

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>DAVID E. EASTERDAY &amp; CO., INC.,</b>	)	<b>Docket No.: FIFRA-05-2019-0005</b>
<b>d/b/a WOODWRIGHT FINISHING,</b>	)	
<b>WILMOT, OHIO,</b>	)	
	)	
<b>RESPONDENT.</b>	)	
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**COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE**

**I. Responses to Respondent’s Prehearing Exchange**

**A. Exhibits**

Complainant objects to the admissibility of several of Respondent’s proposed exhibits. In addition, Respondent’s proposed exhibit, RX 10, contains settlement material, contrary to the Presiding Officer’s instructions to the parties on page 7 of the February 8, 2019 Prehearing Order to not include terms of settlement offers. Complainant reserves its right to file a motion or motions to address these objections in the appropriate manner according to 40 C.F.R. Part 22 and any instructions in the Presiding Officer’s order(s) related to the administrative hearing.

**B. Factual information Respondent considers relevant to penalty**

Respondent asserts that it received an inadequate and misleading notification from the inspectors for the specific grounds for suspected noncompliance. Throughout its Prehearing Exchange, Respondent argues that it reasonably believed the compliance concern was focused on the validity of the antibacterial claims on its products, and not whether the products were required to be registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Respondent should not have been confused about the nature of the inspection or the compliance concern. The Notice of Inspection form (CX 1 at 10), which was provided to Respondent contemporaneously with the October 1, 2014 inspection, states:

**VIOLATION(S) SUSPECTED:**

“THE DISTRIBUTION OR SALE OF A PESTICIDE NOT REGISTERED  
UNDER SECTION 3 OF FIFRA OR WHOSE REGISTRATION HAS BEEN  
CANCELED.”

The Notice of Inspection, as well as the inspection itself, was more than enough to put Respondent on notice of its obligations under FIFRA.

Respondent also contends that it will put forward testimony and exhibits to support findings of no harm to health or the environment from its products. Respondent takes too narrow a view of the factors which inform an appropriate penalty under FIFRA. The Environmental Appeals Board has recognized that it is appropriate to assess a penalty under FIFRA for the failure to register a pesticide product because of the harm caused to the FIFRA pesticide registration program. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 799-801 (1997). Under EPA's December 2009 *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act* ("FIFRA ERP"), the "gravity level" for each violation of FIFRA considers the actual and potential harm to human health and the environment, as well as the importance of the requirement to achieving the goals of the statute. Complainant will establish the basis for its proposed penalty as described further in Section II.

**C. Respondent's narrative statement that the penalty should be reduced or eliminated**

Respondent states that it was not aware of the "complicated terminology and presumptions about intent in FIFRA[.]" However, one of Respondent's officers, Terri Babcock, stated during the October 1, 2014 inspection that a customer had recently informed the company that its products were making pesticidal claims without EPA registration. (CX 1 at 4). Moreover, as discussed above, Respondent should have been on notice about potential FIFRA requirements because of the October 1, 2014 inspection.

Respondent argues that EPA should exercise its discretion under Section 14(a)(4) of FIFRA to issue a warning in lieu of a penalty, or that any penalty assessed should not exceed \$2,622.80, which Respondent states is the amount of gross sales of the unregistered pesticide products for the month of September 2014. Complainant does not agree that this case merits a warning only, because the record demonstrates that, as of October 1, 2014, Respondent knew or should have known that its products were required to be registered under FIFRA, and Respondent failed to take action to come into compliance. Moreover, Complainant determined that the gravity value of the violations, as calculated using Appendix B of the FIFRA ERP, exceeded the threshold for issuing a warning in lieu of a penalty. For these reasons, Complainant also disagrees that the penalty amount should be limited to the amount of gross sales of unregistered pesticides in September 2014. Complainant describes its basis for the proposed penalty in Section II of this Rebuttal Prehearing Exchange.

Respondent also argues that the Complaint should be viewed as a single violation of FIFRA. Respondent is incorrect in its view. The Environmental Appeals Board has found that each proven sale or distribution of an unregistered pesticide constitutes an independent violation of FIFRA. *In re Chempace Corp.*, 9 E.A.D. 119, 129 (2000).

Finally, Respondent contends that the penalty sought by Complainant in this matter is premised on statements in the inspection report that it characterizes as false hearsay (CX 1). The statements attributed to Respondent's officers in CX 1, which were memorialized in an inspection report dated one day after the inspection, are not hearsay. Complainant also disagrees

that its proposed penalty is premised primarily on those statements. Rather, the proposed penalty is based on the totality of the circumstances of this case as applied to the statutory criteria in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), as well as the FIFRA ERP. Complainant's proposed penalty is discussed thoroughly in Section II of this Rebuttal Prehearing Exchange.

## **II. Statement Regarding Penalty**

This case involves Respondent's sales of products alleged to be unregistered pesticides in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and Respondent's production of pesticides in an establishment not registered with EPA in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L). Respondent produced several furniture cleaning products with label statements that the products were "antibacterial" and that each product "Removes 99.9% of bacteria." (*See e.g.*, CX 1 at 14). Under federal regulations promulgated pursuant to FIFRA, such label statements are considered pesticidal claims, which require the substance to be registered. 40 C.F.R. § 152.15(a)(1). Respondent admits that it had not obtained FIFRA registration for the products at issue in this Complaint, (*See e.g.*, Answer at ¶ 57), and that it had not registered its facility in Wilmot, Ohio with EPA as a pesticide-producing establishment. (Answer at ¶ 93).

As allowed by 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not propose a specific penalty in the Complaint. In accordance with 40 C.F.R. § 22.19(a)(4), of the Consolidated Rules of Practice and the Prehearing Order, this statement specifies the dollar amount of the penalty Complainant proposes for the violations alleged in the Complaint, including a detailed explanation of the factors considered and methodology utilized in calculating the amount of the proposed penalty. In calculating the proposed penalty, Complainant has considered the facts and circumstances of this case as known and understood at the time of this filing. To the extent that facts or circumstances unknown to Complainant at the time of this filing become known at a later time, such facts and circumstances may also be considered as a basis for adjusting the civil penalty proposed herein.

Complainant will consider, among other factors, Respondent's ability to pay as a basis for adjusting the civil penalty proposed in this Rebuttal Prehearing Exchange. The proposed penalty included herein reflects a presumption of Respondent's ability to pay the penalty and to continue in business. The burden of raising and demonstrating an inability to pay rests with the Respondent. Respondent's Prehearing Exchange states that Respondent "does not take the position of an inability to pay."

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA may be assessed a civil penalty of not more than \$5,000 for each offense. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, the Debt Collection Improvement Act of 1996, amendments to the Federal Civil Penalties Inflation Adjustment Act enacted in 2015, and the Civil Monetary Penalty Inflation Adjustment Rule promulgated at 40

C.F.R. Part 19,<sup>1</sup> violations of FIFRA which occur subsequent to January 12, 2009 through November 2, 2015 are subject to a statutory maximum penalty of \$7,500 per violation. 78 *Fed. Reg.* 66643, 66647 (Nov. 6, 2013).

As required by Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant has considered the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violations ("FIFRA statutory penalty factors") in its determination of the amount of the proposed penalty. Complainant has also considered the facts and circumstances of this case with specific reference to the FIFRA ERP, and EPA's December 6, 2013 *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*. These policies seek to provide a rational, consistent, and equitable methodology for applying the FIFRA statutory penalty factors to particular cases while accounting for inflation.

### Penalty Calculation

Complainant calculated its proposed penalty in accordance with the methodology described on pages 15 and 16 of the FIFRA ERP. This methodology included: (1) determining the number of independently assessable violations; (2) determining the size of business category for the Respondent, using Table 1; (3) determining the gravity level of the violation for each independently assessable violation, using Appendix A; (4) determining the base penalty amount associated with the size of business (*see* step 2) and the gravity of the violation level (*see* step 3) for each independently assessable violation, using the matrices in Table 2; (5) determining any gravity adjustment criteria based on case specific factors, using Appendix B and Table 3; (6) calculating the economic benefit of noncompliance; and (7) considering the effect that payment of the total penalty amount will have on the respondent's ability to continue in business.

**Step 1.** Complainant determined the number of independently assessable violations in accordance with Section IV.A.1. of the FIFRA ERP. The FIFRA ERP defines an independent violation as one resulting from an act which is not the result of any other alleged violation or if it has at least one element of proof different from any other violation. For example, under Section IV.A.1. of the FIFRA ERP, each sale of an unregistered pesticide product is considered to be an independent violation for purposes of the penalty calculation. Each of the Section 12(a)(1)(A) FIFRA violations ("unregistered pesticide product violations"), and the one count of the Section 12(a)(2)(L) violation ("unregistered establishment violation"), alleged in the Complaint involve at least one element of proof that is different from any other violations. Respondent's sales records obtained during the October 1, 2014 inspection provide evidence of sales of unregistered pesticide products during the period October 1, 2013 to October 1, 2014. (CX 1 at 35-54).

