UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 29 2008

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)

FROM: Granta Y. Nakayama
Assistant Administrator

TO: Regional Administrators

The purpose of this memorandum is to amend all of EPA's existing civil penalty policies to conform to the recently promulgated 2008 Civil Monetary Penalty Inflation Adjustment Rule (2008 Penalty Inflation Rule or Rule). The Rule amends 40 CFR Part 19 to adjust statutory civil penalties to account for inflation. (A copy of the Rule, as published at 73 Fed. Reg. 75340-46 (Dec. 11, 2008), is attached.) These amendments are effective on the same date as the final rule – January 12, 2009. This memorandum also provides guidance on how to plead penalties and how to determine the new maximum civil penalty amounts that may be sought in EPA administrative enforcement actions.

On December 11, 2008, the Agency promulgated the 2008 Penalty Inflation Rule 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 (DCIA or the Act), 31 U.S.C. § 3701 note. 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. Because the 2008 Penalty Inflation Rule will be effective on January 12, 2009, all violations occurring after January 12, 2009 are subject to the new statutory penalties that have been adjusted for inflation.[1]

The Rule also amends the Program Fraud Civil Remedies Rule, 40 CFR Part 27, to adjust the statutory maximum penalty that may be imposed pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812.

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[1] 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.]

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I. Overview

The primary purpose of the DCIA is to preserve the deterrent effect of civil statutory penalty provisions by adjusting them for inflation. In particular, the DCIA directed each federal agency to review its respective civil monetary penalty provisions and to issue a regulation adjusting them for inflation, and thereafter to periodically review and adjust the penalty provisions at least once every four years.

The first penalty inflation adjustment rule, effective on January 30, 1997, was limited by the DCIA to 10 percent above the statutory penalty amounts, as enacted. For EPA, this meant that all the civil penalty amounts, with the exception of a few new penalty provisions added by the 1996 Safe Drinking Water Act (SDWA) amendments (which did not require any adjustment), were adjusted upward by 10 percent. By memorandum dated May 9, 1997 (1997 Memorandum), EPA modified all penalty policies to conform to the DCIA and the 1997 rule.

The second penalty inflation adjustment rule became effective March 15, 2004. These increases in civil penalty amounts apply only to violations which occurred after the date the increases took effect, *i.e.*, violations which occurred after March 15, 2004. (See 69 Fed. Reg. 7121 (Feb. 13, 2004).) By memorandum dated September 21, 2004 (2004 Memorandum), EPA modified all penalty policies to conform to the DCIA and the 2004 rule.

The third and latest penalty inflation adjustment rule – the 2008 Penalty Inflation Rule -- will be effective January 12, 2009. The statutory penalty provisions and the new maximum penalty amounts are found in the attached Table 1 of 40 CFR 19.4. For example, Clean Water Act (CWA) Section 309 previously authorized judicial penalties of up to $32,500 per day per violation for violations occurring after March 15, 2004. After the effective date of the 2008 Rule, the new maximum penalty amount is $37,500. Therefore, if a violation subject to CWA Section 309(d) began on January 1, 2009, and lasted through January 20, 2009, the maximum statutory penalty liability would consist of 12 days of violations at $32,500 per day, plus 8 days of violation at $37,500 per day.

II. Amendments to EPA's Civil Penalty Policies

By this memorandum, the Office of Enforcement and Compliance Assurance (OECA) is amending all of EPA's existing civil penalty policies to increase the initial gravity component of the penalty calculation by 9.83 percent for those violations subject to the new rule, *i.e.*, violations occurring after January 12, 2009. The inflation adjustment for the penalty provisions set forth in the rule was calculated by comparing the Consumer Price Index-Urban (CPI-U) for June 2004 with the CPI-U for June 2007, resulting in an inflation adjustment factor of 9.83 percent.[2] While

[2] For a detailed discussion of the four-step process and the formula provided by the DCIA for determining the cost-of-living adjustment to the civil monetary penalties, see 73 Fed. Reg. at 75340.

not required specifically by the Act, we believe revising our civil penalty policies is consistent with the Congressional intent in passing the Act and is necessary to implement effectively the mandated penalty increases set forth in 40 CFR Part 19. Accordingly, each civil penalty policy is now modified to apply the appropriate guidelines set forth below. These new guidelines apply to all 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. A complete list of all of our existing penalty policies is provided at the end of this memorandum. Subsequent to this issuance of this memorandum, the division directors in the Office of Civil Enforcement (OCE) and the Office of Site Remediation Enforcement (OSRE) may issue revised penalty matrices under program-specific penalty policies to reflect the following guidelines.

A. If all of the violations in a particular case occurred on or before the effective date of the 2008 Rule, penalty policy calculations should be consistent with the 2004 Memorandum.[3]

B. For those judicial and administrative cases in which some or all of the violations occurred after the effective date of the 2008 Rule, the penalty policy calculations are modified by following these four 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.[4] Do not apply any mitigation or adjustment factors at this point.

