UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
BP Products North America Inc.,	**)**	**Docket No. CWA-05-2016-0014**
	)	
Respondent.	**)**	

ORDER DENYING PETITION TO SET ASIDE CONSENT AGREEMENT AND PROPOSED FINAL ORDER

Pursuant to Section 309(g)(4)(C) of the Clean Water Act, 33 U.S.C. § 1319(g)(4)(C), on February 24, 2017, Carlotta Blake-King, Carolyn A. Marsh, Debra Michaud, and Patricia Walter ("Petitioners") jointly filed a Petition to set aside the Consent Agreement and proposed Final Order agreed upon by the parties to this matter, Complainant, the Director of Water Division, United States Environmental Protection Agency ("EPA"), Region 5, and Respondent, BP Products North America Inc. The Petition alleges that Complainant failed to consider material evidence before issuing the proposed Final Order as required under Section 309(g)(4)(C) of the Clean Water Act, 33 U.S.C. § 1319(g)(4)(C). Because the Petition fails to present any relevant and material evidence that was not adequately considered and responded to by Complainant, the Petition is **DENIED** without the need for a hearing. *See* 33 U.S.C. § 1319(g)(4)(C); 40 C.F.R. § 22.45(c)(4).

A. STATUTORY BACKGROUND

The objective of the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or "Act"), is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants[1] into navigable waters.[2] 33 U.S.C. § 1251(a). In furtherance of that objective, the Act prohibits the "discharge of any pollutant by any person"[3] *unless* done in compliance with a permit issued by EPA or an

[1] The Act defines the term "pollutant" as including "chemical wastes . . . and industrial . . . waste discharged into water." 33 U.S.C. § 1362(6).

[2] "Navigable waters" means "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The phrase "waters of the United States" has, in turn, been defined as including waters that are "currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"; "all interstate waters"; intrastate waters "the use, degradation or destruction of which could affect interstate or foreign commerce"; and tributaries of such waters. 40 C.F.R. § 230.3(s).

[3] "Discharge of a pollutant" means the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The terms "pollutant" and "navigable waters" have already been defined herein. The term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The term "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5).

authorized state pursuant to the National Pollutant Discharge Elimination System ("NPDES") program established under the Act. 33 U.S.C. §§ 1311(a), 1342(a) and (b); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1145 (9th Cir. 2000). In addition, the CWA provides that in order to carry out the Act's objectives, including the NPDES permit requirements, the owner or operator of any point source can be required to maintain records, make reports, or provide other reasonably required information. 33 U.S.C. § 1318(a).

As to non-compliance with its provisions, the CWA provides in pertinent part that:

> Whenever on the basis of any information available –
>
> (A) the Administrator finds that any person has violated section 301 [33 U.S.C. § 1311 (prohibiting pollutant discharges)], . . . [or] 308 [33 U.S.C. § 1318 (regarding records and reports)] . . . of this Act, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 U.S.C. § 1342] by the Administrator or by a State . . .
>
> * * *
>
> the Administrator . . . may . . . assess a . . . civil penalty under this subsection.

33 U.S.C. § 1319(g)(1)(A).

The CWA proscribes two classes of administrative civil penalties that can be levied against violators. 33 U.S.C. § 1319(g)(2). Class II penalties are imposed for more egregious conduct, and the procedural protections of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, requiring notice and opportunity for a hearing "on the record" before an Administrative Law Judge, apply to such cases. *See id.* For violations occurring after January 12, 2009, through December 6, 2013, the Act provides that the Class II penalties imposed "may not exceed" $16,000 for each day the violation continues, and the total Class II penalty cannot exceed $177,500. 40 C.F.R. § 19.4.[4] For violations occurring after December 6, 2013, through November 2, 2015, the Act provides that the Class II penalties imposed "may not exceed" $16,000 for each day the violation continues, and the total Class II penalty cannot exceed $187,500. *Id.*

In determining the appropriate amount of penalty to impose, the CWA requires EPA to consider the nature, circumstances, extent, and gravity of the violation; the violator's ability to pay, any prior history of such violations, degree of culpability, and any economic benefit or savings resulting from the violation; and "such other matters as justice may require." 33 U.S.C. § 1319(g)(3). However, as observed by the Environmental Appeals Board, "[t]he Act does not . . . 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phoenix Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002)); *see also Tull v. United States*, 481 U.S. 412, 426-27 (1987) (recognizing that the setting of

[4] The amounts stated here are those shown in Table 1, 40 C.F.R. § 19.4, reflecting the statutory penalty amounts adjusted pursuant to section 4 of 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).

penalties under the CWA is "highly discretionary").

In addition, to provide for the rights of "interested persons" to be informed of such administrative penalty actions, the Act mandates that EPA "shall provide public notice of and reasonable opportunity to comment on" a proposed order assessing a penalty prior to its issuance. 33 U.S.C. § 1319(g)(4)(A). Moreover, "[a]ny person who comments on a proposed assessment of a penalty" is entitled to receive notice of "any hearing," and at such hearing "shall have a reasonable opportunity to be heard and to present evidence." 33 U.S.C. § 1319(g)(4)(B). The CWA further provides as follows:

> If no hearing is held . . . before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the [EPA] Administrator . . . to set aside such order and to provide a hearing on the penalty. *If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator . . . shall immediately set aside such order and provide a hearing* . . . . If the Administrator . . . denies a hearing under this subparagraph, the Administrator . . . shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

33 U.S.C. § 1319(g)(4)(C) (emphasis added).

B. FACTUAL BACKGROUND

Respondent BP Products North America Inc. ("BP") owns and operates a petroleum refinery located at 2815 Indianapolis Boulevard, in Whiting, Indiana (the "Facility"),[5] which includes a waste water treatment plant ("WWTP").[6] Ex. 1 at 3, ¶ 17.[7] At the time relevant hereto, BP operated the Facility under an NPDES permit ("Permit") issued by the Indiana Department of Environmental Management ("IDEM").[8] *Id*. at 4, ¶ 19. The Permit authorized

[5] BP describes the Facility as "one of the largest refineries in the United States," which "can process up to approximately 420,000 barrels of crude oil each day." BP Whiting Business Unit, Environmental Statement for Year 2015, https://www.bp.com/content/dam/bp/pdf/sustainability/site-reports/Whiting%20Refinery%202014.pdf. The Facility "operates 24 hours a day, 365 days a year, and employs approximately 1,800 full-time employees, and over a thousand contractors." *Id.*

[6] The specific phrase "waste water treatment plant" does not appear to be defined under the Act; however, the more general term "treatment works" is defined as "any devices and systems used in the storage, treatment, recycling, and reclamation of . . . industrial wastes of a liquid nature to implement [the CWA requirements], . . . including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment," and "any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of . . . industrial waste, including waste in combined storm water and sanitary sewer systems." 33 U.S.C. § 1292(2)(A), (B).