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<sup>1</sup> On February 6, 2019, EPA issued a Civil Monetary Penalty Inflation Adjustment Rule to adjust the level of statutory civil monetary penalty amounts for statutes administered by the Agency, as mandated by amendments enacted in 2015 to the Federal Civil Penalties Inflation Adjustment Act. 84 *Fed. Reg.* 2056 (Feb. 6, 2019). Although this final rule is effective on January 15, 2019, the adjustments to the statutory penalty amounts do not apply to this matter as all the violations alleged in the Complaint occurred prior to November 2, 2015. *See id.* at 2057.

Although Complainant has evidence that Respondent sold unregistered pesticide products for at least a twelve-month period, Complainant limited the number of alleged unregistered pesticide product violations in the Complaint to those that occurred during the month prior to the inspection (September 2014). In addition, contemporaneously with the filing of this Rebuttal Prehearing Exchange, Complainant has filed a motion seeking leave to amend its Complaint. In the proposed Amended Complaint, Complainant will limit the number of alleged unregistered pesticide product violations to 18 sales that occurred during the month prior to the inspection (September 2014). Complainant believes this approach more appropriately conforms the overall penalty with the significance of the gravity of the violations at issue in this case. During the month prior to the inspection, Respondent distributed or sold the unregistered pesticide products on at least 18 occasions, which constitutes 18 independently assessable violations. As such, Complainant's proposed penalty is based on 18 unregistered pesticide product violations and one unregistered establishment violation in the proposed Amended Complaint.

**Step 2.** Complainant determined the appropriate size of business category in accordance with Section IV.A.2. of the FIFRA ERP. The FIFRA ERP contains three tiers for companies that are not applicators. These tiers break companies into groups based on gross annual revenues from all revenue sources during the prior calendar year: Category I for those companies with revenues of more than \$10M; Category II for those companies with \$1M – \$10M; and, Category III for those companies with less than \$1M.

Respondent's Answer states that its gross annual revenues are in the range of \$5 to \$6 million. (Answer at 2). Similarly, information included in a Hoover's Report, dated June 14, 2017, for David E. Easterday and Co., Inc., indicates estimated annual sales of \$3.32 million. (CX 17 at 4). Because Respondent is a registrant, retailer or other distributor, or a "Section 14(a)(1) of FIFIRA" violator, Complainant determined that according to Table 1, Respondent is a "Category II" (*i.e.* gross revenue between \$1M and \$10M a year) size of business.

**Step 3.** Complainant determined the gravity level for each independently assessable violation in accordance with Section IV.A.3. of the FIFRA ERP. The level assigned to each violation in Appendix A is based on the relative severity of each violation, which considers the actual or potential harm to human health and the environment, which could result from the violation and the importance of the requirement to achieving the goals of the statute. Based on the violations alleged, Complainant determined that, according to Appendix A, the unregistered pesticide product violations are gravity level 1 violations, while the unregistered establishment violation is a gravity level 2 violation.

**Step 4.** Complainant determined the base penalty amount for each independently assessable violation in accordance with Section IV.A.4. of the FIFRA ERP. Using the applicable civil penalty matrix for non-applicators and applying the size of business category and gravity level determinations from Steps 2 and 3, Complainant determined that according to Table 2, the base penalty amount for each unregistered pesticide product violation is \$7,150 per count, and for the unregistered establishment violation is \$5,670.

**Step 5.** Complainant adjusted the penalty amount for each of the unregistered pesticide product violations and the unregistered establishment violation in accordance with Section IV.A.5. of the FIFRA ERP, which allows for increasing or decreasing the penalty depending on case-specific factors. Under Appendix B of the FIFRA ERP, gravity adjustment values are assigned based on the severity of circumstances for each of five case-specific gravity adjustment factors (*i.e.*, pesticide's toxicity, potential for harm to human health and the environment, and the violator's compliance history and culpability), then totaled and used in Table 3 to determine the appropriate adjusted penalty amount. The Appendix B adjustments are as follows:

*Pesticide Toxicity:* Complainant believes the ingredients used to produce Respondent's unregistered pesticide products merit a toxicity level consistent with category III or IV, as defined at 40 C.F.R. § 156.62, based on language found throughout Respondent's Material Safety Data Sheets ("MSDS sheets") (CX 1 at 57-74), which indicate that product constituents may cause moderate to severe irritation to eyes, skin, and the gastrointestinal and respiratory systems. Respondent also sold concentrated forms of the pesticide product, with significantly higher concentrations of the active ingredients. The MSDS Sheets state that the concentrate forms of the product contained ethyl alcohol at 40% by weight. (CX 1 at 61). Taking a conservative approach, Complainant assigned a pesticide toxicity value of "1" of a possible maximum of "3" under Appendix B. This value applies to both the unregistered pesticide product violations and the unregistered establishment violation.

*Harm to Human Health:* Based on information from the relevant MSDS sheets, including the identification of potential risks of moderate to severe irritation to eyes, skin, and the gastrointestinal and respiratory systems from product constituents, Complainant determined that there is a potential for harm to human health. (CX 1 at 57-74). The potential for harm to human health is exacerbated by the fact that Respondent sold a concentrated form of the pesticide product, with significantly higher concentrations of the active ingredients, in large, one-gallon and five-gallon, containers. (*See* CX 1 at 16, 61-65, and 70-74; CX 3 at 2). These concentrated versions of the products instructed purchasers to dilute the product before use, which would heighten the risk of exposure and potential health concerns noted on the MSDS sheets.

Moreover, because Respondent's pesticide products were unregistered, they did not undergo studies regarding the toxicity of the formulations in their entirety (not just the active ingredients). These studies are required by EPA to determine potential risks to human health, including whether efficacy standards are being met in conjunction with public health claims identified for a product, and whether certain precautionary labeling may be required to protect end users. In addition, producing pesticide products in an establishment that is not registered hinders EPA's information gathering ability, which is necessary to perform risk assessments and regulate the production, sale, and distribution of potentially hazardous pesticide products.

For the reasons explained above, Complainant assigned a harm to human health value of "1" of a possible maximum of "5" under Appendix B. This value applies to both the unregistered pesticide product violations and the unregistered establishment violation.

*Environmental Harm:* Although there are statements in the MSDS sheets suggesting a potential for environmental harm from Respondent's unregistered pesticide products, Complainant determined that an environmental harm value of "0" out of a possible maximum of "5" is appropriate under Appendix B given the totality of circumstances in this case. This value applies to both the unregistered pesticide product violations and the unregistered establishment violation.

*Compliance History:* After a review of available resources, Complainant determined that Respondent has no prior documented violations of FIFRA within five years of the present violations. Thus, Complainant assigned a compliance history value of "0" of a possible maximum of "4" under Appendix B. This value applies to both the unregistered pesticide product violations and the unregistered establishment violation.

*Culpability:* In his inspection report dated one day after the inspection took place, Ohio Department of Agriculture inspector Ryan King wrote:

[Respondent's officers] Easterday and Babcock were asked general questions regarding what type of products are sold by their firm and to whom. Babcock and Easterday stated that they were in the process of finding out more information about the registration process of pesticides. According to Babcock, they were recently informed by one of their customers that their furniture and glass cleaner was making pesticidal claims without an EPA REG #. After Babcock was informed of the registration requirement, she stated that she started inquiring about product registration.

(CX 1 at 4). Further, the Notice of Inspection provided during the 2014 inspection states that the violation suspected was, "THE DISTRIBUTION OR SALE OF A PESTICIDE NOT REGISTERED UNDER SECTION 3 OF FIFRA OR WHOSE REGISTRATION HAS BEEN CANCELED." (CX 1 at 10). However, Respondent continued to distribute or sell, or offer for distribution or sale, the unregistered pesticide products until at least December 2017. (CX 3).

Because Respondent's failure to register its pesticide products and its pesticide-producing establishment resulted from negligence, Complainant assigned a culpability value of "2" of a possible maximum of "4" under Appendix B. This value applies to both the unregistered pesticide product violations and the unregistered establishment violation.

	Section 12(a)(1)(A) of FIFRA Unregistered Pesticide Product Violations	Section 12(a)(2)(L) of FIFRA Unregistered Establishment Violations
	Assigned (Maximum)	Assigned (Maximum)
Pesticide Toxicity	1 (3)	1 (3)
Harm to Human Health	1 (5)	1 (5)
Environmental Harm	0 (5)	0 (5)
Compliance History	0 (4)	0 (4)
Culpability	<u>2 (4)</u>	<u>2 (4)</u>
TOTAL	4 (21)	4 (21)

Using the sum of the gravity adjustment values, above, Complainant determined that according to Table 3, that matrix value should be reduced by 50%. As such, the 50% reduction in the matrix value was applied and the base, per count penalty, adjusted to \$3,575 for the unregistered pesticide product violations and to \$2,835 for the unregistered establishment violation. Because the 18 independently assessed violations occurred after December 6, 2013, the inflation adjustment multiplier was applied at a rate of 1.0487, in accordance with EPA's December 6, 2013 memorandum, *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation*. As a result, the base penalty amount for each unregistered pesticide product violation is \$3,749 per count, and for the unregistered establishment violation is \$2,973. After rounding to the nearest \$100 as instructed by the FIFRA ERP at page 20, the final per count penalties are \$3,700 and \$3,000 respectively.