3. (a) <u>For those penalty policies that were issued prior to January 31, 1997</u>: 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% increase. For violations that occurred after March 15, 2004, through January 12, 2009, multiply the gravity component by 1.2895, reflecting both the 10% increase and the 17.23% increase [1.10 x 1.1723 = 1.2895]. For violations that occur after January 12, 2009, multiply the gravity component by 1.4163, reflecting the 10% increase, the 17.23% increase, and the 9.83% increase [1.10 x 1.1723 x 1.0983 = 1.4163]. 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

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[3] Memorandum dated September 21, 2004, from Thomas V. Skinner, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance, entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996), Effective October 1, 2004."

[4] The instructions for calculating the gravity component are also set out in a chart on page 5.

inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 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 days x $1,000 = $10,000 x 1.2895 = $12,895. If 10 days of the violations occurred after January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.4163= $ 14,163.

(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% increase 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% increase. For violations occurring after January 12, 2009, multiply the gravity component by 1.2875, reflecting both the 17.23% increase and the 9.83% increase [1.1723 x 1.0983 = 1.2875]. 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 days x $1,000 = $10,000 x 1.1723 = $11,723. If 10 days of the violations occurred after January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.2875 = $ 12,875.

(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% increase and 17.23% increase are reflected in those policies. For violations occurring after January 12, 2009, multiply the gravity component by 1.0983, reflecting the 9.83% increase. 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, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.0983 = $ 10,983.

Chart Reflecting Inflation Adjustment Multipliers	
Penalty Policy Issued Prior to January 31, 1997	
Date(s) of violation	**Inflation Adjustment Multiplier**
January 31, 1997 through March 15, 2004	**1.1**
March 16, 2004 through January 12, 2009	**1.2895**
After January 12, 2009	**1.4163**
Penalty Policy Issued or Revised after January 30, 1997 through March 15, 2004	
Date(s) of violation	**Inflation Adjustment Multiplier**
January 31, 1997 through March 15, 2004	**None - use gravity component in penalty policy**
March 16, 2004 through January 12, 2009	**1.1723**
After January 12, 2009	**1.2875**
Penalty Policy Issued or Revised after March 15, 2004 through January 12, 2009	
Date(s) of violation	**Inflation Adjustment Multiplier**
March 16, 2004 through January 12, 2009	**None - use gravity component in penalty policy**
After January 12, 2009	**1.0983**
All Violations Occurred after January 12, 2009	
Date of Penalty Policy Revision or Issuance	**Inflation Adjustment Multiplier**
Issued Prior to January 31, 1997	**1.4163**
January 31, 1997 through March 15, 2004	**1.2875**
March 16, 2004 through January 12, 2009	**1.0983**

4. Take the total applicable gravity component (the gravity-based penalty should be rounded to the nearest unit of 100) from above and adjust the total, as appropriate, pursuant to the mitigation factors in the applicable penalty policy. The economic benefit calculation should be added to the adjusted total gravity amount. The combined total of the gravity and economic benefit components may then be adjusted based on litigation considerations and/or defendant's/respondent's ability to pay, as appropriate.

III. Penalty Pleading

If all of the violations in a particular case occurred on or before the effective date of the 2008 Rule, the pleading practices set forth in the 2004 Memorandum should be applied. If some of the violations in a particular case occurred after the effective date of the 2008 Rule, then any penalty amount pled should use the newly adjusted civil penalty amounts for those violations. For example, in a civil judicial complaint alleging violations of Section 301 of the CWA, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [*name of Defendant*] up to $32,500 per day for each violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), that occurred after March 15, 2004 through January 12, 2009; and $37,500 per day for each violation of Section 301 of the CWA, 33 U.S.C. § 1311, that occurred after January 12, 2009, up to the date of judgment herein.

If all of the violations in a particular case occurred after the effective date of the 2008 Rule, then any penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of Section 301 of the CWA, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [*name of Defendant*] up to $37,500 per day for each violation of Section 301 of the CWA, 33 U.S.C. § 1311, up to the date of judgment herein.

IV. Administrative Penalty Caps for the CWA, SDWA, Clean Air Act (CAA), and the Certain Alaskan Cruise Ship Operations Act[5]

The DCIA and 40 CFR Part 19 increased 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 one administrative enforcement action. This increase is particularly relevant for administrative enforcement actions under the CWA, SDWA, CAA and CACSOA, which are limited by maximum penalty amounts that may be sought in a single administrative enforcement action (commonly called "penalty caps").[6] For example, prior to the 2008 Rule, CWA Class II administrative penalties were authorized up to $11,000 per violation

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[5] The Certain Alaskan Cruise Ships Operations Act (CACSOA) 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.

[6] See CWA Section 309(g)(2)(A)-(B), 33 U.S.C. § 1319(g)(2)(A)-(B); CWA Section 311(b)(6)(B)(i)-(ii), 33 U.S.C. § 1321(b)(6)(B)(i)-(ii); SDWA, 42 U.S.C. § 300h-2(c)(1)-(2); CAA, 42 U.S.C. § 7413(d)(1); CAA, 42 U.S.C. § 7524(c)(1); CACSOA, 33 U.S.C. § 1901 note.

and not to exceed $157,500 in one administrative action; after the effective date of the 2008 Rule, the new maximum penalty amounts are now $16,000 and $177,500, respectively. Similarly, Part 19 also raised the total penalty amounts that may be sought in a single administrative enforcement action under the CAA from $270,000 to $295,000 (although higher amounts may still be pursued with the joint approval of the EPA Administrator and U.S. Attorney General). Note that the adjusted penalty caps apply if an action is filed or a complaint is amended after January 12, 2009, even if some or all of the violations occurred on or before January 12, 2009.