[7] Exhibits 1-7 referenced herein are those attached to EPA's Request to Assign Petition Officer filed in June 2017.

[8] The State of Indiana has been authorized by EPA to operate its own NPDES permit program under the CWA since at least 1977, with EPA Region 5 maintaining oversight authority. *See* National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Indiana and the United States Environmental Protection Agency Region V (July 22, 1977), with amendments, https://www.epa.gov/sites/production/files/2013-09/documents/in-moa-npdes.pdf; *see also* State of Indiana Water Quality in Indiana, http://www.in.gov/idem/cleanwater/2429.htm (last visited Feb. 7, 2018).

BP to discharge effluent, such as total suspended solids, biochemical oxygen demand, oil and grease, and phosphorus, from the Facility into Lake Michigan (through outfalls 002 and 005), and into the Lake George Branch of the Indiana Harbor Ship Canal ("Lake George Canal") (through outfalls 003 and 004), subject to certain terms and conditions. *Id*. at 4, ¶¶ 19, 20, 22.

EPA conducted an inspection of the Facility from May 5 through May 9, 2014, during which it identified a number of areas of concern. Ex. 1 at 4, ¶ 24. First, based on a review of BP's discharge monitoring reports ("DMRs"), EPA determined that BP's effluent discharges exceeded its Permit limits during various periods between July 2010 through November 2011 as follows:

Monitoring Period	Outfall	Parameter	Permit Limit	Time Period limit	Reported DMR Value	Days of Violation
7/1/2010 through 7/31/2010	001[9]	Total Suspended Solids (TSS)	5694 lbs/day	Daily Maximum	7050 lbs/day	1
4/1/2011 through 4/30/2011	005	Biochemical Oxygen Demand (BOD)	8164 lbs/day	Daily Maximum	14116 lbs/day	1
4/1/2011 through 4/30/2011	005	Total Suspended Solids (TSS)	7723 lbs/day	Daily Maximum	8324 lbs/day – 66362 lbs/day	8
4/1/2011 through 4/30/2011	005	Total Suspended Solids (TSS)	4925 lbs/day	Monthly Average	14174 lbs/day	30
4/l/2011 through 4/30/2011	005	Oil and Grease	2600 lbs/day	Daily Maximum	3263 lbs/day	1
11/1/2011 through 11/30/2011	005	Phosphorus	1 mg/l	Daily Maximum	l.25mg/l	1

Id. at 5, ¶ 25.

Second, during each day of the inspection, EPA inspectors observed "oil sheen" throughout the "number six separator" at the Facility's WWTP, including sheen in the final cell prior to discharge to Lake Michigan. Ex. 1 at 5-6, ¶¶ 26, 28. The number six separator is a "multiple cell retention basin with concrete underflow dams that separate each of the cells." *Id*. at 5, ¶ 26. After use in the "once-through cooling water system" operated by BP at the Facility, "once-through cooling water" is sent to the number six separator to remove any oil present prior to discharging to Lake Michigan through outfall 002, as that outfall is subject to, among other things, an oil and grease daily maximum permit limit of five milligrams per liter (mg/l).[10] *Id*. at

[9] Outfall 001 existed under BP's previous NPDES permit; effluent that previously flowed through outfall 001 flows through outfall 005 under the Permit in effect at the times relevant hereto. Ex. 1 at 4, ¶ 25 n.1.

[10] The number six separator works by:

> allowing time for oil droplets to float to the surface based on the difference in density between the water and oil. Once at the surface, oil is manually captured and removed through the use of, among other things, booms and/or vacuum trucks. The flow through the [number] six separator ranges

5, ¶¶ 26, 27. The inspectors also observed sediment accumulation in the number six separator that was approximately two feet below the water's surface in several locations. *Id*. at 6, ¶ 28. Sediment accumulation generally affects the number six separator's ability to work effectively by reducing its capacity and residence time. *Id*. at 6, ¶ 29. Based upon these observations, EPA concluded that BP failed to properly maintain and efficiently operate its number six separator in violation of the Permit, which required it to "maintain in good working order and efficiently operate all facilities and systems for the collection and treatment which are installed or used . . . and which are necessary for achieving compliance with the terms and conditions of this permit." *Id*. at 6, ¶ 30 (citing Permit, Part II, Section B, Number 1, Management Requirements, Proper Operation and Maintenance).

Third, "EPA inspectors observed a discharge from the Facility to Indianapolis Boulevard and to the City of East Chicago's storm sewer," which, in turn, discharges to the Lake George Canal. Ex. 1 at 6, ¶ 31. According to the inspectors, "the discharge was orange/brown in color and had an oily sheen, and the area smelled strongly of oil and hydrocarbons."[11] *Id.* Based upon these observations, EPA concluded that BP's discharge of pollutants to the storm sewer was not authorized under the Permit, and therefore violated the Section 301(a) of the CWA, 33 U.S.C. § 1311(a). *Id*.

Fourth, EPA inspectors observed at the Facility "large piles of excavated dirt and other materials that [BP] stored in a manner that allowed contact with storm water and a subsequent discharge through erosional pathways to the Lake George Canal." Ex. 1 at 7, ¶ 33. Specifically, the inspectors found that the storm water controls surrounding the piles included dilapidated silt fencing that allowed storm water to bypass the controls. *Id.* Based upon these observations, EPA concluded that BP's discharge of pollutants from the dirt piles to the Lake George Canal was not authorized under the Permit or its Industrial Storm Water Pollution Prevention Plan ("SWPPP"),[12] and therefore violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a). *Id*. at 7, ¶¶ 32, 33.