Because Complainant proposes to allege 18 unregistered pesticide product violations, the penalty amount for those violations is \$66,600 (18 x \$3,700). Complainant added the unregistered pesticide product violations penalty of \$66,600 to the \$3,000 penalty for the unregistered establishment violation for a total penalty of \$69,600.

**Step 6.** Complainant considered the economic benefit of noncompliance in accordance with Section IV.A.6. of the FIFRA ERP. Complainant is unaware of any evidence to support an analysis of the possible profits gained by Respondent due to its illegal distributions or sale of the unregistered pesticide products. Consequently, Complainant is unable at this time to calculate what, if any, economic benefits accrued to Respondent.

**Step 7.** Complainant considered the effect of the proposed \$69,600 penalty on Respondent's ability to continue in business in accordance with Section IV.A.7. of the FIFRA ERP. The proposed penalty will not affect Respondent's ability to continue in business. Respondent's Answer states that it has gross annual revenues in the range of \$5 to \$6 million. Therefore, Complainant's proposed penalty represents approximately 1.1% to 1.3% of Respondent's gross annual revenues. Further, Respondent has specifically stated in its Prehearing Exchange that it does not claim an inability to pay a penalty.

Complainant believes its proposed penalty is proportionate to the totality of the circumstances in this case and that it appropriately reflects the gravity of the violations, given the volume of distribution or sales of unregistered pesticide products, the ability of the Respondent to continue in business, and the associated potential risks of harm posed by the Respondent's conduct, including harm to the integrity of the FIFRA regulatory program; that it is of sufficient and necessary magnitude to serve as a deterrent to Respondent, as well as to other members of the regulated community; and that it is consistent with the FIFRA ERP.

TOTAL PENALTY CALCULATION:       \$69,600

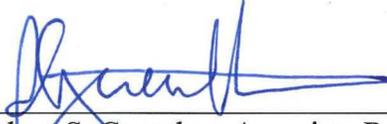
### **III. Exhibits**

Complainant intends to introduce the following additional exhibit at hearing, a copy of which is attached:

CX 18 – EPA Memorandum: *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)* (12/6/13).

Respectfully Submitted,

Counsel for EPA:



\_\_\_\_\_  
Date

\_\_\_\_\_  
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In the matter of David E. Easterday & Co., Inc. d/b/a Woodwright Finishing  
Docket Number: FIFRA-05-2019-0005

**CERTIFICATE OF SERVICE**

I certify that the foregoing Complainant's Initial Prehearing Exchange, dated and filed May 9, 2019, was sent this day to the following addresses in the manner indicated below.



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Robert S. Guenther  
Associate Regional Counsel

Copy by Email to Attorneys  
for Respondent:

Mr. Robert L. Brubaker  
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Mr. Christopher R. Schraff  
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC - 6 2013

ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)

**FROM:** Cynthia Giles  
Assistant Administrator *Cynthia Giles*

**TO:** Regional Administrators  
Deputy Regional Administrators

The purpose of this memorandum is to amend the EPA's existing civil penalty policies to account for inflation. Specifically, with the exception of penalties assessed under expedited settlement agreement (ESA) programs, this memorandum amends all existing penalty policies to increase the initial gravity-based penalties by 4.87 percent for violations that occur after December 6, 2013, the effective date of the 2013 Civil Monetary Penalty Inflation Adjustment Rule (2013 Penalty Inflation Rule or Rule). The 4.87 percent represents the cost-of-living adjustment, calculated pursuant to the formula prescribed in Section 5(b) of the Debt Collection Improvement Act (DCIA),<sup>1</sup> which was applied in developing the 2013 Rule.

This memorandum also provides guidance on pleading civil penalties for violations that occur before and after the effective date of the Rule, and when to apply the new maximum civil penalty amounts that may be sought in certain administrative enforcement actions brought under the Clean Water Act (CWA), Certain Alaskan Cruise Ship Operations Act (CACSOA), Safe Drinking Water Act (SDWA), Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Emergency Planning and Community Right-to-Know Act (EPCRA).

**I. Background**

The DCIA requires each federal agency to issue regulations adjusting for inflation the statutory civil penalties that can be imposed under the laws administered by that agency. On November 6, 2013, the EPA promulgated the 2013 Penalty Inflation Rule pursuant to Section 4 of the DCIA; the Rule is effective December 6, 2013. (A copy of the Rule, as published at 78 Fed. Reg. 66643-48 (Nov. 6, 2013), is attached.) Under the Rule, only 20 out of 88 statutory penalty amounts are being increased for two reasons: (1) since 2008, when the last Penalty Inflation Adjustment Rule was promulgated, the rate of inflation has been low, resulting in a cost-of-living adjustment of only 4.87 percent for those penalties

<sup>1</sup> See the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note.

that were last adjusted in 2008; and (2) when the DCIA's mandatory rounding rules were applied to the inflation adjusted increment, the inflation adjusted amounts were, in most cases, insufficient to warrant an increase under the 2013 Rule. All violations occurring after December 6, 2013, the effective date of the Rule, are subject to the new, inflation-adjusted, statutory penalties.<sup>2</sup>

## II. The DCIA's Formula for Calculating Cost-of-Living Adjustments to Civil Penalties

Pursuant to the DCIA, each federal agency is required to issue regulations adjusting for inflation all statutory civil monetary penalties that can be imposed pursuant to such agency's statutes. The purpose of these inflation adjustments is to maintain the deterrent effect of civil penalties, thereby promoting compliance with the law. Section 5 of the DCIA requires each agency to apply a specific formula and statutorily prescribed rounding rules to determine whether and to what extent statutory civil penalties should be increased to account for any changes in the cost-of-living. Under the DCIA, the cost-of-living adjustment (COLA) is determined by calculating the percentage increase, if any, by which the Consumer Price Index for all-urban consumers (CPI-U) for the month of June of the calendar year preceding the current adjustment exceeds the CPI-U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted. Accordingly, the COLA applied under the 2013 Rule equals the percentage by which the CPI-U for June 2012 (*i.e.*, June of the year preceding 2013, the year the Rule was published), exceeds the CPI-U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be).

## III. Amendments to the EPA's Civil Penalty Policies

By this memorandum, the Office of Enforcement and Compliance Assurance (OECA) is amending the EPA's existing civil penalty policies to increase the initial gravity component of the penalty calculation by 4.87 percent for those violations subject to the new Rule, *i.e.*, violations occurring after December 6, 2013. As further discussed below, this memorandum does not increase penalty amounts that may be assessed under any of the EPA's ESA programs.

While not required specifically by the Act, we believe revising our civil penalty policies to account for inflation is consistent with the Congressional intent in passing the DCIA and is necessary to implement effectively the mandated penalty increases set forth in 40 C.F.R. Part 19. In addition, this is consistent with the practice we have been implementing since 1997, when we first amended the EPA's civil penalty policies to reflect the COLA applied under the 1996 Civil Monetary Penalty Inflation Adjustment Rule.<sup>3</sup> Accordingly, each non-ESA civil penalty policy is now modified to apply the appropriate guidelines set forth below. These new guidelines apply to civil penalty policies, regardless of whether the policy is used for determining a specific amount to plead in a complaint or for determining a bottom-line settlement amount.

<sup>2</sup> Section 6 of the DCIA provides that "[a]ny increase under this Act in a civil monetary penalty shall apply only to violations that occur *after* the date the increase takes effect." [Emphasis added.]

<sup>3</sup> See Memorandum dated May 9, 1997, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance (OECA), "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule;" Memorandum dated September 21, 2004, from Thomas V. Skinner, Acting Assistant Administrator of OECA, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule" (2004 Memorandum); and Memorandum dated December 29, 2008, from Granta Y. Nakayama, Assistant Administrator for OECA, "Amendments to EPA Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Rule (Effective January 12, 2009)" (2008 Memorandum).

A complete list of all of the EPA's non-ESA penalty policies is provided at the end of this memorandum. Subsequent to the issuance of this memorandum, the division directors in the Office of Civil Enforcement and the Office of Site Remediation Enforcement may issue revised penalty matrices under program-specific penalty policies to reflect the following guidelines, as summarized in the chart at pages 5-6.

A. If all of the violations in a particular case occurred on or before the effective date of the 2013 Rule, penalty policy calculations should be consistent with the 2008 Memorandum.