V. Challenges in the Course of Enforcement Proceedings

If a respondent/defendant challenges the validity of applying the adjusted penalty provisions on the grounds that EPA did not have the authority to promulgate the rule which adjusted the penalty maximums, please notify the Special Litigation and Projects Division of the challenge, so that OECA, the Region and the Department of Justice (DOJ), as appropriate, can coordinate our response before it is filed.

VI. Further Information

Any questions concerning the 2008 Rule and its implementation can be directed to David Abdalla of OCE's Special Litigation and Projects Division at (202) 564-2413 or by email at abdalla.david@epa.gov.

List of Existing Civil Penalty Policies Modified by this Memorandum

General

- Policy on Civil Penalties (2/14/84)
- A Framework for Statute-Specific Approaches to Penalty Assessments (2/14/84)
- 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 (7/23/95) (This is a generic policy for stationary sources.)
- Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)
- Combined Enforcement Policy for Section 112(r) of the Clean Air Act [Risk Management Plan] (8/15/01)
- National Petroleum Refinery Initiative Implementation: Application of Clean Air Action Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements (11/08/07)

There are a series of appendices that address certain specific subprograms within the stationary source program.

- 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 (7/13/95)
- 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
- Appendix VI - Volatile Hazardous Air Pollutant Civil Penalty Policy (Revised 3/2/88)
- Appendix VII - Residential Wood Heaters (9/14/89)
- Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under Protection of Stratospheric Ozone (11/24/89)
- Appendix IX - Clean Air Act Civil 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 CFR Part 82, Protection of Stratospheric Ozone, Subpart B (7/19/93)
- Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 CFR 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 CFR 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)
- Civil Penalty Policy for Administrative Hearings (1/14/93)
- Manufacturers Programs Branch Interim Penalty Policy (3/31/93)
- Interim Diesel Civil Penalty Policy (2/8/94)
- Tampering and Defeat Device Civil Penalty Policy for Notices of Violation (2/28/94)
- Draft Reformulated Gasoline and Anti-Dumping Settlement Policy (6/3/96)

Clean Water Act

- Revised Interim Clean Water Act Settlement Penalty Policy (3/3/98)
- Clean Water Act Section 404 Civil Administrative Penalty Actions Guidance on Calculating Settlement Amounts (12/21/01)
- Civil Penalty Policy for Section 311(b)(3) and Section 311 (j) of the Clean Water Act (8/98)
- Pilot Enforcement Approach for MOM [Management, Operation and Maintenance] Cases in Region IV (1/23/03)

Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA)

- 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/Enforcement Response Policy for Section 103 of the Comprehensive Enforcement Response, Compensation, and Liability Act (9/30/99)

Emergency Planning and Community Right-to-Know Act (EPCRA)

- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right to Know Act/Enforcement Response Policy for Section 103 of the Comprehensive Enforcement 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)

- General FIFRA Enforcement Response Policy (7/2/90)
- FIFRA Section 7(c) ERP (6/22/07)
- 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, Interim Final (9/97)

Resource Conservation and Recovery Act (RCRA), 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 (November 1990)

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 (TSCA)

- Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in Federal Register of 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete.) This is a generic policy for TSCA sources.

There are a series of policies that address certain specific subprograms within TSCA. They are as follows:

- Record keeping and Reporting Rules TSCA Sections 8, 12, and 13 (3/31/99)
- 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 Policy (4/9/85)
- TSCA Section 4 Test Rules (5/28/86)
- TSCA Title II - Asbestos Hazard Emergency Response Act (AHERA)
- Interim Final ERP for the Asbestos Hazard Emergency Response Act (1/31/89)
- ERP for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)

- Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act - Disclosure Rule Enforcement Response Policy (12/20/07)

Attachment (2008 Penalty Inflation Rule)

cc: (w/attachment)
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, Office of Civil Rights, Enforcement and Environmental Justice, Region X
Regional Media Division Directors
Regional Enforcement Coordinators, Regions I - X
OECA Office Directors
OCE Division Directors
OSRE Division Directors
David Coursen, OGC-CCID
Grant MacIntyre, OGC-CCID
Bruce Gelber, Chief, EES, DOJ
Deputy and Assistant Chiefs, EES, DOJ

option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

§ 912.9 [Amended]

■ 4. Amend § 912.9 as follows:

■ a. In paragraph (b), remove the address "P.O. Box 66640, St. Louis, MO 63166–6640" and add "P.O. Box 66640, St. Louis, MO 63141–0640" in its place.

■ b. In paragraph (c), remove the address "P.O. Box 66640, St. Louis, MO 63166–6640" and add "P.O. Box 66640, St. Louis, MO 63141–0640" in its place.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. E8–29299 Filed 12–10–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 19 and 27

[FRL–8750–4]

RIN 2020–AA46

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is issuing this final Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the Debt Collection Improvement Act of 1996 (DCIA), to adjust for inflation the 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 specified in the DCIA. Table 1 of the regulations, which appears near the end of this rule, contains a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation.

DATES: *Effective Date:* January 12, 2009.