> from 55 to 85 million gallons per day and the residence time of water in the separator varies from 50 to 90 minutes.
>
> Ex. 1 at 5, ¶ 26.

[11] BP opined to the inspectors that the discharge was "emanating groundwater that was near a nonoperational hydraulic groundwater gradient control system." Ex. 1 at 6, ¶ 31.

[12] The term "storm water" is defined by the regulations promulgated by the State of Indiana to implement the NPDES program as "storm water runoff, snow melt runoff, and surface water runoff and drainage." 327 IND. ADMIN. CODE 5-1.5-64.2 (referring to 40 C.F.R. § 122.26(b)(13)); *see also* 327 IND. ADMIN. CODE 15-1-2 ("'Storm water' means water resulting from rain, melting or melted snow, hail, or sleet."). In turn, an SWPPP is "a written document that addresses storm water run-off pollution prevention for a specific industrial facility." 327 IND. ADMIN. CODE 15-6-4. BP's SWPPP Section 5.2.2: Stock and Spoil Piles, in effect at the time of the inspection, stated that "on-going working piles require the installation of sediment barrier measures along the down-slope side of all soil stockpiles/borrow areas and that unvegetated areas likely to be left inactive for fifteen (15) days or more are temporarily or permanently stabilized with measures appropriate for the season to minimize erosion potential." Ex. 1 at 7, ¶ 32. Additionally, BP's SWPPP Section 5.4.2: Structural Best Management Practices stated that "piles are covered and/or surrounded with an impervious structure such as silt fencing on the down gradient side of the pile." *Id.*

In May 2016, almost exactly two years after the inspection, BP and Complainant executed a "Consent Agreement and Final Order" ("CAFO").[13] Ex. 1. The CAFO sought to simultaneously commence and conclude an administrative penalty action against BP under Section 309(g) of the CWA for the alleged violations found during the aforementioned inspection. *See* Ex. 1 at 1, ¶ 1. Under the terms of the CAFO, BP admitted the jurisdictional allegations set forth in the CAFO but "neither admit[ted] nor denie[d] the factual allegations and alleged violations." Ex. 1 at 2, ¶ 7. Nevertheless, BP waived its right to a hearing or to otherwise contest the CAFO, and agreed to pay a civil penalty in the amount of $74,212. Ex. 1 at 2, 7, ¶¶ 8, 34. On May 31, 2016, BP and Complainant also entered into an Administrative Consent Order that incorporated a Compliance Plan setting forth the measures BP had already taken as well as those it agreed it would take in the future in response to the alleged violations, including the repair or installation of certain equipment and control measures, undertaking of additional inspections and monitoring, and sediment and water removal. Ex. 8.[14]

Consistent with the Act's requirements, on or about June 1, 2016, EPA provided public notice of its intent to file the proposed CAFO and accept public comments thereon.[15] *See* Ex. 2. Petitioners, among others, timely filed comments on the proposed CAFO ("Comments"). Ex. 3. Complainant subsequently prepared a Response to Comments Regarding Proposed CAFO ("Response to Comments"), which indicated that EPA would not be altering the proposed CAFO. Ex. 4. The Response to Comments was mailed to Petitioners, together with a copy of the proposed CAFO, on or about January 13, 2017, and each Petitioner received the materials by January 30, 2017. Ex. 5-6. On or about February 24, 2017, Petitioners timely filed their Petition seeking to set aside the proposed CAFO and have a public hearing held thereon. Ex. 7.

A Request to Assign Petition Officer ("Request") was issued by EPA Region 5's Acting Regional Administrator on May 17, 2017, and served on Petitioners on May 30, 2017. In the Request, the Acting Regional Administrator stated that after considering the issues raised in Petitioners' Petition, Complainant "decided not to withdraw the CAFO." Accordingly, the Acting Regional Administrator requested assignment of an Administrative Law Judge to consider and rule on the Petition pursuant to Section 22.45(c)(4)(iii) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules," "Rules of Practice," or "Rules"), 40 C.F.R. § 22.45(c)(4)(iii). By Order dated June 16, 2017, the undersigned was designated to preside over this matter, and the Agency was directed to file a response to the Petition. Complainant filed its Response to Petition to Set Aside Consent Agreement and Proposed Final Order ("Response") on July 13, 2017.

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[13] The CAFO was executed for BP by Donald Porter, Whiting Refinery Manager, on May 12, 2016, and for EPA by Tinka G. Hyde, Director for EPA Region 5's Water Division, on May 31, 2016. Ex. 1 at 11. While titled jointly, the Final Order is actually a separate document, drafted to be signed solely by EPA Region 5's Acting Regional Administrator. *Id.* at 12. It is the execution of the Final Order and its subsequent filing with the Regional Hearing Clerk at EPA Region 5 that will effectuate the parties' Consent Agreement and conclude the proceeding; to this date, the Final Order in this matter remains unsigned. *Id.* (citing 40 C.F.R. §§ 22.18, 22.31).

[14] Exhibit 8 was filed in this proceeding by EPA on July 13, 2017.

[15] In its Response to the Petition, EPA represents that it provided public notice of and opportunity to comment on the CAFO from June 3, 2016, through July 12, 2016. Response at 3.

C. STANDARD OF REVIEW

As set forth above, the CWA provides as follows:

> If no hearing is held . . . before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the [EPA] Administrator . . . to set aside such order and to provide a hearing on the penalty. *If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator . . . shall immediately set aside such order and provide a hearing* . . . . If the Administrator . . . denies a hearing under this subparagraph, the Administrator . . . shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

33 U.S.C. § 1319(g)(4)(C) (emphasis added).

The Consolidated Rules also speak to this issue. The Consolidated Rules are a set of procedural rules issued by EPA that establish the process for adjudicating such administrative adjudicatory proceedings as those seeking Class II penalties under 33 U.S.C. § 1319(g), consistent with the APA and the due process rights established under the U.S. Constitution. *See* 40 C.F.R. § 22.1(A)(6).[16] The Rules provide that "where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order." 40 C.F.R. § 22.13(b); *see also* 40 C.F.R. § 22.18(b)(2), (b)(3) (describing the terms that a consent agreement must include and the need for an executed final order ratifying the parties' consent agreement in order to dispose of a proceeding).