B. For those judicial and administrative cases in which some or all of the violations occurred *after* the effective date of the 2013 Rule, the penalty policy calculations are modified by following these three steps:

1. Perform the economic benefit calculation for the entire period of the violation. Do not apply any mitigation for ability to pay or litigation considerations at this point.
2. Apply the gravity component of the penalty policy in the standard way for all violations according to the provisions of subparagraph 3 below. Do not apply any mitigation or adjustment factors at this point.
- 3.(a) ***For those penalty policies that were issued prior to January 31, 1997:*** Calculate the gravity component according to the penalty policy. For violations that occurred after January 30, 1997 through March 15, 2004, multiply the gravity component by 1.1, reflecting the 10% first-time adjustment. For violations that occurred after March 15, 2004 through January 12, 2009, multiply the gravity component by 1.2895, reflecting both the 10% first-time adjustment and the 17.23% COLA [ $1.10 \times 1.1723 = 1.2895$ ]. For violations that occur after January 12, 2009 through December 6, 2013, multiply the gravity component by 1.4163, reflecting the 10% first-time adjustment, the 17.23% and the 9.83% COLAs [ $1.10 \times 1.1723 \times 1.0983 = 1.4163$ ]. For violations that occur after December 6, 2013, multiply the gravity component by 1.4853, reflecting the 10% first-time adjustment, the 17.23%, the 9.83% and the 4.87% COLAs [ $1.10 \times 1.1723 \times 1.0983 \times 1.0487 = 1.4853$ ].

*Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is \$1,000 for each day of violation. If the violations occurred for a total of 10 days during the period after January 30, 1997 through March 15, 2004, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.1 = \$11,000$ . If the violations occurred for 10 days during the period after March 15, 2004 through January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.2895 = \$12,895$ . If 10 days of the violations occurred after January 12, 2009 through December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.4163 = \$14,163$ . If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.4853 = \$14,853$ .*

(b) **For those penalty policies that were issued or revised after January 30, 1997, through March 15, 2004:** Calculate the gravity component according to the penalty policy. For violations that occurred after January 30, 1997 through March 15, 2004, use the gravity component set forth in the penalty policy, as the 10% first-time adjustment is reflected in those policies. For violations that occurred after March 15, 2004 through January 12, 2009, multiply the gravity component by 1.1723, reflecting the 17.23% COLA. For violations occurring after January 12, 2009 through December 6, 2013, multiply the gravity component by 1.2875, reflecting both the 17.23% and the 9.83% COLAs [ $1.1723 \times 1.0983 = 1.2875$ ]. For violations that occur after December 6, 2013, multiply the gravity component by 1.3502, reflecting the 17.23% COLA, the 9.83% and the 4.87% COLAs [ $1.1723 \times 1.0983 \times 1.0487 = 1.3502$ ].

*Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is \$1,000 for each day of violation. If the violations occurred for 10 days during the period after March 15, 2004 through January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.1723 = \$11,723$ . If 10 days of the violations occurred after January 12, 2009 through December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.2875 = \$12,875$ . If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.3502 = \$13,502$ .*

(c) **For those penalty policies that were issued or revised after March 15, 2004, through January 12, 2009:** Calculate the gravity component according to the penalty policy. For violations that occurred after March 15, 2004 through January 12, 2009, use the gravity component set forth in the penalty policy, as the 10% first-time adjustment and 17.23% COLA are reflected in those policies. For violations occurring after January 12, 2009 through December 6, 2013, multiply the gravity component by 1.0983, reflecting the 9.83% COLA. For violations occurring after December 6, 2013, multiply the gravity component by 1.1518, reflecting both the 9.83% and the 4.87% COLAs [ $1.0983 \times 1.0487 = 1.1518$ ].

*Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is \$1,000 for each day of violation. If 10 days of the violations occurred after January 12, 2009 through December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.0983 = \$10,983$ . If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.1518 = \$11,518$ .*

(d) **For those penalty policies that were issued or revised after January 12, 2009, through December 6, 2013:** Calculate the gravity component according to the penalty policy. For violations that occurred after January 12, 2009 through December 6, 2013, use the gravity component set forth in the penalty policy, as the 9.83% COLA is reflected in these policies. For violations occurring after December 6, 2013, multiply the gravity component by 1.0487, reflecting the 4.87% COLA. Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is \$1,000 for each day of violation. If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows:  $10 \text{ days} \times \$1,000 = \$10,000 \times 1.0487 = \$10,487$ .

**Chart Reflecting Inflation Adjustment Multipliers**

<b>Penalty Policy Issued Prior to January 31, 1997</b>		
<b>Date(s) of violation</b>	<b>Inflation Adjustment Multiplier</b>	<b>Calculation Explanation</b>
January 31, 1997 through March 15, 2004	1.1	This value reflects the 10% first-time adjustment ( <i>i.e.</i> , 1.1).
March 16, 2004 through January 12, 2009	1.2895	This value is adjusted by the COLA of 17.23% applied in the 2004 Memorandum ( <i>i.e.</i> , $1.1 \times 1.1723 = 1.2895$ ).
January 13, 2009 through December 6, 2013	1.4163	This value is adjusted by the COLA of 9.83% applied in the 2008 Memorandum ( <i>i.e.</i> , $1.1 \times 1.1723 \times 1.0983 = 1.4163$ ).
After December 6, 2013	1.4853	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum ( <i>i.e.</i> , $1.1 \times 1.1723 \times 1.0983 \times 1.0487 = 1.4853$ ).
<b>Penalty Policy Issued or Revised after January 30, 1997 through March 15, 2004</b>		
<b>Date(s) of violation</b>	<b>Inflation Adjustment Multiplier</b>	<b>Calculation Explanation</b>
January 31, 1997 through March 15, 2004	None - use gravity component in penalty policy	There is no multiplier here because the 10% first-time adjustment is already reflected in the penalties.
March 16, 2004 through January 12, 2009	1.1723	This value reflects the COLA of 17.23% applied in the 2004 Memorandum, or 1.1723.
January 13, 2009 through December 6, 2013	1.2875	This value is adjusted by the COLA of 9.83% applied in the 2008 Memorandum ( <i>i.e.</i> , $1.1723 \times 1.0983 = 1.2875$ ).
After December 6, 2013	1.3502	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum ( <i>i.e.</i> , $1.1723 \times 1.0983 \times 1.0487 = 1.3502$ ).

<b>Penalty Policy Issued or Revised after March 15, 2004 through January 12, 2009</b>		
<b>Date(s) of violation</b>	<b>Inflation Adjustment Multiplier</b>	<b>Calculation Explanation</b>
<b>March 16, 2004 through January 12, 2009</b>	<b>None - use gravity component in penalty policy</b>	There is no multiplier here because the 10% first-time adjustment and 17.23% COLA is already reflected in the penalties.
<b>January 13, 2009 through December 6, 2013</b>	<b>1.0983</b>	This value reflects the COLA of 9.83% applied in the 2008 Memorandum, or 1.0983.
<b>After December 6, 2013</b>	<b>1.1518</b>	This value is adjusted by the COLA of 4.87% applied in the 2013 Memorandum ( <i>i.e.</i> , $1.0983 \times 1.0487 = 1.1518$ ).
<b>Penalty Policy Issued or Revised after January 12, 2009 through December 6, 2013</b>		
<b>Date(s) of violation</b>	<b>Inflation Adjustment Multiplier</b>	<b>Calculation Explanation</b>
<b>January 13, 2009 through December 6, 2013</b>	<b>None - use gravity component in penalty policy</b>	There is no multiplier here because the COLA of 9.83% applied in the 2008 Memorandum is already reflected in the penalties.
<b>After December 6, 2013</b>	<b>1.0487</b>	This value reflects the COLA of 4.87% applied in this 2013 Memorandum.
<b>All Violations Occurred after December 6, 2013</b>		
<b>Date of Penalty Policy Revision or Issuance</b>	<b>Inflation Adjustment Multiplier</b>	<b>Calculation Explanation</b>
<b>Issued Prior to January 31, 1997</b>	<b>1.4853</b>	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum ( <i>i.e.</i> , $1.1 \times 1.1723 \times 1.0983 \times 1.0487 = 1.4853$ ).
<b>January 31, 1997 through March 15, 2004</b>	<b>1.3502</b>	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum ( <i>i.e.</i> , $1.1723 \times 1.0983 \times 1.0487 = 1.3502$ ).
<b>March 16, 2004 through January 12, 2009</b>	<b>1.1518</b>	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum ( <i>i.e.</i> , $1.0983 \times 1.0487 = 1.1518$ ).
<b>January 13, 2009 through December 6, 2013</b>	<b>1.0487</b>	This value reflects the COLA of 4.87% applied in this 2013 Memorandum.

#### IV. Penalty Pleading

If all of the violations in a particular case occurred on or before the effective date of the 2013 Rule, the pleading practices set forth in the 2008 Memorandum should be applied. If some of the violations in a particular case occurred after the effective date of the 2013 Rule, then any penalty amount sought should reflect the newly adjusted civil penalty amounts for those violations.