FOR FURTHER INFORMATION CONTACT: David Abdalla, 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) 564–2413.

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 [1] ("civil penalties" or "penalties") that can be imposed under the laws administered by that agency. The purpose of these adjustments is to 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. EPA's second and most recent adjustment to each civil penalty amount was published in the **Federal Register** on February 13, 2004 (69 FR 7121) and became effective on March 15, 2004 ("the 2004 Rule").

This rule, specifically Table 1 in 40 CFR 19.4, adjusts in accordance with the DCIA the maximum and, in some cases, the minimum amount of each statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision. This rule also clarifies that the adjusted penalty amounts in 40 CFR 19.4 are applicable to violations that occur after the effective date of this rule.

The formula provided by the DCIA for determining the cost-of-living adjustment to statutory civil penalties consists of a four-step process. The first step entails determining the inflation adjustment factor. This is done by calculating the percentage increase by which the Consumer Price Index [2] 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.[3] Accordingly, the inflation adjustment factor for the present adjustment equals the CPI–U for June 2007 (*i.e.*, June of the year preceding this year), divided by the CPI–U for June 2004. Given that the last adjustment was made and published on February 13, 2004, the inflation adjustment for most civil penalties set forth in this rule was calculated by comparing the CPI–U for June 2004 (189.7) with the CPI–U for June 2007 (208.352), resulting in an inflation adjustment factor of 9.83 percent. Certain civil penalties that had not been adjusted since the initial 1996 adjustment were adjusted by an inflation adjustment of 32.96 percent calculated comparing the CPI–U for June 1996 (156.7) with the CPI–U for June 2007 (208.352).

Once the inflation adjustment factor is determined, the second step is to multiply the inflation adjustment factor by the current civil penalty amount to calculate the raw inflation increase. The third step is to round this raw inflation increase according to the section 5(a) of the DCIA. 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.) 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 most civil penalties, the amount of the last adjusted civil penalty reflected in Table 1 of the 2004 Rule

[1] 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 * * *."

[2] 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: *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[3] Section 5(b) of the DCIA requires that statutory civil penalties be adjusted to reflect "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."

was multiplied by 9.83 percent (the inflation adjustment) and the resulting increase amount was rounded up or down according to the rounding requirements of the statute. In the case of statutory civil penalty amounts that are being adjusted for the first time, such inflation adjustments are capped at a 10 percent increase in accordance with section 31001(s)(2) of the DCIA. For example, because this rule adjusts for the first time the administrative and civil judicial penalty amounts provided pursuant to "Title XIV—Certain Alaskan Cruise Ship Operations" of the Consolidated Appropriations Act of 2001, 33 U.S.C. 1901 note, these civil penalties, once adjusted for inflation, are capped at 110 percent of the original penalty amounts, as enacted. Further, certain civil penalties that had not been adjusted since the initial 1996 adjustment were adjusted by an inflation adjustment of 32.96 percent calculated by comparing the CPI–U for June 1996 (156.7) with the CPI–U for June 2007 (208.352). The last column of Table 1 below reflects the inflation-adjusted civil penalties as of the effective date of this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to readjust these amounts in the year 2012 and every four years thereafter.

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.

II. Technical Revisions to 40 CFR Part 19—Adjustment to Civil Monetary Penalties for Inflation

After publication of the 2004 Rule, EPA identified errors in certain sections of the regulatory language. Many of these errors also occurred in EPA's initial adjustment on December 31, 1996 (61 FR 69360). Because these errors may prove misleading and are in need of clarification, with this rulemaking EPA is correcting the errors described below. The changes made through these corrections are all technical in nature and do not affect the substance of the rule.

A. Technical Revisions to Sections 19.1 and 19.4

EPA is revising Table 1 of section 19.4 to shorten the penalty description to refer only to the title of the statute. In addition, the Agency has added for clarity a column that delineates the statutory penalties, as enacted, before any inflation adjustments were made. Further, EPA is revising Table 1 to clarify that the penalties are effective "after January 30, 1997 through March 15, 2004" rather than using the term "between January 31, 1997 and March 15, 2004."

In addition, because a few of the statutory civil penalty amounts pursuant to statutes implemented by EPA are framed as the minimum penalty as opposed to the statutory maximum penalty that can be assessed for a particular violation, this rule revises sections 19.1 and 19.4 to remove references to a "maximum" civil monetary penalty.[4] Specifically, with this rule, EPA is revising section 19.1 to make clear that 40 CFR Part 19 applies to "each statutory provision under the laws administered by [EPA] concerning the civil monetary penalties which may be assessed in either civil judicial or administrative proceedings."[5] Similarly, the rule revises the introductory text to Table 1 of section 19.4 to remove references to "maximum" penalty amounts to read as follows: "[t]he 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." Finally, this rule revises the headings under Table 1 of section 19.4 to refer to "penalties effective" rather than "new maximum penalty amount."