With regard to petitions to set aside a CAFO under the CWA, the Consolidated Rules provide, in relevant part, as follows:

> The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:
>
> (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
>
> (B) Whether complainant adequately considered and responded to the petition; and
>
> (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

40 C.F.R. § 22.45(c)(4)(v).

[16] The CAFO's reference to Section 22.1(a)(2) of the Consolidated Rules, which concerns the Clean Air Act, appears to be in error. Ex. 1 at 1, ¶ 1.

The Consolidated Rules proceed to identify the proper course of action to take depending upon the Petition Officer's determination as to the appropriateness of a hearing for resolution of the proceeding. In particular, the Consolidated Rules provide that "[u]pon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing." 40 C.F.R. § 22.45(c)(4)(vi). Conversely:

> Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:
>
> (A) File the order with the Regional Hearing Clerk;
>
> (B) Serve copies of the order on the parties and the commenter; and
>
> (C) Provide public notice of the order.

40 C.F.R. § 22.45(c)(4)(vii).

While the statute requires a proposed CAFO to be set aside "[i]f the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order," 33 U.S.C. § 1319(g)(4)(C), and the Consolidated Rules require findings as to the "extent to which the petition states an issue relevant and material to the issuance of the proposed final order," 40 C.F.R. § 22.45(c)(4)(v)(A), neither the CWA nor the Rules define the terms "relevant" and "material." Consequently, it is appropriate to look to the Federal Rules of Evidence and federal court practice for guidance. *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 657 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges . . . to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance."); *City of Salisbury*, 10 E.A.D. 263, 285 n.31 (EAB 2002) ("[T]he Agency's trial level administrative law judges may appropriately look to the federal courts for guidance.").

Under the Federal Rules of Evidence, information is "relevant" when "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.[17] Similarly, evidence is deemed "material" when, if presented, it reasonably has the potential to cause a different outcome. *See United States v. Bagley*, 473 U.S. 667, 682 (1981). The context in which evidence is offered will determine its relevance. *99 Cents Only Stores*, 2008 EPA ALJ LEXIS 46, at *7 (Order on Respondent's Motion in Limine).

[17] This two-part definition of the term "relevant" appears to subsume any independent definition of the term "material," and the latter term does not appear in the Federal Rules. *United States v. Carriger*, 592 F.2d 312, 315 (6th Cir. 1979).

D. ISSUES RAISED IN THE COMMENTS AND PETITION[18]

In their Comments on the proposed CAFO, Petitioners offered three "recommendations" for changes: (1) that the civil penalty be increased to $619,500; (2) that "a Grand Calumet River Area of Concern (AOC) violation penalty of $5,000,000" be imposed; and (3) that the proposed CAFO include "a Supplemental Environmental Project (SEP) Fund." Ex. 3 at 2. The Petition reiterates these three recommendations, albeit consolidating the first and second into one, and adds an additional recommendation, that an independent advisory committee and environmental monitoring program for BP's wastewater treatment plant be created. Ex. 7 at 2-3. The Comments and Petition could also be construed to argue – though it is included in introductory background sections, and not presented as a separate claim – that EPA failed to properly consider BP's history of violations. *Id*. at 1-2; Ex. 3 at 1-2. Each of these issues is addressed below.

Issue 1: That the Civil Penalty Should be Increased

In their Comments, Petitioners argued that the "[t]otal assessed penalties [for the alleged violations] should be $619,500, not the proposed $74,212." Ex. 3 at 3. They enumerated their calculations for such a penalty, which would involve first assessing the maximum daily penalty amount of $16,000 or the "monthly maximum" penalty amount of $177,500 for the 42 alleged violations relating to the Discharge Monitoring Reports, for a total of $369,500. *Id.* To this amount Petitioners would then add $125,000 for each of the SWPPP violations from the two locations at the Facility, for an additional $250,000. *Id*. In support of such penalty amounts, Petitioners proclaimed in their Comments that "[a]ll discharges are extremely hazardous for the Lake George Canal and subsequent waterways, which eventually is deposited in Indiana Harbor of Lake Michigan," and suggested that Lake Michigan is the source of their drinking water.[19] *Id*. at 1, 3. They also argued that "[t]he fact that the respondent 'cooperated' only applies to the visit by the EPA officials, not to the correct implementation of the permit limitations." *Id.* at 3. Finally, they state their belief that "the CAFO penalty is not an adequate amount to pressure BP to improve operations to prevent future oil spills." *Id.* at 5.

In addition to arguing in favor of a penalty in the amount of $619,500 for the alleged violations, Petitioners urged in their Comments that an additional penalty of five million dollars be imposed against BP on account of the violations occurring in the "Grand Calumet River Area of Concern (AOC)," of which the "Lake George Branch and Indiana Harbor and Ship Canal" are a part. Ex. 3 at 3. Petitioners explained that EPA "identified tributaries and harbors in the Great Lakes area as having pollution problems as Superfund sites and are known as Areas of Concern, or AOCs," and that the Grand Calumet River AOC was designated as such under the 1987 Great Lakes Water Quality Agreement. *Id.* They further asserted that remediation efforts and

[18] The Petition describes the arguments set forth therein as "additions" to the Comments that Petitioners previously submitted to EPA in response to the public notice of EPA's intent to file the proposed CAFO. Ex. 7 at 4. Petitioners submitted their Comments from various email addresses to EPA on July 12, 2016. Ex. 3. As the text of the emailed Comments is identical, page citations herein to Petitioners' Comments are to the specific email from Debra Michaud (debramichaud73@gmail.com) to the Regional Hearing Clerk for EPA Region 5, LaDawn Whitehead (whitehead.ladawn@epa.gov), dated Tuesday, July 12, 2016 at 10:51 AM. *See* Ex. 3.