For example, if a person tampered with a public water system on November 7, 2013, the maximum statutory penalty under SDWA Section 1432(c) would be \$1,100,000. The prayer for relief under such facts would be written as follows:

*Pursuant to Section 1432(c) of the Safe Drinking Water Act, 42 U.S.C. § 300i-1(c), and 40 C.F.R. Part 19, assess civil penalties against [name of Defendant] of not more than \$1,100,000 for tampering with the public water supply on November 7, 2013.*

If violations occur after the effective date of the 2013 Rule (*i.e.*, after December 6, 2013), then any penalty amount pled should use the newly adjusted maximum amount, if any. For example, if an act of tampering occurs on December 7, 2013, the prayer for relief in a civil judicial complaint alleging a violation of Section 1432(c) of the SDWA would be written as follows:

*Pursuant to Section 1432(c) of the Safe Drinking Water Act, 42 U.S.C. § 300i-1(c), and 40 C.F.R. Part 19, assess civil penalties against [name of Defendant] of not more than \$1,150,000 for tampering with the public water supply on December 7, 2013.*

#### V. Administrative Penalty Caps for the CWA, CACSOA, SDWA, CAA, CERCLA and EPCRA

The 2013 Rule increases the statutory penalty amounts that may be sought for individual violations in administrative enforcement actions, as well as the total amounts that may be sought in a single administrative enforcement action under the CWA, the CACSOA, the SDWA, the CAA, the CERCLA and the EPCRA (commonly called “penalty caps”).<sup>4</sup> For example, prior to the 2013 Rule, the EPA was authorized under CAA Section 205(c)(1) to assess administrative penalties not to exceed \$295,000 for tampering with a vehicle or engine. After the effective date of the 2013 Rule, the EPA may assess an administrative penalty not to exceed \$320,000 under CAA Section 205(c)(1). Note that the adjusted penalty caps apply if an action is filed or a complaint is amended after December 6, 2013, even if some or all of the violations occurred on or before December 6, 2013.

<sup>4</sup> *E.g.*, the statutory maximum amount of administrative penalties that can be assessed under SDWA Section 1423(c)(1), 42 U.S.C. § 300h-2(c)(1), will increase from \$177,500 to \$187,500; the statutory maximum amount of administrative penalties that can be assessed under SDWA Section 1423(c)(2), 42 U.S.C. § 300h-2(c)(2), will increase from \$177,500 to \$187,500; the statutory maximum amount of administrative penalties that can be assessed under CAA Section 113(d)(1), 42 U.S.C. § 7413(d)(1), will increase from \$295,000 to \$320,000; the statutory maximum amount of administrative penalties that can be assessed under CAA Section 205(c)(1), 42 U.S.C. § 7524(c)(1), will increase from \$295,000 to \$320,000.

## **VI. Expedited Settlements**

Expedited settlements offer “real time” enforcement in situations where violations are corrected and a penalty is obtained in a short amount of time, generally within 30-45 days of the issuance of an expedited settlement offer. Expedited settlements serve to achieve compliance while reducing transaction costs for both the EPA and the violator, as long as the violator comes into compliance promptly and pays the expedited penalty amount. Rather than apply the inflation factors across the board to expedited penalty amounts at this time, national program managers within OECA should review expedited penalty amounts periodically to determine whether they need to be adjusted to reflect inflation.

## **VII. Challenges in the Course of Enforcement Proceedings**

If a respondent/defendant challenges the validity of any statutory maximum penalty amount, as adjusted in 40 C.F.R. Part 19, please notify the Special Litigation and Projects Division of the challenge, so that OECA, the Region and the U.S. Department of Justice, as appropriate, can coordinate our response before it is filed.

## **VIII. Further Information**

Any questions concerning the 2013 Rule and its implementation can be directed to Caroline Hermann of OCE’s Special Litigation and Projects Division at (202) 564-2876 or by email at [hermann.caroline@epa.gov](mailto:hermann.caroline@epa.gov).

## List of Existing Civil Penalty Policies Modified by this Memorandum

### General

- Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments (2/16/84)
- Guidance on Use of Penalty Policies in Administrative Litigation (12/15/95)

### Clean Air Act - Stationary Sources

- Clean Air Act Stationary Source Civil Penalty Policy (10/25/91)
- Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)
- Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68 (6/20/12)
- National Petroleum Refinery Initiative Implementation: Application of Clean Air Act Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements (11/08/07)
- Appendix I - Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution (Revised 3/25/87)
- Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy (7/23/95)
- Appendix II - Vinyl Chloride Civil Penalty Policy (Revised 2/8/85)
- Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy (Revised 5/5/92)
- Appendix IV - Volatile Organic Compounds Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance (Revised 3/25/87)
- Appendix V - Air Civil Penalty Worksheet (3/25/87)
- Appendix VI - Volatile Hazardous Air Pollutant Penalty Policy (Revised 9/12)
- Appendix VII - Residential Wood Heaters (5/18/99)
- Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under 40 C.F.R. Part 82: Protection of Stratospheric Ozone (11/2/90)
- Appendix IX - Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82 (7/19/93)
- Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (6/1/94)
- Appendix XI - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart C: Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances (Not Dated)

### **Clean Air Act - Mobile Sources**

- Volatility Civil Penalty Policy (12/1/89)
- Interim Diesel Civil Penalty Policy (2/8/94)
- Clean Air Act Mobile Source Penalty Policy: Vehicle and Engine Emissions Certification Requirements (1/16/09)

### **Clean Water Act**

- Interim Clean Water Act Settlement Penalty Policy (3/1/95)
- Clean Water Act Section 404 Settlement Penalty Policy (12/21/01)
- Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (8/1/98)
- Supplemental Guidance to the Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) for Violations of the Construction Storm Water Requirements (2/5/08)

### **Comprehensive Environmental Response, Compensation, and Liability Act**

- Interim Policy on Settlement of CERCLA Section 106(b)(1) and Section 107(c)(3) -- Punitive Damage Claims for Noncompliance with Administrative Orders (9/30/97)
- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (9/30/99)

### **Emergency Planning and Community Right-to-Know Act**

- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (9/30/99)
- Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) (Amended)(4/12/01)

### **Federal Insecticide, Fungicide, and Rodenticide Act**

- FIFRA Enforcement Response Policy (12/09)
- Enforcement Response Policy for FIFRA Section 7(c) (5/10)
- Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act: Good Laboratory Practice (GLP) Regulations (9/30/91)
- FIFRA Worker Protection Standard Penalty Policy – Enforcement Interim Final (9/97)
- Enforcement Response Policy for the FIFRA Pesticide Container/Containment Regulations (Appendix H)(3/12)

### **Resource Conservation and Recovery Act, Subtitle C**

- RCRA Civil Penalty Policy (6/23/03)
- Guidance on the Use of Section 7003 of RCRA (10/97)

### **RCRA, Subtitle I – UST**

- U.S. EPA Penalty Guidance for Violations of UST Regulations, OSWER Directive 9610.12 (November 14, 1990)
- Guidance of Federal Field Citation Enforcement, OSWER Directive 9610.16 (October 6, 1993)

### **Safe Drinking Water Act - UIC**

- Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy - Underground Injection Control Guidance No. 79 (9/27/93)

### **Safe Drinking Water Act - PWS**

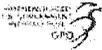
- New Public Water System Supervision Program Settlement Penalty Policy (5/25/94)

### **Toxic Substances Control Act**

- Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in *Federal Register* on 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete.)
- Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12, and 13 (3/31/1999)
- PCB Penalty Policy (4/9/90)
- TSCA Section 5 Enforcement Response Policy (6/8/89), amended (7/1/93)
- TSCA Good Laboratory Practices Regulations Enforcement Response Policy (4/9/85)
- Enforcement Response Policy for Test Rules Under Section 4 of the Toxic Substances Control Act (5/28/1986)
- Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act (1/31/89)
- Enforcement Response Policy for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)
- Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy, December 2007
- Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule, Interim Final Policy, August 2010

Attachment (2013 Penalty Inflation Rule)

cc: (w/attachment)  
Steven Chester, OECA  
Lawrence Starfield, OECA  
Regional Counsel, Regions I - X  
Director, Office of Environmental Stewardship, Region I  
Director, Division of Enforcement and Compliance Assurance, Region II  
Director, Office of Enforcement, Compliance, and Environmental Justice, Region III  
Director, Office of Enforcement and Compliance Assurance, Region V  
Director, Compliance Assurance and Enforcement Division, Region VI  
Director, Office of Enforcement, Compliance and Environmental Justice, Region VIII  
Director, Enforcement Division, Region IX  
Director, Office of Civil Rights, Enforcement and Environmental Justice, Region X  
Regional Media Division Directors  
Regional Enforcement Coordinators, Regions I - X  
OECA  
W. Benjamin Fisherow, Chief, EES, DOJ  
Deputy and Assistant Chiefs, EES, DOJ



and amended citations in two provisions of the construction standards to show the correct incorporation-by-reference section.