B. Technical Correction of Statutory Maximum Penalty Amount Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

The row of Table 1 of 19.4, which lists the statutory maximum penalty figures for section 14 of FIFRA, 7 U.S.C. 136l.(a)(2), incorrectly reflected a statutory maximum penalty of $1,000 for violations after January 30, 1997 through March 15, 2004, and $1,200 for violations after March 15, 2004 for subsequent offenses or violations. Although EPA should have adjusted the maximum civil penalty in the 1996 rule from $1,000 to $1,100 for violations after January 30, 1997 through March 15, 2004, this rule does not adjust the penalty amount from $1,000 to $1,100 for violations that occurred during that time period because to do so would be to increase penalties retroactively without fair notice to the public. With this rule, EPA is correcting the row of Table 1 related to the maximum statutory penalty amount under FIFRA section 14 from the amount of $1,200 to $1,100 for violations after March 15, 2004 through January 12, 2009 to prevent the assessment of penalties above the correct statutory maximum amount that should have been listed in Table 1 for that time period. The correct penalty amount of $1,100 for violations occurring after the effective date of this rule has also been listed. The Agency is not aware of any case in which EPA assessed a civil penalty in excess of the correct statutory maximum amount of $1,100 pursuant to section 14 of FIFRA.

C. Technical Correction of Statutory Maximum Penalty Amount Under the Toxic Substances Control Act (TSCA)

The row of Table 1 of 19.4, which lists the statutory maximum penalty figures for section 207 of TSCA, 15 U.S.C. 2647(g), incorrectly reflected a statutory maximum penalty of $5,000 for violations after January 30, 1997 through March 15, 2004, and $5,500 for violations after March 15, 2004 for subsequent offenses or violations. EPA should have adjusted TSCA section 207's the maximum civil penalty from $5,000 to $5,500 for violations after January 30, 1997 through March 15, 2004, and from $5,500 to $6,500 for violations after March 15, 2004 through January 12, 2009. In this rule, EPA has not revised Table 1 to increase the section 207 penalties for violations that may have occurred in the past to prevent retroactive application of the higher penalty without the public having received fair notice of the penalty increases. With this rule, EPA is adjusting the civil penalty to reflect the correct penalty amount of $7,500 for violations occurring after the effective date of this rule.

D. Technical Correction Related to Civil Penalty Authorities Under the Clean Water Act (CWA)

EPA discovered an error in Table 1 of 40 CFR 19.4 (hereinafter 19.4), in which section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. 1321(b)(6)(B)(i), was cited incorrectly as 33 U.S.C. 1321(b)(6)(B)(I). To correct this error, the Agency is revising Table 1 of 19.4 to reflect the correct citation.

[4] For example, section 311(b)(7)(D) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(D), provides for both a minimum and maximum civil penalty that can be assessed for the discharge of oil or hazardous substances where the violation was the result of gross negligence or willful misconduct.

[5] The term "civil monetary penalty" is defined under the DCIA to include both "a specific monetary amount" as well as a "maximum amount" provided by federal law. *See* 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.

E. Technical Revision Related to Civil Penalty Authorities Under the Marine Protection, Research, and Sanctuaries Act (MPRSA)

The row of Table 1 of 19.4 related to section 104B(d) of the MPRSA, 33 U.S.C. 1414b(d), is being revised to add a footnote that reads "[n]ote 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 1. The amount set forth in this Table reflects 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."

F. Technical Correction Related to Civil Penalty Authorities Under the Safe Drinking Water Act (SDWA)

The row of Table 1 of 19.4 related to section 1414(c) of the SDWA, 42 U.S.C. 300g–3(c), is being deleted because the enforcement of the public notice requirements under this subsection is accomplished under section 1414(b) of the SDWA, 42 U.S.C. 300g–3(b), or SDWA section 1414(g)(3)(A), 42 U.S.C. 300g–3(g)(3)(A).

G. Technical Correction of Statutory Maximum Penalty Amounts Under the Clean Air Act (CAA)

In the 2004 Rule, the row of Table 1 of 19.4, which listed the statutory maximum civil penalty figures for 42 U.S.C. 7524(a), incorrectly reflected a statutory maximum civil penalty of $32,500 for "manufacturers or dealers" for the manufacture or sale of defeat devices in violation of CAA section 203(a)(3)(B), 42 U.S.C. 7522(a)(3)(B). The correct penalty amount of $2,750 for that violation should have been listed as the same for any person, regardless of whether the violator is a manufacturer or dealer. With this rule, EPA is correcting Table 1 to reflect that the statutory maximum penalty for the manufacture or sale of defeat devices, in violation of CAA section 203(a)(3)(B), 42 U.S.C. 7522(a)(3)(B), is $2,750 for violations occurring after January 30, 1997 through March 15, 2004 and after March 15, 2004 through January 12, 2009. The Agency is not aware of any case in which EPA assessed a civil penalty in excess of the correct statutory amount of $2,750.

H. Clarification of the Effective Date

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.) Accordingly, inflation-adjusted civil penalties may be applied only to violations that occur after the effective date of a rule implementing penalty adjustments pursuant to the DCIA. Today's rule clarifies the top of the fifth column of Table 1 of 19.4 to reflect that the maximum penalty amounts apply for violations occurring after March 15, 2004 (*i.e.*, after the March 15, 2004 effective date of the 2004 Rule), through January 12, 2009.