[19] Petitioners also state that "[t]he 'NWI Munster Times' article of March 20, 2015 reported on hazardous discharges that affect wildlife and people," but provide no citation to it. Ex. 3 at 3. No such article could be located by this Tribunal at the website of The Northwest Indiana Times, which is accessible at http://www.nwitimes.com/.

restoration projects for the AOC are funded by EPA Region 5 through such measures as the Great Lakes Restoration Initiative and that one such restoration project is ongoing in the Lake George Canal, with BP, among others, acting as a local partner for the project. *Id.* at 3-4. Petitioners proceeded to question how there could be "a clean up and restoration of the AOC when BP, a partner of the USEPA, continues to violate the Clean Water Act in its operations." *Id.* at 4. Petitioners then concluded that an additional penalty of five million dollars is warranted by BP's "grievous neglect." *Id.*

The Petition's argument in support of this claim, in full, is as follows:

> You [EPA] have not responded why a violation that occurred within the Grand Calumet River Area of Concern is not relevant. BP discharged pollutants from the oil refinery to Lake Michigan and the Lake George Branch of the Indiana Harbor Ship Canal where restoration projects are occurring. EPA should calculate the very highest monetary value on the discharges into cleanup and restoration superfund areas. Otherwise, like in West Calumet, it can only be viewed as mock cleanups and restoration if BP discharges pollutants that will again damage the remediation process. A public hearing is necessary to understand the proposed consent decree agreement CAFO.

Ex. 7 at 2.

In its Response to the Petition, Complainant contends that it "did consider and respond to this issue [related to the penalty and Grand Calumet River AOC] in the response to comments." Response at 8 (citing Ex. 4 at 3). Complainant then proceeds to reiterate and expand on that earlier response. *See* Response at 12 ("Complainant's responses [in its Response to the Petition] are taken largely from Complainant's response to comments."). First, noting that it calculated the penalty set forth in the CAFO based upon the factors identified in EPA's policy for determining appropriate penalties in settlement of civil judicial and administrative actions ("Penalty Policy"),[20] Complainant maintains that the penalty is consistent with the Penalty Policy and appropriate for the alleged violations. *Id.* at 6, 8-9, 14. Furthermore, Complainant asserts, it is "satisfied" that the penalty "is adequate to deter future violations and is further supported by conserving the resources required by prolonged litigation and avoiding uncertainty regarding the outcome at an administrative hearing or trial." *Id.* at 14. Complainant also points to the compliance actions that BP was required to undertake pursuant to the Administrative Consent Order. *Id.*

With regard to Petitioners' contention concerning the Grand Calumet River AOC, Complainant denies that such a consideration warrants an additional penalty, arguing that

[20] Complainant cites the applicable policy as the Interim Clean Water Act Settlement Penalty Policy, dated March 1, 1995, and accessible at https://www.epa.gov/sites/production/files/documents/cwapol.pdf. Response at 6, n.9, 13, n.14. While Complainant describes the methodology and goals of the Penalty Policy, Response at 8-9, 13-14, it does not provide a detailed explanation of how it applied the Penalty Policy to the facts of this case, such as its assessment of the economic benefit, if any, that BP received from the alleged violations; the gravity of the alleged violations; or litigation considerations. As Complainant explains in its Response, "[d]ue to the confidential nature of settlement negotiations, there are legal constraints on the information that EPA can share concerning the details of penalty calculations and settlement negotiations." Response at 13.

"Petitioners do not point to any information in the penalty policy that directs EPA to assess maximum penalties for alleged discharges that may impact Areas of Concern, or provide any information that indicates Respondent's alleged discharges impacted any ongoing cleanup or remediation work." Response at 8, 9. Complainant also argues that "Petitioners do not identify any information to support their allegation that Respondent has polluted the Lake George Canal, or explain how it is relevant to the allegations in the CAFO." Response at 7. Complainant goes on, somewhat confusingly, to state that "[t]he CAFO does allege that Respondent unlawfully discharged pollutants to the Lake George Canal during May 5, 2014 through May 9, 2014 from an area near a groundwater control system and piles of excavated dirt," and that Complainant "considered these alleged discharges in the assessment of the proposed penalty and believes that the penalty is appropriate." *Id*. Complainant further notes that "storm water controls and additional inspections to abate those discharges" have been implemented. *Id*.

Complainant is correct that it did address the penalty calculation and Grand Calumet River AOC arguments in its Response to Comments. As to the penalty calculation, Complainant informed the commenters that in negotiating the settlement of cases such as the present one, the penalty is calculated and negotiated in accordance with EPA's Interim Clean Water Act Settlement Penalty Policy; that "penalties imposed in CAFOs vary widely for reasons unique to each situation"; and that "due to the confidential nature of settlement negotiations," it was legally constrained to share the details of its penalty calculation and settlement negotiations. Ex. 4 at 2. However, Complainant assured the commenters that the penalty set forth in the proposed CAFO was consistent with the Penalty Policy, "adequate to deter future violations," and "supported by conserving the resources required by prolonged litigation and avoiding uncertainty regarding the outcome at an administrative hearing or trial." *Id*. at 3.

As to the commenters' arguments pertaining to the Grand Calumet River AOC, Complainant also responded in its Response to Comments, albeit in a rather more cursory fashion, stating:

> [T]he fact that these violations may have occurred within the Grand Calumet Area of Concern does not warrant a separate, additional penalty. The U.S.-Canada Great Lakes Water Quality Agreement defines "Area of Concerns" (AOCs) as "geographic areas designated by the Parties where significant impairment of beneficial uses has occurred as a result of human activities at the local level." Designating an area as an AOC is a process by which EPA and other federal and state agencies work to restore certain areas within the Great Lakes Basin. The penalty policy requires EPA to consider many factors in assessing a penalty, including the impact on human health and environmental harm. As discussed above, EPA believes the penalty assessed is appropriate for the alleged violations and consistent with the penalty policy.

Ex. 4 at 3.[21]

[21] Complainant references EPA's webpage concerning the Grand Calumet River AOC, accessible at https://www.epa.gov/grand-calumet-river-aoc. Response to Comments at 3 n.3. The webpage notes that "[a]ll 14 beneficial uses [of the Grand Calumet River] were determined to be impaired" on account of contaminated sediments and industrial waste site runoff, among other causes. *About the Grand Calumet River AOC*, U.S. EPA, https://www.epa.gov/grand-calumet-river-aoc/about-grand-calumet-river-aoc (last visited Feb. 8, 2018).