In the DFR, OSHA stated that it would confirm the effective date of the DFR if it received no significant adverse comments. OSHA received eight favorable and no adverse comments on the DFR (see ID: OSHA-2013-0005-0008 thru -0015 in the docket for this rulemaking). Accordingly, OSHA is confirming the effective date of the final rule.

In addition to explicitly supporting the DFR, several of the commenters provided supplemental information. Mr. Charles Johnson of AltairStrickland stated that as a result of "[OSHA's] incorporating both the 1968 and the [2011] versions of the ANSI Z535 standard by reference[,] both manufacturers and employers will likely migrate to the newer versions and the older versions will likely fade away as demand declines" (ID: OSHA-2013-0005-0011). Mr. Johnson also commented that "[h]ad OSHA deleted the reference to the ANSI Z35.1-1968 language, these signs would require replacement at considerable and unnecessary cost to employers." *Id.*

A second commenter, Mr. Blair Brewster of MySafetySign.com, described several advantages and limitations of the updated ANSI signage standards, concluding that "[i]t would be arguable to assume that a single standard is best. The ANSI Z535 designs, the traditional safety sign and tag designs, as well as the countless other designs to come, will all have their place and will all coexist" (ID: OSHA-2013-0005-0014).

A third commenter, Mr. Kyle Pitsor of the National Electrical Manufacturers Association (NEMA) stated that "[w]hile we would have preferred that the references to the outdated standards be removed entirely from OSHA's regulations, NEMA agrees that giving employers the option of using signs and tags that meet either the 1967-1968 or the most recent versions of the standards will provide the greatest flexibility without imposing additional costs" (ID: OSHA-2013-0005-0013). Mr. Pitsor also helpfully noted that, contrary to proposed §§ 1910.6(e)(66) and (e)(67) and 1926.6(h)(28)-(h)(30), the International Safety Equipment Association (ISEA) is not authorized to sell the ANSI Z535 standards proposed for incorporation by reference, and these standards are not sold on the ISEA Web site, [www.safetyequipment.org](http://www.safetyequipment.org). In response to Mr. Pitsor's comment, OSHA is correcting the incorporation-by-reference provisions in question in

29 CFR 1910.6 and 1926.6 in a separate Federal Register notice identifying the three locations where the public can purchase the updated ANSI Z535 standards.

Finally, OSHA received an email from Jonathan Stewart, Manager, Government Relations, NEMA, after the comment period ended (ID: OSHA-2013-0005-0015). In his email, Mr. Stewart mentioned NEMA's earlier comments to the docket (ID: OSHA-2013-0005-0013), and stated that "[w]hile reflective of NEMA's position, those comments did not include a clarification regarding the language that the NRPM used in Sec. 1926.200 Accident prevention signs and tags." He further indicated that "[t]he language, while not inaccurate, was unclear regarding which figure(s) it intended to reference in the ANSI Z535.2-2011 standard." Although this comment was late, OSHA considered it because it was a purely technical comment, pointing out an ambiguity in the cited provision's reference to figures in the updated version of the national consensus standard, ANSI Z535.2-2011. OSHA finds that the comment has merit, and accordingly is clarifying the language in 29 CFR 1926.200(b) and (c) specifying which figures employers must follow in ANSI Z535.2-2011.

**List of Subjects in 29 CFR Parts 1910 and 1926**

Signage, Incorporation by reference, Occupational safety and health, Safety.

**Authority and Signature**

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this final rule. OSHA is issuing this final rule pursuant to 29 U.S.C. 653, 655, and 657, 5 U.S.C. 553, Secretary of Labor's Order 1-2012 (77 FR 3912), and 29 CFR part 1911.

Signed at Washington, DC, on October 30, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013-26336 Filed 11-5-13; 8:45 am]

BILLING CODE 4510-26-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 19**

[FRL-9901-98-OECA]

RIN 2020-AA49

**Civil Monetary Penalty Inflation Adjustment Rule**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** With this action, EPA is promulgating a final rule that amends the Civil Monetary Penalty Inflation Adjustment Rule. This action is mandated by the Debt Collection Improvement Act of 1996 (DCIA) to adjust for inflation certain statutory civil monetary penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. The Agency is required to review the civil monetary penalties under the statutes it administers at least once every four years and to adjust such penalties as necessary for inflation according to a formula prescribed by the DCIA. The regulations contain a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation, since 1996.

**DATES:** This rule is effective December 6, 2013.

**FOR FURTHER INFORMATION CONTACT:** Caroline Hermann, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460. (202) 564-2876.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, each federal agency is required to issue regulations adjusting for inflation the statutory civil monetary penalties<sup>1</sup> ("civil penalties" or "penalties") that can be imposed under the laws administered by that agency. The purpose of these adjustments is to

<sup>1</sup> Section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, defines "civil monetary penalty" to mean "any penalty, fine or other sanction that—(A)(i) is for a specific monetary amount as provided by federal law; or (ii) has a maximum amount provided for by federal law. . . ."

maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. EPA's initial adjustment to each statutory civil penalty amount was published in the *Federal Register* on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997 ("the 1996 Rule"). EPA's second adjustment to civil penalty amounts was published in the *Federal Register* on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004 ("the 2004 Rule"). EPA's third adjustment to civil penalty amounts was published in the *Federal Register* on December 11, 2008 (73 FR 75340), as corrected in the *Federal Register* on January 7, 2009 (74 FR 626), and became effective on January 12, 2009 ("the 2008 Rule").

Where necessary under the DCIA, this rule, specifically Table 1 in 40 CFR 19.4, adjusts for inflation the maximum and, in some cases, the minimum amount of the statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 of 40 CFR 19.4 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision after the effective dates of the 1996, 2004 and 2008 rules. Where required under the DCIA formula, this rule amends the adjusted penalty amounts in Table 1 of 40 CFR 19.4 for those violations that occur after the effective date of this rule.

The formula prescribed by the DCIA for determining the inflation adjustment, if any, to statutory civil penalties consists of the following four-step process:

1. *Determine the Cost-of-Living Adjustment (COLA)*. The COLA is determined by calculating the percentage increase, if any, by which the Consumer Price Index<sup>2</sup> for all-urban consumers (CPI-U) for the month of June of the calendar year preceding the adjustment exceeds the CPI-U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted.<sup>3</sup> Accordingly, the COLA

applied under this rule equals the percentage by which the CPI-U for June 2012 (*i.e.*, June of the year preceding this year), exceeds the CPI-U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be). Given that the last inflation adjustment was published on December 11, 2008, the COLA for most civil penalties set forth in this rule was calculated by determining the percentage by which the CPI-U for June 2012 (229.478) exceeds the CPI-U for June 2008 (218.815), resulting in a COLA of 4.87 percent. For those few civil penalty amounts that were last adjusted under the 2004 Rule, the COLA equals 20.97 percent, calculated by determining the percentage by which the CPI-U for June 2012 (229.478) exceeds the CPI-U for June 2004 (189.7). In the case of the maximum civil penalty that can be imposed under section 311(b)(7)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(A), which is the sole civil penalty last adjusted under the 1996 Rule, the COLA is 46.45 percent, determined by calculating the percentage by which the CPI-U for June 2012 (229.478) exceeds the CPI-U for June 1996 (156.7).

2. *Calculate the Raw Inflation Increase*. Once the COLA is determined, the second step is to multiply the COLA by the current civil penalty amount to determine the raw inflation increase.

3. *Apply the DCIA's Rounding Rule to the Raw Inflation Increase*. The third step is to round this raw inflation increase according to section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note. The DCIA's rounding rules require that any increase be rounded to the nearest multiple of: \$10 in the case of penalties less than or equal to \$100; \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000; \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000; \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000; \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and \$25,000 in the case of penalties greater than \$200,000. (*See* section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of

1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.)

4. *Add the Rounded Inflation Increase, if any, to the Current Penalty Amount*. Once the inflation increase has been rounded pursuant to the DCIA, the fourth step is to add the rounded inflation increase to the current civil penalty amount to obtain the new, inflation-adjusted civil penalty amount. For example, in this rule, the current statutory maximum penalty amounts that may be imposed under Clean Air Act (CAA) section 113(d)(1), 42 U.S.C. 7413(d)(1), and CAA section 205(c)(1), 42 U.S.C. 7524(c)(1), are increasing from \$295,000 to \$320,000. These penalty amounts were last adjusted with the promulgation of the 2008 Rule, when these penalties were adjusted for inflation from \$270,000 to \$295,000. Applying the COLA adjustment to the current penalty amount of \$295,000 results in a raw inflation increase of \$14,376 for both penalties. As stated above, the DCIA rounding rule requires the raw inflation increase to be rounded to the nearest multiple of \$25,000 for penalties greater than \$200,000. Rounding \$14,376 to the nearest multiple of \$25,000 equals \$25,000. That rounded increase increment of \$25,000 is then added to the \$295,000 penalty amount to arrive at a total inflation adjusted penalty amount of \$320,000. Accordingly, once this rule is effective, the statutory maximum amounts of these penalties will increase to \$320,000.