III. Technical Revisions to 40 CFR 27.3, Regulations Implementing the Program Fraud Civil Remedies Act

A. Technical Revisions to 40 CFR 27.3(a)(1)(iv)

EPA is amending 40 CFR 27.3(a)(1)(iv) to refer to the operative maximum civil penalty amount, as provided in 40 CFR 19.4, that may be imposed by EPA pursuant to section 3802(a)(1) of the Program Fraud Civil Remedies Act (Program Fraud Act), 31 U.S.C. 3802(a)(1). Through this technical amendment, 40 CFR 27.3(a)(1)(iv) will hereafter be revised to conform to the maximum civil penalty amount that can be assessed pursuant to the Program Fraud Act, as adjusted for inflation in accordance with the DCIA under 40 CFR 19.4. Because this technical revision affects only a change to conform 40 CFR 27.3(a)(1)(iv) to be consistent with 40 CFR 19.4, this change does not require notice and comment.

B. Technical Revisions to 40 CFR 27.3(b)(1)(ii)

EPA is amending 40 CFR 27.3(b)(1)(ii) to refer to the operative maximum civil penalty amount, as provided in 40 CFR 19.4, that may be imposed by EPA pursuant to section 3802(a)(2) of the Program Fraud Act, 31 U.S.C. 3802(a)(1). Through this technical amendment, 40 CFR 27.3(b)(1)(ii) will hereafter be revised to conform to the maximum civil penalty amount that can be assessed pursuant to the Program Fraud Act, as adjusted for inflation in accordance with the DCIA under 40 CFR 19.4. Because this technical revision affects only a change to conform 40 CFR 27.3(b)(1)(ii) to be consistent with 40 CFR 19.4, this change does not require notice and comment.

IV. Good Cause

Under 5 U.S.C. 553(b)(B), EPA finds that there is good cause to promulgate this rule without providing for further public comment. In its proposed rule published in the **Federal Register** on July 3, 2003 (68 FR 39882), EPA provided an opportunity for public comment on the inflation adjustment calculations and rounding rules that EPA has used in this final rule. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA, as amended, to make periodic increases in civil penalty amounts by applying the adjustment formula established by the statute. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable civil monetary penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the correct figure, and EPA cannot vary the amount of the adjustment to reflect any views or suggestions provided by commenters, it would serve no purpose to provide an opportunity for public comment on this adjustment. Thus, further notice and public comment is unnecessary.

Further, EPA is making the technical revisions discussed above without notice and public comment. With regard to Table 1 of section 19.4, EPA is making technical revisions that do not change the substance of the rule but make Table 1 easier to read and amend in the future. For example, EPA is revising Table 1 to shorten the penalty description to refer only to the name of the statute. We have also added for clarity a column that delineates the statutory penalties, as enacted, before any inflation adjustments were made. In addition, this rule clarifies that that the penalties are effective "after January 30, 1997 through March 15, 2004" rather than using the term "between January 31, 1997 and March 15, 2004." Finally, in sections 19.1 and 19.4, this rule removes references to "maximum" penalties because, in a few instances, EPA-administered statutes provide for both minimum as well as maximum civil penalty amounts. These are technical revisions that more accurately reflect the statutory provisions and do not constitute substantive revisions to the rule.

Similarly, the technical correction adjusting the penalty amount of section 14 of FIFRA, 7 U.S.C. 136*l*.(a)(2), to $1,100, does not require notice and public comment because this is the adjusted penalty amount that is required by the DCIA. The statute prescribes a formula that must be followed to determine the allowable statutory civil penalty amounts. The $1,000 and $1,200 figures included in the 2004 Rule did not comply with the statute. The incorrect penalty amount of $1,000 for

violations after January 30, 1997 through March 15, 2004 was not changed to prevent the assessment of penalties above the statutory maximum amount that was in effect during that time period. The incorrect penalty of $1,200 for violations after March 15, 2004 through January 12, 2009 was changed in Table 1 to prevent the assessment of penalties above the correct statutory maximum amount that should have been listed in Table 1 for that time period. The Agency is not aware of any case in which EPA assessed a civil penalty in excess of the correct statutory maximum civil penalty of $1,100 pursuant to section 14 of FIFRA.

With regard to the technical correction adjusting the penalty amount for section 207 of TSCA, 15 U.S.C. 2647(g), to $7,500, that adjustment can be made without notice and public comment because $7,500 is the adjusted penalty amount that is required by the DCIA. The statute prescribes a formula that must be followed to determine the statutory civil penalty amounts. The $5,000 and $5,500 figures included in the 2004 Rule did not comply with the DCIA. The incorrect penalty amounts have not been changed in the revised Table 1 to prevent the assessment of penalties above the statutory maximums that were in effect during those time periods. The correct statutory maximum penalties of $5,500 for violations after January 30, 1997 through March 15, 2004, and $6,500 for violations after March 15, 2004 through January 12, 2009 have not been listed in the revised Table 1 to prevent retroactive application of a higher penalty without the regulated community receiving fair notice of the increases. EPA's correction to the maximum penalties that can be imposed under the CAA section 205, 42 U.S.C. 7524(a), is also technical and not substantive in nature. By revising the penalty amount from $32,500 to $2,750, EPA is correcting the maximum penalty to be consistent with the adjusted penalty amount that is required by the DCIA. Notice and public comment on this technical correction is not necessary given that the DCIA prescribes a formula that must be followed to determine the civil penalty amounts and the $32,500 figure included in the 2004 Rule did not comply with the statute. Furthermore, EPA is not aware of any case in which the Agency assessed a civil penalty in excess of the correct statutory maximum penalty of $2,750 per violation of for violations of CAA section 203(a)(3)(B). In this rule, the correct penalty amount of $2,750 has been listed in Table 1 for violations occurring during both time periods after January 30, 1997 through March 15, 2004 and after March 15, 2004 through January 12, 2009 to prevent the assessment of penalties above the correct statutory maximum amount that should have been listed in Table 1 for those time periods.