It would certainly have been preferable to see a more detailed explanation of Complainant's penalty calculations, and in particular an account of why the matter of the AOC designation is not a proper basis for an increased penalty, if only under the statutory penalty criterion of "other factors as justice may require." Nevertheless, while not ideal, it is indisputable that Complainant did, in fact, consider and respond to the issues regarding the penalty amount raised in the Comments and the Petition. And as the Petitioners provide no evidence in support of their assertions that the violations and designation of the area as an AOC warrant a higher penalty, or any rebuttal of Complainant's contention that it properly followed the Penalty Policy, which is itself based on the required statutory factors, it cannot be said that the Petition has met its burden of demonstrating that this issue constitutes material and relevant evidence that Complainant failed to consider in agreeing to the proposed CAFO.

The Petition faces the problem of a lack of recognizable claims regarding the alleged discharges to the Lake George Canal specifically. The CAFO describes allegations of two unauthorized discharges into the canal, and EPA issued an Administrative Consent Order requiring BP to, among other compliance actions, implement actions to remedy the causes of those unauthorized discharges and prevent future violations. *See* Ex. 8 at 4. There can thus be no argument that Complainant failed to consider these discharges. Further, the Petition provides no evidence or argument showing that these discharges had an effect on ongoing rehabilitation efforts or that any such impact would warrant a greater penalty. The Petition also provides no evidence or argument that Complainant's implementation of its Penalty Policy with regard to these alleged discharges and their impact on the aquatic environment, if any, was improper. Therefore, the Petition having presented no material or relevant evidence that Complainant failed to consider, this claim must be **DENIED**.

Issue 2: That the Proposed CAFO Should Include a Supplemental Environmental Project Fund

Under this heading in their Comments, Petitioners urged that a Supplemental Environmental Project ("SEP") fund be incorporated into the CAFO and that local residents be included in the SEP projects. Ex. 3 at 4-5. In association with these requests, they made two claims regarding the way funding for SEPs is distributed. Specifically, they asserted that EPA and the Department of Justice dispersed SEP funds to "those that do not reside in environmental justice areas"[22] and that the National Fish and Wildlife Federation Foundation did not include community input in connection with three Great Lakes habitat restoration projects. Ex. 3 at 4. Similarly, in their Petition, Petitioners allege that the U.S. Treasury distributes SEP monies to an Indiana state committee to decide on how to use them but it is unclear how the committee operates; that the committee lacks a representative from Lake County and organizations within Lake County are disadvantaged; that private foundations are involved in the distribution of these monies but are not required to disclose their financial operations; that these foundations are

[22] To support this assertion, Petitioners referred to a "DJ.Ref. No. 90-5-2-1-05860 – May 8, 2013 letter from Carolyn A. Marsh to US DOJ, United States v. Dominion Energy Inc., Dominion Energy Brayton Point LLC, and Kincaid Generation LLC, Civ. No. 13-cv-3086, C.D. Ill." Ex. 3 at 4. This Tribunal was unable to locate a copy of any such letter. Environmental justice areas are those that bear a disproportionate share of adverse human health and environmental impacts, often where the nation's minority, low-income, tribal, or indigenous populations reside. *See Factsheet on the EPA's Office of Environmental Justice*, https://www.epa.gov/sites/production/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf.

influenced or controlled by BP, with a "silent kickback scheme at work"; and that if "superfund site people do not benefit from settlements, it is discrimination against us." Ex. 7 at 3.

In its Response, Complainant addresses the absence of a SEP in the parties' settlement agreement by stating that "SEPs are projects that go beyond what could legally be required in order for the respondent to return to compliance" and that although "EPA encourages the use of SEPs that are consistent with the 2015 SEP Policy, EPA cannot require a respondent to perform a SEP, or dictate any particular SEP."[23] Response at 10; *see also* Ex. 4 at 4. It goes on to argue that "[c]ivil penalties paid to EPA must be deposited in the U.S. Treasury pursuant to the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b)," that "federal law directs where civil penalties are to be applied," and that "Complainant has no control over how penalties submitted to the U.S. Treasury are directed." Response at 10; *see also* Ex. 4 at 3. Complainant concludes that Petitioners' concerns about the Indiana state committee and the alleged kickback scheme simply are not relevant and material to the CAFO. Response at 10.

Petitioners' desire for BP to perform a SEP benefitting the local community and for local residents to be included in any associated decision-making process is certainly understandable. However, their requests reflect a misconception of how SEPs come to be developed and incorporated into a settlement agreement and how civil penalties are collected. As Complainant informed commenters in its Response to Comments and reiterated in its Response to the Petition, EPA lacks the authority to demand a SEP or control the distribution of civil penalty funds. It clearly cannot be argued that the Petition should succeed in setting aside the agreed upon settlement because Complainant failed to impose an obligation that it had no authority under the CWA to unilaterally impose or to direct the distribution of the assessed civil penalty in a manner inconsistent with federal law. Because of Complainant's lack of authority in this regard, Petitioners' requests necessarily are immaterial to the issuance of the proposed CAFO in this matter.

Even if Complainant possessed the authority to fulfill Petitioners' requests to include a SEP as an element of the parties' settlement agreement, federal courts have often held that decisions to settle, and the terms thereof, are areas in which agencies enjoy broad discretion. *See, e.g., Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030-31; (D.C. Cir. 2007) ("Although the Supreme Court's decision in *Chaney* applies directly to agency decisions not to enforce a statute, we have also applied it to an agency's decision to settle an enforcement action.") (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). Thus, Complainant would have discretion with respect to a SEP, as long as the terms were consistent with applicable law and policy. As for the other concerns raised by the Petition regarding Petitioners' desire for a SEP, such as the composition of the state committee charged with deciding how to use penalty funds, they too are outside of Complainant's control and the scope of this matter.

For the foregoing reasons, the undersigned finds that this issue does not present any new fact or argument that is relevant and material to the proposed CAFO, and that this claim must therefore be **DENIED**.