In contrast, this rule does not adjust those civil penalty amounts where the raw inflation amounts are not high enough to round up to the required multiple stated in the DCIA. For example, under section 3008(a)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(a)(3), the Administrator may assess a civil penalty of up to \$37,500 per day of noncompliance for each violation. This penalty was last adjusted for inflation under the 2008 Rule. Multiplying the applicable 4.87 percent COLA to the statutory civil penalty amount of \$37,500, the raw inflation increase equals only \$1,827.40; the DCIA rounding rule requires a raw inflation increase increment to be rounded to the nearest multiple of \$5,000 for penalties greater than \$10,000 but less than or equal to \$100,000. Because this raw inflation increase is not sufficient to be rounded up to a multiple of \$5,000, in accordance with the DCIA's rounding rule, this rule does not increase the \$37,500 penalty amount. However, if during the development of EPA's next Civil Monetary Penalty Inflation Adjustment Rule, anticipated to be

<sup>2</sup> Section 3 of the DCIA defines "Consumer Price Index" to mean "the Consumer Price Index for all-urban consumers published by the Department of Labor." Interested parties may find the relevant Consumer Price Index, published by the Department of Labor's Bureau of Labor Statistics, on the Internet. To access this information, go to the CPI Home Page at: <http://fp.bls.gov/pub/special.requests/cpi/cpiat.txt>.

<sup>3</sup> Section 5(b) of the DCIA defines the term "cost-of-living adjustment" to mean "the percentage (if

any) for each civil monetary penalty by which—(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law."

promulgated in 2017, the raw inflation increase can be rounded up to the next multiple of \$5,000, statutory maximum penalty amounts currently at \$37,500 will be increased to \$42,500.

Because of the low rate of inflation since 2008, coupled with the application of the DCIA's rounding rules, only 20 of the 88 statutory civil penalty provisions implemented by EPA are being adjusted for inflation under this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to review all statutory penalty amounts and adjust them as necessary to account for inflation in the year 2017 and every four years thereafter.

## II. Technical Revision to Table 1 of 40 CFR 19.4 To Break Out Each of the Statutory Penalty Authorities Under Section 325(b) of the Emergency Planning and Community Right-To-Know Act (EPCRA)

EPA is revising the row of Table 1 of 40 CFR 19.4, which lists the statutory maximum penalty amounts that can be imposed under section 325(b) of EPCRA, 42 U.S.C. 11045(b), to break out separately the three penalty authorities contained in subsection (b). Since 1996, EPA has been adjusting for inflation all of the statutory maximum penalty amounts specified under EPCRA section 325(b), 42 U.S.C. 11045(b). Under past rules, the Agency has grouped the maximum penalty amounts that may be assessed under section 325(b) under the heading of 42 U.S.C. 11045(b) in Table 1 of 40 CFR 19.4. For example, under the 2008 Rule, Table 1 of 40 CFR 19.4 reflects that the statutory maximum penalties that can be imposed under any subparagraph of EPCRA section 325(b) are \$37,500 and \$107,500. Consistent with how the other penalty authorities are displayed under Part 19.4, Table 1 now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)). That is, upon the effective date of this rule, the statutory maximum penalty that can be imposed under section 325(b)(1)(A) is \$37,500; the statutory maximum penalties that can be imposed under section 325(b)(2) are \$37,500 and \$117,500; and the statutory maximum penalties that can be imposed under section 325(b)(3) are \$37,500 and \$117,500.

## III. Effective Date

Section 6 of the DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date

the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Thus, the new inflation-adjusted civil penalty amounts may be applied only to violations that occur after the effective date of this rule.

## IV. Good Cause

Section 553(b) of the Administrative Procedure Act (APA) provides that, when an agency for good cause finds that "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest," the agency may issue a rule without providing notice and an opportunity for public comment. EPA finds that there is good cause to promulgate this rule without providing for public comment. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA to make periodic increases in civil penalty amounts by applying the adjustment formula and rounding rules established by the statute. Because the calculation of the increases is formula-driven and prescribed by statute, EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, it would serve no purpose to provide an opportunity for public comment on this rule. Thus, notice and public comment is unnecessary.

In addition, EPA is making the technical revisions discussed above without notice and public comment. Because the technical revisions to Table 1 of 40 CFR 19.4 more accurately reflect the statutory provisions under each of the subparagraphs of section 325(b) (*i.e.*, under 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)) and do not constitute substantive revisions to the rule, these changes do not require notice and comment.

## V. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and therefore is not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction

Act of 1995, 44 U.S.C. 3501–3521. Burden is defined at 5 CFR 1320.3(b). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

### C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice and comment requirements.

### D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action implements mandates specifically and explicitly set forth by Congress in the DCIA without the exercise of any policy discretion by EPA. By applying the adjustment formula and rounding rules prescribed by the DCIA, this rule adjusts for inflation the statutory maximum and, in some cases, the minimum, amount of civil penalties that can be assessed by EPA in an administrative enforcement action, or by the U.S. Attorney General in a civil judicial case, for violations of EPA-administered statutes and their implementing regulations. Because the calculation of any increase is formula-driven, EPA has no policy discretion to vary the amount of the adjustment. Given that the Agency has made a "good cause" finding that this rule is not subject to notice and comment requirements under the APA or any other statute (*see* Section IV of this notice), it is not subject to sections 202 and 205 of UMRA. EPA has also determined that this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule merely increases

the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

#### *E. Executive Order 13132 (Federalism)*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely increases the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. Thus, Executive Order 13132 does not apply to this rule.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. This final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

#### *G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the U.S. Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this final rulemaking. The primary purpose of this final rule is merely to apply the DCIA's inflation adjustment formula to make periodic increases in the civil penalties that may be imposed for violations of EPA-administered statutes and their implementing regulations. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula.

Since there is no discretion under the DCIA in determining the statutory civil penalty amount, EPA cannot vary the amount of the civil penalty adjustment to address other issues, including environmental justice issues.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801-808, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 40 CFR Part 19**

Environmental protection,  
Administrative practice and procedure,  
Penalties.

Dated: October 29, 2013.

Gina McCarthy,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, title 40, chapter I, part 19 of the Code of Federal Regulations is amended as follows:

#### **PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION**

■ 1. The authority citation for part 19 continues to read as follows:

**Authority:** Pub. L. 101-410, 28 U.S.C. 2461 note; Public Law 104-134, 31 U.S.C. 3701 note.

■ 2. Revise § 19.2 to read as follows:

##### **§ 19.2 Effective date.**

The increased penalty amounts set forth in the seventh and last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after December 6, 2013. The penalty amounts in the sixth column of Table 1 to § 19.4 apply to violations under the applicable statutes and regulations which occurred after January 12, 2009, through December 6, 2013. The penalty amounts in the fifth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations

which occurred after March 15, 2004, through January 12, 2009. The penalty amounts in the fourth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations

which occurred after January 30, 1997, through March 15, 2004.

■ 3. Revise § 19.4 to read as follows:

§ 19.4 Penalty adjustment and table.

The adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts.