EPA's revisions and corrections to Table 1 of section 19.4 related to the CWA, the MPRSA and the SDWA are also technical rather than substantive in nature and, hence, do not require notice and public comment. In the case of the CWA, this rule corrects an erroneous statutory citation. With regard to the MPRSA, this rule adds a footnote directing the public to the fact that section 104B(d) contains a penalty escalation provision that must be applied to the penalty amounts set forth in Table 1. In addition, this rule corrects Table 1 to delete a reference to section 1414(c) of the SDWA, 42 U.S.C. 300g–3(c), because this subsection governs public notice requirements for public water systems rather than civil penalty authorities under the SDWA. These changes either correct errors in prior rules or, in the case of the MPRSA, refer back to the provisions of that statute. Accordingly, these changes do not require notice and comment.

EPA is amending the regulations implementing the Program Fraud Act, 40 CFR 27.3(a)(1)(iv) and 40 CFR 27.3(b)(1)(ii), to refer to 40 CFR 19.4 so that hereafter 40 CFR 27.3(a)(1)(iv) and 40 CFR 27.3(b)(1)(ii) will conform to the civil penalty inflation adjustments made in accordance with the DCIA to the maximum civil penalty amounts that can be assessed by EPA pursuant to the Program Fraud Act, 31 U.S.C. 3802(a). Because these technical revisions affect only changes to conform 40 CFR 27.3(a)(1)(iv) and 40 CFR 27.3(b)(1)(ii) to be consistent with 40 CFR 19.4, these changes do not require notice and comment.

As required by the DCIA, this rule addresses only inflation adjustments to statutory civil penalty amounts under the statutes identified in Table 1 of 40 CFR 19.4. The technical corrections ensure consistency with the language of the statutes administered by EPA and correct errors in certain formula-driven civil penalty amounts, in accordance with the DCIA. This rule does not address the discretion to impose or not to impose a penalty, nor the procedures that must be followed in initiating an administrative or civil judicial enforcement action involving the assessment of civil penalties. Thus, EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and 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 Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* "Burden" is defined at 5 CFR 1320.3(b). Because this rule does not contain a collection of information, no control number is necessary.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, 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 Administrative Procedure Act (APA) or any other statute. Although this rule is subject to the APA, the Agency has made a "good cause" finding that this rule is not subject to the APA's notice and comment requirements (*see* Section IV of this notice). Because this rule is not subject to notice and comment rulemaking requirements under the APA or any other statute, this rule is not subject to the regulatory flexibility provisions of the RFA.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, establishes the requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This action contains no federal mandates under the provisions of Title II of UMRA for state, local, or tribal governments or the private sector. 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

Executive Order 13132, entitled *Federalism*, 64 FR 43255 (August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The term "policies that have federalism implications" is defined in the Executive Order to include regulations that 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." This final rule 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. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments*, 65 FR 67249 (November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." As 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, Executive Order 13175 does not apply to this rule.

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 That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*, 66 FR 28355 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d), 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. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, EPA is not considering 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 *et seq.*, 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

40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

40 CFR Part 27

Administrative practice and procedure, Assessments, False Claims, False Statements, Penalties.

Dated: December 4, 2008.

Stephen L. Johnson,

Administrator, Environmental Protection Agency.

■ For the reasons set out in the preamble, title 40, chapter I of the Code

of Federal Regulations is amended as follows:

■ 1. Revise part 19 to read as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

Sec.
19.1 Applicability.
19.2 Effective date.
19.3 [Reserved].
19.4 Penalty adjustment and table.

Authority: Public Law 101–410, 28 U.S.C. 2461 note; Public Law 104–134, 31 U.S.C. 3701 note.

§ 19.1 Applicability.

This part applies to each statutory provision under the laws administered by the Environmental Protection Agency concerning the civil monetary penalties which may be assessed in either civil judicial or administrative proceedings.

§ 19.2 Effective date.

The increased penalty amounts set forth in the last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after January 12, 2009. The penalty amounts that were adjusted in EPA's initial adjustment to each statutory civil penalty amount that was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997, apply to all violations under the applicable statutes and regulations which occurred after January 30, 1997, through March 15, 2004. The penalty amounts that were adjusted in EPA's second adjustment to each statutory civil penalty amount that was published in the **Federal Register** on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004, apply to all violations under the applicable statutes and regulations which occurred after March 15, 2004, through January 12, 2009.