[23] EPA's policies concerning SEPS may be found at https://www.epa.gov/enforcement/supplemental-environmental-projects-seps.

Issue 3: That an Independent Advisory Committee and Environmental Monitoring Program for Respondent's Wastewater Treatment Plant Should be Created

The heading for this section of the Petition states that "[a]n independent advisory committee and environmental monitoring program for Respondent's wastewater treatment plant should be created." Ex. 7 at 3. Yet the remainder of the section provides no further evidence or argument in support of the claim. Rather, Petitioners appear to respond to the discussion in Complainant's Response to Comments of the community outreach activities in which BP engages and the webpage on which BP describes those activities. *See* Ex. 4 at 6. Specifically, Petitioners protest that BP's website uses a brief "flash notice" to indicate that it is attaching a cookie[24] to the computer of a visitor to the website, making "one afraid" to use it. Ex. 7 at 3. Petitioners then question BP's purported community outreach, asserting that BP ceased publishing quarterly operations and accident reports for the Facility and holding quarterly "Citizens Advisory Committee" meetings – which Petitioners state were required under a "consent decree remediation case" involving the previous owner of the Facility – after determining in 2014 that such measures were unnecessary. *Id*. at 3-4. Petitioners do not provide any additional information about this consent decree or explain how it relates to the proposed CAFO.

In its Response, Complainant argues that Petitioner's statements concerning this topic "do not provide any relevant and material issues related to the issuance of the CAFO." Response at 11. It also maintains:

> [These statements] are outside the scope of EPA's authority under this class II administrative penalty proceeding. Complainant brought this enforcement action under Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A), which allows Complainant to assess a civil administrative penalty against, among other things, any person who has violated Section 301 of the CWA, 33 U.S.C. § 1311, or has violated any permit condition or limitation implementing the CWA in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342. Under 40 C.F.R. § 22.18(c), payment of a penalty proposed in a CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO. EPA does not have authority under Section 309(g) of the CWA (Administrative Penalties) or the Rules of Practice to establish advisory committees and independent monitoring programs, or fund such committees or programs. As discussed above, civil penalties paid to EPA must be deposited in the U.S. Treasury pursuant to the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b). Similarly, EPA cannot require Respondent to conduct outreach activities, and has no control over Respondent's website.

[24] In the computing sense, the term "cookie" has been defined as "a small file or part of a file stored on the World Wide Web user's computer, created and subsequently read by a website server, and containing personal information (such as a user identification code, customized preferences, or a record of pages visited)," MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cookie, or "[a] packet of data sent by an Internet server to a browser, which is returned by the browser each time it subsequently accesses the same server, used to identify the user or track their access to the server," OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries/definition /cookie.

Response at 11-12.

The reasoning behind denying Petitioners' claim with regard to a SEP similarly applies in this instance. As Complainant argues, it lacks the legal authority to pursue the course of action that Petitioners request. The Petition provides no argument in opposition to this claim. Moreover, even if Complainant possessed such authority, as discussed above, it enjoys broad discretion in negotiating the terms of a settlement. There being no material and relevant issue here that has not been considered by Complainant, this claim is **DENIED**.

Issue 4: That BP has a History of Violations

While it is not presented as a specific claim in either the Comments or the Petition, both documents refer to BP having a history of violations. Specifically, the Comments referred to the BP Gulf of Mexico Deepwater Horizon spill in April 2010, as well as a March 24, 2014 BP oil spill from the Facility into Lake Michigan. Ex. 3 at 1. With regard to the latter incident, the Comments noted that the U.S. Coast Guard fined BP only $2,000, rather than the maximum penalty of $40,000. *Id.* at 2. According to Petitioners, such a low penalty is consistent with the pattern of nominal, if any, fines imposed against BP for years of violations at the Facility.[25] *Id.* The Petition more generally proclaims that "[t]here are too many accidents at BP for the public to tolerate the cavalier attitude by government regulators assigned to BP." Ex. 7 at 1. It does not specify what these incidents may be, other than to cite what appears to be a newspaper article about a purported incident in January 2014,[26] which the Petition describes as "a near-miss that could have caused an explosion and fatalities" and a reflection of BP's poor management of critical safety information. *Id.* at 1-2.

In its Response, Complainant counters that while the report of the purported incident in January 2014 is "troubling," it "is not relevant and material to Respondent's effluent permit limit exceedances, which occurred in 2010 and 2011, and Respondent's inadequate operation and maintenance of the oil/water separator and failure to implement storm water controls, which EPA identified during the May 2014 inspection of the refinery." Response at 6-7. Complainant also stated in its Response to Comments:

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[25] In support of this assertion, Petitioners quote an article, published by the Better Government Association at http://www.bettergov.org/bad_communication_over_bp_spill/, as follows:

> The Better Government Association's Brett Chase wrote, ". . . the company paid no fines over the past dozen years for multiple violations of water pollution permits. A review of government inspection reports by the Better Government Association found that despite more than a dozen violations of water pollution regulations since 2002, BP wasn't fined once by its frontline regulator, the Indiana Department of Environmental Management."

Ex. 3 at 2 (citing http://www.bettergov.org/bad_communication_over_bp_spill/). However, the quoted language does not appear in the article cited by Petitioners. Substantively similar language does appear in an article entitled "Oil and Water," which is accessible on the website for the Better Government Association at https://www.bettergov.org/news/oil-and-water.

[26] Complainant states in its Response to the Petition that it located the article referenced by Petitioners and that it is accessible at http://www.nwitimes.com/business/near-miss-at-bp-whiting-refinery-in-was-potentially-deadly/article_2406bd02-9738-59f4-bb7d-40039bc666b7.html. Response at 6, n.8.

> Some commenters provided a "track record" or list of what appears to be alleged environmental and safety issues relating to Respondent's operations from 1976 through 2015. This list covers a wide range of issues, including various environmental and other laws and enforcement actions at facilities operated by BP across the country. None of the issues appear to relate to the allegations described in the Proposed CAFO. Additionally, many of the issues describe enforcement actions that have been resolved through settlements and are well outside the applicable five year statute of limitations. *See* 28 U.S.C. § 2462.

