penalty would have been higher, not lower, if such calculation were undertaken. Economic benefit was not calculated for any of the other Penalty Groups and will not be further discussed in this Order.

C. Culpability, Any Other Penalty for the Same Incident, Any History of Prior Violations

In determining culpability, Complainant looked at the "sophistication, the resources and the information available to [the facility]." (Tr. at 88-89). In the case of Respondent, Ms. Starkey asserted that she designated a small culpability factor of 10% based on the fact that "this facility may not belong to the different environmental associations that they should or might and they may not have all of the information that is out there for it." (Tr. at 118).

Further, the fact that Respondent did not have another penalty for the same incident assessed by any other agency (Tr. at 89-90) and that Respondent had no history of prior violations is relevant. (Tr. at 93). Complainant did not directly account for either statutory criteria in its ultimate calculation in this matter, because, as it correctly points out in its Reply Brief, neither should cause a decrease in the penalty using a "bottom-up" calculation. (C's Reply Br. at 5). However, these criteria are relevant in that they could go to culpability. Specifically, Ms. Starkey states that "if [Complainant was] involved with them in a prior case, we know that they . . . know what the regulations are and they should have been more aware not to have the violation again." (Tr. at 93). Despite their implicit relevance to culpability, the undersigned will not further employ either factor in this opinion.

Accordingly, it is evident that the imposition of a large culpability factor would be inappropriate due to Respondent's lack of sophistication, resources, and awareness. However, Respondent should have been aware of the regulations under which they are operating, such that the imposition of a culpability factor is appropriate for this and subsequent penalty groups. Accordingly, a 10% culpability factor shall be assessed against Respondent in this Penalty Group, which increases

the base penalty amount of $2,875 by $287.50 ($2,875 X 10% = $287.50).

D. Nature, Extent, Degree of Success to Mitigate, Economic Impact on Violator, and Any Other Matters as Justice May Require

Ms. Starkey states that the nature, extent, and degree of success to mitigate refers to whether the "facility has mitigated prior to them being given an Administrative Complaint." (Tr. at 94). In other words, Complainant would adjust the penalty downward if Respondent came into compliance before being notified of the violation. In this case, Ms. Starkey presented uncontradicted testimony that Respondent failed to mitigate or minimize any of the violations charged in this matter. Accordingly, Complainant did not consider this factor for this or any subsequent Penalty Group, and this factor will not be addressed again in this Order.

Similarly, Respondent failed to demonstrate that the penalty would impact it economically. Respondent failed to submit any information demonstrating that it lacked the ability to pay the penalty (Tr. at 96) and in fact, Complainant states that Respondent has never produced any reliable financial information. (C's Reply Br. at 5). This factor remained constant in all of Complainant's penalty

calculations and will not be addressed again in this Order. Finally, Ms. Starkey testified that she has never encountered anything that would fall under the criteria of other matters as justice may require. (Tr. at 97-98). Therefore, this factor was not addressed in Complainant's penalty calculations and will not be addressed again in this Order.

Based on the foregoing discussion, Complainant's proposed penalty assessment of $7,095 for violations under Penalty Group 1 is reduced and determined to be **$3,162.50** ($2,875 (seriousness) + 287.5 (culpability) = $3,162.50).

2. Penalty Group 2

This Penalty Group was pled as Count I of the Complaint. Per the undersigned's Order of January 17, 2001, Count I was withdrawn, and this Penalty Group need not be discussed for purposes of this opinion.

3. Penalty Group 3

This Penalty Group encompasses Count II of the Complaint, which alleges a violation of 40 C.F.R. § 112.7(e)(2). According to Ms. Starkey's testimony, this violation pertains to "bulk storage tanks not

having sufficient impervious containment and adequate secondary containment for the largest single tank plus sufficient free water." (Tr. at 120).