§ 19.3 [Reserved]

§ 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
7 U.S.C. 136*l*.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT CIVIL (FIFRA).	$5,000	$5,500	$6,500	$7,500
7 U.S.C. 136*l*.(a)(2)	FIFRA	$500/1,000	$550/1,000	$650/1,100	$750/1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	$25,000	$27,500	$32,500	$37,500
15 U.S.C. 2647(a)	TSCA	$5,000	$5,500	$6,500	$7,500
15 U.S.C. 2647(g)	TSCA	$5,000	$5,000	$5,500	$7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	$5,000	$5,500	$6,500	$7,500
31 U.S.C. 3802(a)(2)	PFCRA	$5,000	$5,500	$6,500	$7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	$25,000	$27,500	$32,500	$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
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
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
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
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
33 U.S.C. 1321(b)(7)(B)	CWA	$25,000	$27,500	$32,500	$37,500
33 U.S.C. 1321(b)(7)(C)	CWA	$25,000	$27,500	$32,500	$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
33 U.S.C. 1415(a)	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	$50,000/125,000	$55,000/137,500	$65,000/157,500	$70,000/177,500
33 U.S.C. 1414b(d)(1)[1]	MPRSA	$600	$660	$760	$860
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[2]	$10,000/25,000	$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
33 U.S.C. 1901 note (*see* 1409(b)(1)).	CACSO	$25,000	$25,000	$25,000	$27,500
42 U.S.C. 300h–2(b)(1)	SDWA	$25,000	$27,500	$32,500	$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
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
42 U.S.C. 300h–3(c)	SDWA	$5,000/10,000	$5,500/11,000	$6,500/11,000	$7,500/16,000
42 U.S.C. 300i(b)	SDWA	$15,000	$15,000	$16,500	$16,500
42 U.S.C. 300i–1(c)	SDWA	$20,000/50,000	$22,000/55,000[3]	$100,000/1,000,000	$110,000/1,100,000
42 U.S.C. 300j(e)(2)	SDWA	$2,500	$2,750	$2,750	$3,750
42 U.S.C. 300j–4(c)	SDWA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 300j–6(b)(2)	SDWA	$25,000	$25,000	$27,500	$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
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD–BASED PAINT HAZARD REDUCTION ACT OF 1992.	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6928(c)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6928(g)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6928(h)(2)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6934(e)	RCRA	$5,000	$5,500	$6,500	$7,500
42 U.S.C. 6973(b)	RCRA	$5,000	$5,500	$6,500	$7,500
42 U.S.C. 6991e(a)(3)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6991e(d)(1)	RCRA	$10,000	$11,000	$11,000	$16,000

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
42 U.S.C. 6991e(d)(2)	RCRA	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	$25,000	$27,500	$32,500	$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
42 U.S.C. 7413(d)(3)	CAA	$5,000	$5,500	$6,500	$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
42 U.S.C. 7524(c)(1)	CAA	$200,000	$220,000	$270,000	$295,000
42 U.S.C. 7545(d)(1)	CAA	$25,000	$27,500	$32,500	$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
42 U.S.C. 9606(b)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 9609(a)(1)	CERCLA	$25,000	$27,500	$32,500	$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
42 U.S.C. 9609(c)	CERCLA	$25,000/75,000	$27,500/82,500	$32,500/97,500	$37,500/107,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT–TO–KNOW ACT (EPCRA).	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 11045(b)	EPCRA	$25,000/75,000	$27,500/82,500	$32,500/97,500	$37,500/107,500
42 U.S.C. 11045(c)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 11045(c)(2)	EPCRA	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 11045(d)(1)	EPCRA	$25,000	$27,500	$32,500	$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
42 U.S.C. 14304(g)	BATTERY ACT	$10,000	$10,000	$11,000	$16,000

[1] 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 1. 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.

[2] CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Public Law 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of 20,000 and 50,000 under section 1432(c) of the Safe Drinking Water Act, 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 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.

PART 27—[AMENDED]

■ 2. The authority citation for Part 27 continues to read as follows:

Authority: 31 U.S.C. 3801–3812; Public Law 101–410, 104 Stat. 890, 28 U.S.C. 2461 note; Public Law 104–134, 110 Stat. 1321, 31 U.S.C. 3701 note.

■ 3. Section 27.3 is amended by revising paragraphs (a)(1)(iv) and (b)(1)(ii) to read as follows:

§ 27.3 Basis for civil penalties and assessments.

(a) * * *

(1) * * *

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than the operative effective statutory maximum amount, as provided in 40 CFR 19.4,[1] for each such claim.

* * * * *

(b) * * *

(1) * * *

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than the operative effective statutory maximum amount, as provided in 40 CFR 19.4,[2] for each such statement.

* * * * *

[FR Doc. E8–29380 Filed 12–10–08; 8:45 am]

BILLING CODE 6560–50–P

[1] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

[2] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2008–0569 FRL–8750–5]

RIN 2050–AG48

Oil Pollution Prevention; Spill Prevention, Control and Countermeasures Rule; Revisions to the Regulatory Definition of "Navigable Waters"

AGENCY: Environmental Protection Agency.

ACTION: Correction.

SUMMARY: This document makes a correction to the Preamble of the final rule amending the Oil Pollution Prevention regulation published on November 26, 2008 (73 FR 71941). The final rule announced the vacatur of the July 17, 2002 revisions to the Clean Water Act section 311 regulatory definition of "navigable waters" in accordance with an order, issued by the United States District Court for the District of Columbia (D.D.C.) in