Ex. 4 at 2.

A violator's history of prior violations is a statutory penalty factor to be considered under 33 U.S.C. § 1319(g)(3). But the Petition presents no specific claims of violations that are related to those alleged in this action, and includes no argument supporting the notion that any prior, unspecified infraction, had it been considered, should have led to a penalty different than that set forth in the proposed CAFO. The fact that Complainant addressed these claims in its earlier Response to Comments also suggests that, to the extent any prior violations would be relevant to this action, Complainant adequately considered them. Given the foregoing considerations, Petitioners' claim that Complainant failed to properly consider BP's history of prior violations, to the extent that such a claim was raised, is hereby **DENIED**.

E. REQUEST FOR A HEARING

In their Comments, Petitioners requested a "public meeting," before continuing as follows:

> [W]e believe the CAFO penalty is not an adequate amount to pressure BP to improve operations to prevent future oil spills. The revelations read in the media that there is no Lake Michigan or Great Lakes coordinated first responder oil spill clean-up plan necessitates that a public hearing is in the public's interest to determine the CAFO. As commenters, we petition that the consent agreement and proposed final order be set aside on the basis that material evidence should be considered in a public hearing.

Ex. 3 at 5. Similarly, Petitioners request in their Petition that a public hearing be held:

> In view of the recent legal battles regarding the East Chicago, Indiana, West Calumet water and housing crisis, we feel a public hearing is necessary to understand the chemical, air and water violations of the proposed CAFO that we maintain involves the broader Northwest Indiana and Northeast Illinois communities.
>
> The USEPA and Justice Department position is that citizens did not provide feedback offered during a public comment period on the East Chicago USS Lead

> Superfund site and missed their chance to weigh in on the environmental cleanup of their neighborhood and cannot legally do so now while the work is on-going.[27]
>
> * * *
>
> Since the USEPA and Justice Department can deny us our legal rights to be involved in a consent decree cleanup and restoration plans because of the lack of feedback during a comment period, then we must insist that a public hearing be held on the proposed BP & USEPA consent decree agreement final order. If the public is not informed of the meaning of this consent decree agreement through a public hearing, the consequences can be catastrophic against the public.

Ex. 7 at 1-2. Petitioners proceed to reiterate the need for a public hearing "to understand the proposed consent decree agreement CAFO" throughout the remainder of their Petition. *See* Ex. 7 at 2-4.

Complainant counters in its Response that while Petitioners request a public hearing to understand the proposed CAFO, Section 309(g)(2)(B) of the CWA and the Rules of Practice "provide for a hearing on the merits of the CAFO," the purpose of which would be to adjudicate whether Complainant has sufficiently proven that BP committed the violations as alleged in the proposed CAFO and that the proposed penalty is appropriate. Response at 7. Complainant continues that "Petitioners have not identified any document or witnesses to be introduced or description of information to be presented that are relevant and material to the allegations in the CAFO." *Id.* at 16. Referring generally to the comments submitted in response to the public notice of its intent to file the proposed CAFO, Complainant concludes that "the commenters have not presented any relevant material information that Complainant has not already considered relating to the CAFO." *Id*. at 15.

As indicated above, the Consolidated Rules governing this proceeding provide that:

> The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:
>
> (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
>
> (B) Whether complainant adequately considered and responded to the petition; and
>
> (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

[27] To support this assertion, Petitioners refer to what appears to be a newspaper article by Sarah Reese in the Northwest Indiana Times entitled "Govt: E.C. residents missed day in court." This Tribunal located an article seeming to match that cited by Petitioners, which is accessible at http://www.nwitimes.com/news/local/lake/government-superfund-residents-shouldn-t-get-say-in-court/article_0f4d2619-08bf-59cc-bf79-7a4c9b6d677d.html.

40 C.F.R. § 22.45(c)(4)(v).

Upon consideration, the undersigned finds that resolution of this proceeding by the parties is appropriate without a hearing. First, it appears that Petitioners seek a public forum, at least in part, for the parties to explain the meaning of the proposed CAFO to the public. As noted by Complainant, however, the applicable law does not provide for a meeting of that nature. Rather, it provides for a hearing at which evidence is presented for the purpose of determining whether Complainant has met its burden of proving that BP committed the alleged violations and that the proposed penalty is appropriate based on applicable law and policy. Petitioners have not specifically identified any testimonial or documentary evidence they would present at any such hearing. Further, neither the Comments nor the Petition offers any relevant and material evidence or arguments that have not already been adequately addressed by Complainant. Petitioners do not appear to contest BP's liability, and most of their arguments regarding penalty do not involve any disputed facts that might be adjudicated at a hearing. For the foregoing reasons, resolution of this proceeding without a hearing is deemed to be appropriate.

F. FINDINGS

For the reasons stated above, the undersigned finds as follows:

1. The Petition fails to state an issue that is relevant and material to the issuance of the proposed final order.

2. Complainant adequately considered and responded to the issues raised in the Petition.

3. Resolution of this proceeding without a hearing is appropriate.

Given this Tribunal's finding that a resolution of this proceeding without a hearing is appropriate, EPA Region 5's Regional Administrator may issue the proposed final order. *See* 40 C.F.R. § 22.45(c)(4)(viii). Such final order shall become final 30 days after both this Order and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court within the 30-day period, with notice simultaneously sent by certified mail to the Administrator of EPA and the Attorney General. *See id.* Written notice of appeal also shall be filed with the Regional Hearing Clerk and sent to the parties. *Id.*

SO ORDERED.[28]

Susan L. Biro
Chief Administrative Law Judge

Dated: May 8, 2018
Washington, D.C.

[28] In accordance with Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C), and Section 22.45(c)(4)(vii) of the Rules of Practice, 40 C.F.R. § 22.45(c)(4)(vii), notice of this Order will be published in the Federal Register. This Tribunal sincerely regrets the delay in issuance of this Order and publication of such notice resulting from staffing limitations and obtaining guidance and approval for publication.

In the Matter of *BP Products North America Inc.*, Respondent.
Docket No. CWA-05-2016-0014

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order**, dated May 8, 2018, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Paralegal Specialist

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Dated: May 8, 2018
Washington, D.C.