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
7 U.S.C. 136l(a)(1) .....	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500
7 U.S.C. 136l(a)(2) .....	FIFRA .....	\$500/\$1,000	\$550/\$1,000	\$650/\$1,100	\$750/\$1,100	\$750/\$1,100
15 U.S.C. 2615(a)(1) .....	TOXIC SUBSTANCES CONTROL ACT (TSCA).	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
15 U.S.C. 2647(a) .....	TSCA .....	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500
15 U.S.C. 2647(g) .....	TSCA .....	\$5,000	\$5,000	\$5,500	\$7,500	\$7,500
31 U.S.C. 3802(a)(1) .....	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500
31 U.S.C. 3802(a)(2) .....	PFCRA .....	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500
33 U.S.C. 1319(d) .....	CLEAN WATER ACT (CWA).	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
33 U.S.C. 1319(g)(2)(A) ..	CWA .....	\$10,000/\$25,000	\$11,000/\$27,500	\$11,000/\$32,500	\$16,000/\$37,500	\$16,000/\$37,500
33 U.S.C. 1319(g)(2)(B) ..	CWA .....	\$10,000/\$125,000	\$11,000/\$137,500	\$11,000/\$157,500	\$16,000/\$177,500	\$16,000/\$187,500
33 U.S.C. 1321(b)(6)(B)(i) ..	CWA .....	\$10,000/\$25,000	\$11,000/\$27,500	\$11,000/\$32,500	\$16,000/\$37,500	\$16,000/\$37,500
33 U.S.C. 1321(b)(6)(B)(ii) ..	CWA .....	\$10,000/\$125,000	\$11,000/\$137,500	\$11,000/\$157,500	\$16,000/\$177,500	\$16,000/\$187,500
33 U.S.C. 1321(b)(7)(A) ..	CWA .....	\$25,000/\$1,000	\$27,500/\$1,100	\$32,500/\$1,100	\$37,500/\$1,100	\$37,500/\$2,100
33 U.S.C. 1321(b)(7)(B) ..	CWA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
33 U.S.C. 1321(b)(7)(C) ..	CWA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
33 U.S.C. 1321(b)(7)(D) ..	CWA .....	\$100,000/\$3,000	\$110,000/\$3,300	\$130,000/\$4,300	\$140,000/\$4,300	\$150,000/\$5,300
33 U.S.C. 1414b(d)(1) ..	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	\$600	\$660	\$760	\$860	\$860
33 U.S.C. 1415(a) .....	MPRSA .....	\$50,000/\$125,000	\$55,000/\$137,500	\$65,000/\$157,500	\$70,000/\$177,500	\$75,000/\$187,500
33 U.S.C. 1901 note (see 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	\$10,000/\$25,000	\$10,000/\$25,000 <sup>2</sup>	\$10,000/\$25,000	\$11,000/\$27,500	\$11,000/\$27,500
33 U.S.C. 1901 note (see 1409(a)(2)(B)).	CACSO .....	\$10,000/\$125,000	\$10,000/\$125,000	\$10,000/\$125,000	\$11,000/\$137,500	\$11,000/\$147,500
33 U.S.C. 1901 note (see 1409(b)(1)).	CACSO .....	\$25,000	\$25,000	\$25,000	\$27,500	\$27,500
42 U.S.C. 300g-3(b) .....	SAFE DRINKING WATER ACT (SDWA).	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 300g-3(g)(3)(A) .....	SDWA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 300g-3(g)(3)(B) .....	SDWA .....	\$5,000/\$25,000	\$5,000/\$25,000	\$6,000/\$27,500	\$7,000/\$32,500	\$7,000/\$32,500
42 U.S.C. 300g-3(g)(3)(C) .....	SDWA .....	\$25,000	\$25,000	\$27,500	\$32,500	\$32,500
42 U.S.C. 300h-2(b)(1) ..	SDWA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 300h-2(c)(1) ..	SDWA .....	\$10,000/\$125,000	\$11,000/\$137,500	\$11,000/\$157,500	\$16,000/\$177,500	\$16,000/\$187,500
42 U.S.C. 300h-2(c)(2) ..	SDWA .....	\$5,000/\$125,000	\$5,500/\$137,500	\$6,500/\$157,500	\$7,500/\$177,500	\$7,500/\$187,500
42 U.S.C. 300h-3(c) .....	SDWA .....	\$5,000/\$10,000	\$5,500/\$11,000	\$6,500/\$11,000	\$7,500/\$16,000	\$7,500/\$16,000
42 U.S.C. 300i(b) .....	SDWA .....	\$15,000	\$15,000	\$16,500	\$16,500	\$21,500
42 U.S.C. 300i-1(c) .....	SDWA .....	\$20,000/\$50,000	\$22,000/\$55,000 <sup>3</sup>	\$100,000/ \$1,000,000	\$110,000/ \$1,100,000	\$120,000/ \$1,150,000
42 U.S.C. 300j(e)(2) .....	SDWA .....	\$2,500	\$2,750	\$2,750	\$3,750	\$3,750
42 U.S.C. 300j-4(c) .....	SDWA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 300j-6(b)(2) ..	SDWA .....	\$25,000	\$25,000	\$27,500	\$32,500	\$32,500
42 U.S.C. 300j-23(d) .....	SDWA .....	\$5,000/\$50,000	\$5,500/\$55,000	\$6,500/\$65,000	\$7,500/\$70,000	\$7,500/\$75,000
42 U.S.C. 4852d(b)(5) .....	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.	\$10,000	\$11,000	\$11,000	\$16,000	\$16,000
42 U.S.C. 4910(a)(2) .....	NOISE CONTROL ACT OF 1972.	\$10,000	\$11,000	\$11,000	\$16,000	\$16,000
42 U.S.C. 6928(a)(3) .....	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 6928(c) .....	RCRA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 6928(g) .....	RCRA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 6928(h)(2) .....	RCRA .....	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 6934(e) .....	RCRA .....	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500
42 U.S.C. 6973(b) .....	RCRA .....	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
42 U.S.C. 6991e(a)(3)	RCRA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 6991e(d)(1)	RCRA	\$10,000	\$11,000	\$11,000	\$16,000	\$16,000
42 U.S.C. 6991e(d)(2)	RCRA	\$10,000	\$11,000	\$11,000	\$16,000	\$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 7413(d)(1)	CAA	\$25,000/\$200,000	\$27,500/\$220,000	\$32,500/\$270,000	\$37,500/\$295,000	\$37,500/\$320,000
42 U.S.C. 7413(d)(3)	CAA	\$5,000	\$5,500	\$6,500	\$7,500	\$7,500
42 U.S.C. 7524(a)	CAA	\$2,500/\$25,000	\$2,750/\$27,500	\$2,750/\$32,500	\$3,750/\$37,500	\$3,750/\$37,500
42 U.S.C. 7524(c)(1)	CAA	\$200,000	\$220,000	\$270,000	\$295,000	\$320,000
42 U.S.C. 7545(d)(1)	CAA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 9606(b)(1)	CERCLA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 9609(a)(1)	CERCLA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 9609(b)	CERCLA	\$25,000/\$75,000	\$27,500/\$82,500	\$32,500/\$97,500	\$37,500/\$107,500	\$37,500/\$117,500
42 U.S.C. 9609(c)	CERCLA	\$25,000/\$75,000	\$27,500/\$82,500	\$32,500/\$97,500	\$37,500/\$107,500	\$37,500/\$117,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA)	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 11045(b)(1)(A) <sup>4</sup>	EPCRA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 11045(b)(2)	EPCRA	\$25,000/\$75,000	\$27,500/\$82,500	\$32,500/\$97,500	\$37,500/\$107,500	\$37,500/\$117,500
42 U.S.C. 11045(b)(3)	EPCRA	\$25,000/\$75,000	\$27,500/\$82,500	\$32,500/\$97,500	\$37,500/\$107,500	\$37,500/\$117,500
42 U.S.C. 11045(c)(1)	EPCRA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 11045(c)(2)	EPCRA	\$10,000	\$11,000	\$11,000	\$16,000	\$16,000
42 U.S.C. 11045(d)(1)	EPCRA	\$25,000	\$27,500	\$32,500	\$37,500	\$37,500
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT)	\$10,000	\$10,000	\$11,000	\$16,000	\$16,000
42 U.S.C. 14304(g)	BATTERY ACT	\$10,000	\$10,000	\$11,000	\$16,000	\$16,000

<sup>1</sup> Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

<sup>2</sup> CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub. L. 106-554, 33 U.S.C. 1901 note.  
<sup>3</sup> The original statutory penalty amounts of \$20,000 and \$50,000 under section 1432(c) of the SDWA, 42 U.S.C. 300i-1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107-188 (June 12, 2002), to \$100,000 and \$1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule ("2004 Rule"), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

<sup>4</sup> Consistent with how the EPA's other penalty authorities are displayed under Part 19.4, this Table now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (i.e., 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R06-OAR-2010-0335; FRL-9902-50-Region 6]

**Approval and Promulgation of Implementation Plans; Texas; Procedures for Stringency Determinations and Minor Permit Revisions for Federal Operating Permits**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Withdrawal of direct final rule.

**SUMMARY:** On September 10, 2013, EPA published a direct final rule approving portions of three revisions to the Texas

State Implementation Plan (SIP) concerning the Texas Federal Operating Permits Program. The direct final action was published without prior proposal because EPA anticipated no adverse comments. EPA stated in the direct final rule that if we received relevant, adverse comments by October 10, 2013, EPA would publish a timely withdrawal in the Federal Register. EPA subsequently received timely adverse comments on the direct final rule. Therefore, EPA is withdrawing the direct final approval and will proceed to respond to all relevant, adverse comments in a subsequent action based on the parallel proposal published on September 10, 2013. As stated in the parallel proposal, EPA will not institute a second comment period on this action.

**DATES:** The direct final rule published on September 10, 2013 (78 FR 55221), is withdrawn as of November 6, 2013.

**FOR FURTHER INFORMATION CONTACT:** Ms. Adina Wiley (6PD-R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD-R), Suite 1200, Dallas, TX 75202-2733. The telephone number is (214) 665-2115. Ms. Wiley can also be reached via electronic mail at [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 28, 2013.

**Ron Curry,**

*Regional Administrator, Region 6.*

Accordingly, the amendments to 40 CFR 52.2270 published in the Federal Register on September 10, 2013 (78 FR