A. Seriousness

Complainant begins its seriousness discussion by initially assessing a base penalty figure of $6,000. According to Ms. Starkey, the $6,000 penalty figure represents the appropriate amount under the Penalty Policy for a facility of Respondent's capacity that is in moderate noncompliance. (Tr. at 121). The undersigned certainly believes that Respondent had deficiencies or inadequacies with its containment. However, the undersigned believes that based on the facts of this case, the proposed base penalty of $6,000 is excessive. Therefore, the undersigned hereby reduces the base penalty figure of $6,000 to $4,500, which is deemed more appropriate under the circumstances.

With regard to environmental impact, the undersigned uses the same reasoning employed in Penalty Group 1 in lowering the adjustment figure from 25% to 15%. Similarly, the undersigned does not deem it appropriate to adjust the base figure to account for duration.

Accordingly, the penalty amount for the seriousness of the violation under Penalty Group 3 is $5,175 ($4,500 + $675 (4,500 X 15%) = $5,175).

B. Culpability

Ms. Starkey assessed a culpability factor of 15% because she believed that Respondent should have ensured that there was adequate containment. (Tr. at 125). Despite the fact that Respondent has been deemed to lack sophistication and sufficient resources, the undersigned agrees with Complainant's assessment that Respondent should know the importance of containment. Therefore, the undersigned accepts Complainant's 15% culpability factor, such that Respondent's base penalty shall be increased by $776.25 ($5,175 X 15% = $776.25). Accordingly, Complainant's proposed penalty assessment for violations under Penalty Group 3 is determined to be **$5,951.25** ($5,175 (seriousness) + $776.25 (culpability) = $5,951.25).

4. Penalty Group 4

This Penalty Group encompasses Count III of the Complaint, which alleges a violation of 40 C.F.R. § 112.7(e)(4)(ii). According to Ms. Starkey, this violation pertains to the fact that "the facility failed to have adequate containment for the

single largest compartment of the truck that would be loading or off-loading at a facility." (Tr. at 127).

A. Seriousness

As in Penalty Group 3, Complainant begins its seriousness discussion with a base penalty figure of $6,000, stating "[a]gain, the seriousness we dealt with 71,000 gallons. The capacity, the extent of noncompliance was moderate. The environmental impact was major." (Id.). Again, based on the evidentiary record, the undersigned believes that the proposed base penalty of $6,000 is excessive. Therefore, the undersigned hereby reduces the base penalty figure of $6,000 to $4,500, which is deemed more appropriate under the circumstances. Further, as previously discussed, the undersigned does not find any compelling reason to categorize the environmental impact as major. Accordingly, the base penalty shall be increased by 15% to factor in the environmental impact. Therefore, the base penalty amount for the seriousness of the violation under Penalty Group 4 is $5,175 ($4,500 + $675 (4,500 X 15%) = $5,175).

B. Culpability

A culpability factor of 15% was assessed because "the facility should know that when containment is involved, especially in [secondary containment for the truck loading and unloading], that they should know a little better." (Tr. at 128). The undersigned agrees with Complainant's reasoning and assessment of the 15%, or $776.25 ($5,175 X 15% = $776.25), increase to reflect culpability. Accordingly, Complainant's proposed penalty assessment for violations under Penalty Group 4 is determined to be **$5,951.25** ($5,175 (seriousness) + $776.25 (culpability) = $5,951.25).

5. Penalty Group 5

This penalty encompasses Count VI of the Complaint, which alleges a violation of 40 C.F.R. § 112.7(e)(8). According to Ms. Starkey, this violation relates to "the facility's failure to keep inspections and records." (Tr. at 134). Specifically, Ms. Starkey stated that inspections should be done monthly, and records of the inspections should be made so that the owner or operator of the facility knows what is happening at the facility. (Id.).

A. Seriousness

Ms. Starkey determined that the extent of noncompliance for this violation was minor and assessed an initial base penalty figure of $2,000. The undersigned agrees that this penalty is minor and believes that $2,000 is a reasonable figure. Further, the undersigned hereby increases the figure by 15% to account for the environmental impact. Regular inspections are important in ensuring that the possibility of future environmental damage is reduced. Therefore, the base penalty amount for the seriousness of the violation under Penalty Group 5 is $2,300 ($2,000 + $300 ($2,000 X 15%) = $2,300).

B. Culpability

A penalty factor of 10% was assessed for culpability under Penalty Group 5. The undersigned does not take issue with Complainant's assessment, because Respondent should know that inspections should be conducted and accurate records should be kept. Accordingly, Complainant's proposed penalty assessment for violations under Penalty Group 5 is determined to be **$2,530** ($2,300 (seriousness) + $230 (culpability) = $2,530).

6. Penalty Group 6

This penalty initially consolidated Count IV and Count V of the Complaint into one penalty calculation. Count IV alleged a violation of 40 C.F.R. § 112.7(e)(9)(i), which states that "[a]ll plants handling, processing, and storing oil should be fully fenced, and entrance gates should be locked and/or guarded when the plant is not in production or is unattended." Count V alleged a violation of 40 C.F.R. § 112.7(e)(9)(iv), which states in part that "[t]he loading/unloading connections of oil pipelines should be securely capped or blank-flanged when not in service or standby service for an extended time." After calculating the proposed penalty for this Penalty Group, Complainant withdrew Count V.

A. Seriousness

In calculating the original proposed penalty amount, Ms. Starkey assessed an initial base penalty amount of $6,000 to account for Counts IV and V. Accordingly, she determined a final penalty amount of $10,642.50 and then divided it in half after Count V was withdrawn. Since Count V has been withdrawn, however, the undersigned will proceed as if only Count IV is in issue.

The undersigned agrees with Ms. Starkey's assessment that the extent of noncompliance was moderate and believes that an initial base

penalty amount of $2,000 is reasonable. Further, the undersigned believes that the failure to properly secure oil pipelines may have a negative environmental impact and finds appropriate the imposition of a 15% increase. Accordingly, the base penalty amount for the seriousness of the violation under Penalty Group 6 is $2,300 ($2,000 + $300 ($2,000 X 15%) = $2,300).

B. Culpability

A penalty factor of 10% was assessed for culpability under Penalty Group 6. The undersigned does not take issue with Complainant's assessment and imposes an increase of $230 ($2,300 X 10%) to account for culpability. Accordingly, Complainant's proposed penalty assessment for violations under Penalty Group 6 is determined to be **$2,530** ($2,300 (seriousness) + $230 (culpability) = $2,530).

Order

As discussed in the undersigned's Order of June 28, 2001, Respondent is liable under Counts II, III, IV, VI, VII, VIII, and IX of the Complaint. Based on the foregoing discussion, the undersigned assesses: a penalty of **$3,162.50** for Penalty Group 1, which

encompasses Counts VII, VIII, and IX; a penalty of **$5,951.25** for Penalty Group 3, which encompasses Count II; a penalty of **$5,951.25** for Penalty Group 4, which encompasses Count III; a penalty of **$2,530** for Penalty Group 5, which encompasses Count VI; and a penalty of **$2,530** for Penalty Group 6, which encompasses Count IV. Therefore, Respondent is assessed a total penalty of **$20,125**.

Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become a final order 45 days after its service upon the parties, unless a party moves to **reopen the hearing** under 40 C.F.R. § 22.28, an **appeal** is taken to the Environmental Appeals Board within 30 days of service of this Initial Decision pursuant to 40 C.F.R. § 22.30(a), or the Board elects to review this Initial Decision *sua sponte*, as provided by 40 C.F.R. § 22.30(b).

Unless this hearing is reopened and timely appeal of this Initial Decision is taken, or the Board chooses to review this Initial Decision on its own initiative, **payment** of the full amount of this civil penalty shall be made **within 30 days** after the effective date of the final order. Payment shall be made by sending a cashier's check or certified check in the amount of **$20,125**, payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency
Region III
Lydia Guy, Regional Hearing Clerk
1650 Arch Street
Philadelphia, PA 19103-2029

A transmittal letter identifying the subject case and docket number (CWA-3-99-0009), as well as Respondent's name and address, must accompany the check. Respondent shall serve copies of the check on the Regional Hearing Clerk and on Complainant. Respondent may be assessed interest on the civil penalty if it fails to pay the penalty within the prescribed period.

_____

Stephen J. McGuire
Administrative Law Judge

Washington, D.C.